


The Future of Mediation

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In an effort to build a stronger justice system, a shift in priorities has emerged away from adversarial court battles and more towards opportunities for consensual resolution. As one of the most popular forms of Alternative Dispute Resolution (ADR), mediation has become increasingly encouraged.

There is little doubt that years of funding cuts to the court system have impacted the functioning and progress of cases towards trial. COVID-19 exacerbated this, leading virtually all stages of litigation to be conducted online. The resulting delays and cancellations have therefore presented a welcomed opportunity for parties to resolve their disputes another way.

Developing The Civil Procedure Rules

Lord Woolf produced a report in 1996 reviewing the rules and procedures of the civil courts in England and Wales with a view to improving access to justice. His report concluded that civil litigation in the UK was crippled by costs, complexity and delays. A key suggestion was to increase the availability and usage of ADR. As a result of the report, the introduction of the Civil Procedure Rules in 1998 ("Rules") saw many of Lord Woolf's suggestions implemented.

The 'overriding objective' introduced by the Rules was to ensure that cases were dealt with justly and at a proportionate cost within the courts. ADR, including mediation, represented a more cost-effective way of settling disputes.

What is Mediation?

Mediation is a confidential process used to settle a dispute between parties through negotiation. It is a voluntary process that all parties agree to take part in. Mediation can take place at any stage of the dispute process, with the principal aim being to avoid litigation. A prime benefit of mediation is that it allows parties to retain control over the dispute before their lawyers take it to trial.

A professionally trained independent party, the mediator, seeks to bring the parties to resolution through compromise. The intended result is for the parties to reach a settlement that is documented, usually in the form of a settlement agreement which is signed by the parties and thus becomes legally binding.

It is important to note that the courts do not look favourably upon parties who unreasonably refuse to mediate, and they may have costs penalties imposed upon them for doing so.

Usage of Mediation

In 2016, 41% of mediators and 43% of lawyers saw an increase in mediation, as reported by the [Centre for Effective Dispute Resolution](#) (CEDR). This rise was attributed to mediation being an effective medium of dispute resolution, with the overall settlement rate being 89%.

Between 2010 and 2019, over half of the courts across England and Wales were closed for one reason or another, increasing the backlog of parties seeking to litigate cases through the courts. This undoubtedly pushed more litigants towards settling their disputes via alternative means.

As with other elements of the litigation process, mediation services have had to adapt due to COVID-19, the subsequent national lockdown and social distancing laws. Sir David Foskett, Chair of the Civil Mediation Council, believes that even as the impact of COVID diminishes, mediators have continued to embrace these adapted working arrangements into their normal work lives, offering online mediation.

On 31 March 2020, a letter was published by the Civil Mediation Council (CMC) to its members. When discussing the future of online mediation, Sir David highlighted what he considered to be some of the bigger challenges the system may face:

“From the mediator’s point of view, the lack of immediate personal contact with the participants. The training of mediators until recently has always involved training face-to-face with real people. Much of a mediator’s art is to “read” the parties and to react to the way the participants themselves are speaking and behaving during the mediation. That is so much easier in person than via a Zoom or other similar virtual meeting. As I have said, I am not suggesting that mediation via that medium does not work – it does – but I think most mediators would prefer the face-to-face contact, certainly in very difficult cases.”

In terms of costs, mediation can often be a cheaper means of resolving parties’ disputes than litigation because of the flexibility of the process. The level of chargeable time is restricted by the speed of the process. Parties are also free to choose the level of formality and preparation. Unlike a trial or a tribunal, the amount of evidence can by agreement be significantly reduced and some categories, for example expert reports, may be dispensed with altogether. There are no additional costs associated with the delivery of a judgment, nor any appeal. All of these variables are agreed prior to mediation and contribute to a potential cost saving of around 80% compared to full-scale litigation.

The Future of Mediation

The Ministry of Justice conducted a consultation in July 2022 regarding “increasing the use of mediation in the civil justice system” . The consultation set out the government’s proposal for the introduction of automatic referrals to mediation for small claims valued at £10,000 or under. Unless exempt, all parties are expected to attend a free one-hour mediation session before progressing their case to a hearing. HMCTS currently operates the Small Claims Mediation Service (SCMS) which offers this service as a non-compulsory resource to parties who mutually consent to participate.

The expected benefit of the proposed new scheme would provide 272,000 more parties with a chance to reach resolution through mediation and avoid the time and costs of litigation. The consultation document also highlights that, in implementing this proposal, a predicted 20,000 cases would be diverted from the court system each year. This would make roughly 7,000 more judicial sitting days available for more complex cases.

The long-term ambition is to extend the mandatory mediation requirement to all County Court users. The outcome of the consultation is not yet known but is awaited with interest by practitioners and judges alike.

Conclusion

There are many advantages which mediation offers, from the informal and flexible nature to the confidentiality and cost. These advantages, paired with the increasing delays in the court system, have pushed more parties towards mediation as an alternative means of dispute resolution.

Due to the pandemic, considerable investments have been made into technological platforms which cater for mediation’s continued operation online. The growing confidence in such platforms which allow for virtual flip charts, splitting parties into different virtual rooms and even private chat functions has made mediation more accessible than ever. With the government’s recent proposals for increasing and expanding mediation services in the near future, there is every reason to believe that the growth seen in the mediation services will continue in the coming years.

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