

# MEDIATING YOUR WAY AROUND COVID-19

## REMOTE MEDIATION – ‘IF NOT NOW, WHEN?’

A Guidance Note from Andrew Miller QC

Spring 2020

By now you will no doubt have received numerous e-publications extolling the benefits of working online or remotely. Given the current Covid-19 situation, the case for remote working has been made out and, of course, it applies equally to mediation – parties simply have no choice but to mediate remotely.

Remote mediation has already started and is proceeding with great success, achieving impressive feedback from satisfied participants. There are plenty of guides available to help you set up and conduct remote mediation, but this is **not** one of those guides.

Instead, in addressing some of the questions and concerns that clients have raised with me over the last few weeks, I present a consideration of the advantages of remotely mediating disputes now rather than waiting until Covid-19 has passed.

### Why mediate now?

The option to mediate is not subject to procedural requirements but dictated by the parties to a dispute. Where parties find that they are unable to move forward in procedural terms, mediation gives them the opportunity to regain control of the process and of their dispute. In the current situation, remote mediation can be used to move the dispute forward, not simply in incremental terms but to a settlement of all outstanding issues.



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*“For all parties this was their first virtual mediation which was expertly navigated by Andrew”*



As for lawyers, remote mediation allows your work on a client's dispute to continue, albeit in a different mode to the formal court process. A successful mediation requires the parties to work both prior to the mediation and at the mediation in what I call *settlement* mode (as opposed to *determinative* mode, which is the basis for formal court litigation). The current situation is an opportunity to prepare for a mediation and work on your client's dispute with both your client and the other side in a positive and hopefully less adversarial way (while of course still retaining constructive fee generation).

All of this can be done in a reasonable timescale – therefore offering both a time- and cost-efficient basis for the advancing and settling of the dispute. In a time when everything else remains tentative, such settlement will provide some welcome certainty for your client.

### But what if it's too early in the legal process for a successful mediation?

I believe that in respect of most, if not all, legal disputes, the '*sooner the better*' approach to mediation is the best approach. Those of you who have seen me talk about mediation will know that I am a strong proponent of Early Stage Mediation. ESM is not a separate formal process but simply a concept for getting parties involved in a legal dispute to mediation sooner rather than later.

A successful mediation does not depend upon parties having exchanged witness statements and/or expert reports. In fact, some of the most successful mediations are those that are held prior to the commencement of proceedings. There is good reason for this. The earlier the parties get to mediation the easier it is for both sides to remember what exactly their dispute is

about and *why* they are in dispute. By the time the trial comes around, people have often forgotten the essence behind the dispute and what it was that they hoped or wanted to achieve in the first place.

Of course, even with mediation there may be some occasions when it is too early to achieve a *settlement*. But I believe it is never too early for parties in dispute to start *talking* about their dispute, the reason why they are in dispute and possible options for bringing that dispute to an end. ESM provides that opportunity.

Our current situation lends lawyers the opportunity to lead their clients towards a settlement discussion *sooner rather than later*. So why not take it? If settlement is realised, it is highly unlikely that a client would be critical of the lawyer who managed to get them out of the dispute resolution process. Will you receive a telephone call from an irate client claiming they wished they were still fighting the case and paying your bills? I very much doubt it!

### Post-Covid-19 – don't you think I will need my existing case load?

A few of my clients have expressed a hesitation or even a reluctance to work on concluding their current disputes for fear of not having any work when coronavirus is finally gone. Whilst I understand their fear, I think it is probably unwarranted.

A more likely scenario is a backlog of work – both in respect of matters within each lawyer's or firm's practice and additionally within the court process. In short, your workload is not going to disappear in the future even if you were now to mediate as much and as often as possible.

It is also inevitable that this extended period of stagnation, which is affecting every single aspect of commercial, civil, public and private life, will result in substantially increased reliance on legal services. Whether you are a generalist or specialise in a specific practice area you will doubtless be inundated with new instructions.

Insurers and insured will be desperate to deal with Covid-19 insurance-related questions, contractors and developers will be striving to find the best way to move their construction projects forward, property owners, buyers and sellers will need answers to their pressing questions and every type of commercial force majeure clause will be there to be considered.

The list can and will go on and on – and many, if not most, of these new disputes will also be able to make use of mediation. In short, your workload post-Covid-19 is highly likely to be extremely healthy.

## Can I really rely on remote mediation?

Yes you can. And you should. You still have current clients and their on-going disputes. You can still help them. With remote mediation, you can move forward by the most practical means to help bring their disputes to an end.

Remote mediation should not be viewed as a 'second choice'. In a very short period of time, whether it's been via Zoom, Skype or similar video conferencing system, remote mediation has proved itself to be an efficient and successful way of conducting and concluding a mediation all the way to settlement. The experience of those who have now mediated remotely has been that it works – and works better than they imagined.

Settlement remains in the hands of your clients. And although, even if settlement is achieved, those hands will not shake any others, your client's feelings and respect for you and the process will undoubtedly remain positive.

If you would like to discuss any matter related to the mediation of your dispute, please contact me on +44 (0)20 7822 1260 or my clerks on +44 (0)20 7822 1200. Alternatively, you can email me at [amiller@2tg.co.uk](mailto:amiller@2tg.co.uk)

*"I was initially sceptical about mediating via video-link. We agreed to it when mediating in person was no longer an option. However, I was impressed by just how well the virtual mediation was expertly coordinated by Andrew in such a way that the dynamics of a mediation, which are so important to settlement, easily translated on to the "virtual" platform."*

(Solicitor Partner – to party at Remote Mediation)

# ABOUT THE AUTHOR



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*"We were impressed by Andrew's conduct of the mediation. He was sensitive to commercial issues and had a very strong level of legal expertise"*

*(Senior Partner – Large commercial firm)*

## Andrew Miller QC

Andrew practices principally as a QC Mediator and Arbitrator, using his specialist expertise in commercial, construction, insurance, land and property, product liability, property damage and professional negligence disputes. Andrew has been involved in the mediation of disputes since 1996, when he undertook his first mediation in Singapore. He has experience of over 150 mediations and has been involved in mediations both domestically and internationally for over 20 years. Andrew has acted as lead mediator in commercial disputes valued at between £50,000 and £35,000,000.

Andrew has used his background as a successful QC commercial practitioner and his substantial experience of mediation to become a practical, efficient, approachable and user-friendly mediator. He favours and is a proponent of the *Active v Passive* approach to mediation and is an advocate for *Early Stage Mediation* (ESM).

Andrew has received glowing feedback and testimonials on his performance and skill as a mediator. Andrew also practices as a single and panel Arbitrator in commercial arbitrations and has been a Fellow of the Chartered Institute of Arbitrators (FCIArb) since 1999. Andrew is also a trustee of the Chartered Institute of Arbitrators.

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