

Pre-mediation conversations: how lockdown has created an opportunity for building better foundations in mediation

(This article was first published by IPOS Mediation at mediate.co.uk)

Now that remote mediation has become a familiar part of the ADR landscape, it's common to bring together the mediator, parties and legal representatives in an online meeting ahead of the day. It's not simply about familiarising parties with video conferencing – it's proving to be a valuable first step in the mediation process.

I have always welcomed the opportunity to talk to the lawyers ahead of the mediation, so I can hit the ground running on the day. The conversation typically covers the basics – for example, the line-up of attendees, who has authority to make decisions, and so on – but might also explore more sensitive issues, such as where the obstacles to settlement might lie and what a deal might look like in principle. I'm also keen to gauge the inter-party dynamics, which can be useful when considering whether to hold a joint opening session, or anticipating negotiating styles. Likewise, the discussion might shed light on other relationships – such as between the lawyer and their client, and the lawyer and their opposite number.

In my experience, some lawyers are open and willing to speak frankly while others adopt a more guarded stance. Caution is entirely understandable and yet this preliminary conversation can be beneficial to all. Hearing professional insights into the nature of the dispute, the people involved and the dynamics, leave me much better placed to plan the early sessions in a way most likely to lead towards settlement later in the day.

Meeting the parties

Historically, however, the parties themselves have usually been excluded from this conversation. Legal representatives have been keen to protect the lawyer/client relationship and mediators (me included) have usually respected that, and been cautious about asking for direct contact. So, in practice, it has happened very rarely. Until now, that is...

Today, with remote mediation, there is usually an online session for everybody, bringing together the mediator, the parties and their legal representatives. Ostensibly, its purpose is to familiarise everyone with the Zoom platform and build confidence in using it. Parties can experience a little of what the process will 'feel like' on the day, be 'walked through' the online rooms and get a sense of what they and others will look and sound like in the remote mediation environment.

However, these sessions can be really valuable on a deeper level. Some of this is obvious: it's an opportunity for the clients to ask their own questions about the mediation process directly, and to share their concerns and expectations. This is useful to me too: it's all valuable information, and it allows me to offer carefully framed explanations and reassurance. So we all end up better informed, and can plan accordingly.

Building trust and understanding

Much more important, however, is that it gives me the opportunity to begin building that relationship of confidence and trust that is so essential if I am to manage a difficult negotiation on their behalf. The immediate consequence is that the parties turn up on the day confident that they are entering a safe and constructive process in which their interests are going to be respected. This is positive not just because it can help to set the right tone and save time at the start; it also tends to result in a stronger relationship, and one which is more likely to endure when things get difficult in the latter stages of mediation, as they so often do. For example, it allows me to explore the client's position more fully and effectively, asking challenging questions where necessary and playing devil's advocate more robustly. It can help in my efforts to avoid becoming 'tainted by association' if, as is often the case, the other side appear intransigent and I end up delivering a series of unwelcome messages. More generally, a strong relationship of this type is an essential ingredient in honest conversations about difficult subjects, and so the opportunity to start building it early is one that I value highly, and am always keen to take.

This new way of handling the mediation preparation may have been forced upon us, but it's an innovation that should be embraced by mediators, lawyers and parties alike. The more inclusive preparation session provides a firm foundation from which to begin the demanding process of negotiation – and inevitably improves the prospects of reaching a settlement on the day.