

The impact of coronavirus (COVID-19) on civil litigation in England and Wales one year on—a mediator's perspective

Dispute Resolution analysis: In the third and final piece in this series of coronavirus (COVID-19) retrospectives, Andrew Miller QC, mediator and arbitrator from 2 Temple Gardens, provides a mediator's perspective on the impact of coronavirus on dispute resolution in England and Wales.

This analysis was first published on Lexis®PSL on 12/05/2021 and can be found [here](#) (subscription required).

The barrister's perspective can be seen [here](#) and the solicitor's perspective [here](#).

What do you consider to have been the most significant challenges and opportunities for dispute resolution practitioners in England & Wales arising out of the pandemic?

The decision to move over to remote mediation was made for us by reason of the pandemic and as such 'necessity was the mother of invention'. This necessity to change how mediations were conducted has provided mediators with an opportunity to assess not simply how mediations could be undertaken during the coronavirus pandemic but equally allowed us to look back and view how we have been undertaking mediations in the past and how we might do so in the future.

Commercial mediation has almost always been a procedure that occurred on a face-to-face basis, with parties coming together to work with a mediator with the aim of bringing their dispute to an end. What has always been emphasised both in training and practice is the need for the mediator to build a relationship with the parties. The building of a relationship of trust as between the parties and the mediator is in my view fundamental to being able to move the parties in the direction of a settlement. Put simply, if the parties are unable to trust the mediator it is very unlikely that they will allow the process to be moved to a settlement. Trust in the process and trust in the mediator is the key.

As such my biggest concern was how I as a mediator would be able achieve this relationship building and this feeling of trust when each party were sitting remotely and only seeing and meeting each other through the medium of a screen. I wondered whether we as mediators would be able to impart our feelings of empathy and understanding of the parties' positions. How would a party be able to adequately communicate why they were in dispute, their concerns about the dispute and the potential barriers to settlement? Most importantly how could they trust someone they did not know and only ever met on screen to mediate their dispute?

Looking back and with over 40 remote mediations under my belt, I remember how those concerns faded away fairly quickly and with some element of surprise on my part. Of course, there were some teething problems at the beginning with many people, including practitioners, getting used to incorporating the new technology into their practice, getting the lighting right and choosing what to wear. The latter of course only seemed to concern the top half of the body.

However, the ability to build a relationship between me as mediator and the parties has proved to be relatively easy. I have found that many parties to a mediation have found the process to be a less stressful experience than the traditional face to face mediation. There are many reasons for this. Parties to a mediation are largely in their own homes, in familiar surroundings and that fear of meeting up with the other side in an unfamiliar and somewhat sterile environment is avoided. I believe that this reduction in stress has meant that parties to the mediation have found it easier to engage directly with the mediator. In some cases, this has perhaps been due to the absence of their legal advisors in the same room as the clients. I think that this has allowed their clients to speak more freely than they might have

done if they had all been together in one room. At the same time, it has been possible to achieve the various elements that are necessary to building the relationship of trust. That ability to look directly into the green light of the camera has proved to be as powerful as looking directly into the eyes of a participant to a mediation, whether they be a client or lawyer. The camera and the immediacy of the screen and the person projected upon it has enabled or at least assisted the building of trusting relationships.

In practical terms, the need to explain the new process both to clients and lawyers alike was achieved by holding preliminary video conference sessions prior to the mediation day. I personally have always held pre-mediation telephone calls, but these were generally only with the parties' representatives, ie the lawyers. In my experience these preliminary mediation video conference calls held separately with each party and attended both by clients and lawyers have been a game changer for the efficiency and potential of the mediation process.

For many clients, a remote mediation might also be their first mediation experience altogether or, as with their lawyer, it might be their first remote mediation. I have used these preliminary video sessions to alleviate any concerns that the parties or their representatives might have about the process. I also take the opportunity of the preliminary video calls to deal with any introductions to the process of mediation that are required and the all-important explanation of the confidentiality and without prejudice principles upon which the mediation operates. Aside from dealing with matters that may cause a delay on the mediation day it provides a chance for parties to express their position and any thoughts or concerns they may have about the mediation day. Although these initial video meetings are termed as 'preliminary' meetings, they are more than that. Of course, they do provide the opportunity to deal with the introductions and necessary explanations of the process but in effect they also start the mediation process prior to the actual mediation day. This is a huge advantage as it means that the actual mediation day proper can start immediately with the parties and mediator effectively continuing the process.

Over the last year I have wondered why we did not use these preliminary video conference calls prior to the coronavirus pandemic. The technology was clearly available to use but for many reasons its advantages or benefits were not appreciated. The fact that we have been forced into this position has therefore created a major advantage to the process. Remote mediation has provided us with a greater degree of flexibility than the traditional mediation format. What this has meant in practice is the ability for me as the mediator to interact with the parties (via video conferencing) at an earlier stage and for longer or on more occasions than the traditional pre-mediation phone-call. I have found that this flexibility and lawyer/client interaction with the mediator has meant that the actual mediation day is generally more efficient and productive. In short, the use of remote meetings with key individuals prior to the mediation day has the effect of ensuring that the parties are best placed to get the most out of mediation.

In terms of organising mediations, this has generally become easier and faster. Remote mediation has provided parties with the opportunity to get to mediation sooner and more efficiently. Parties and lawyers being largely confined to their homes have found it easier to find a date or dates convenient to all parties. The possible delays in the litigation process has resulted in lawyers introducing their clients to the choice of mediation sooner than might have happened in the past. Equally clients, being frustrated that the speed by which their litigation is proceeding, have sought from their lawyers other options to bring their dispute to an end.

There are no empirical studies as to whether remote mediation has had any impact positively or negatively on settlement rates. Personally, I have found that remote mediation has seen a greater commitment to make use of the mediation process and that has resulted in a higher likelihood of achieving a successful mediation. Ultimately, the key factor that has made settlement more likely is the flexibility of the process. The process is no longer stuck in the 'one size fits all' single day mediation. The mediation process effectively starts with the preliminary video conference call. This provides the parties with a familiarity of the process prior to the mediation day with the mediation day itself simply being a continuation of the already commenced process. Similarly, if the parties are unable to achieve a settlement of their dispute at the mediation, then the process provides the flexibility to arrange and carry on further discussion within a short period of time following the completion of the mediation day. The fact that parties simply turn off their computer at the end of the day does not appear to have the same effect as the traditional end to a mediation day when parties reached for their coats and left the building. As such there is less hesitation and less difficulty with getting the parties back into the remote mediation session to continue their discussions.

As to the future, I personally hope that we will resume face-to-face mediations. But it is clear to me that we as practitioners have now been provided with more options and a greater number of tools. Going forward as we come out of the pandemic, I can see that mediations will take several formats. Some may remain as solely remote mediations and some will be only face-to-face. But for many I think and hope that it will be possible to see a hybrid with some parts of the mediation being undertaken remotely and with the rest taken place face-to-face.

As for the latter, irrespective of the advantages and flexibility of the remote mediation process, there is something special about people coming together in physical format to solve their disputes. There are certain interactions and feelings that take place in the face to face setting that cannot be replicated through the video screen.

And when parties do achieve a settlement, that is something that is best experienced in person. After all, we have not yet found a way to shake hands through the screen.

Interviewed by Marie-Gabrielle Williams

Andrew Miller QC practices principally as a mediator and arbitrator, using his specialist expertise in commercial, construction, insurance, property damage and professional negligence disputes

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