

# Listening Brief

*Giving you the latest updates from the Society of Mediators.*

## Upcoming Events & Courses

Foundation Accredited Mediator,  
Taunton, 7th-11th September

Foundation Accredited Mediator,  
London, 21st-25th September

Foundation Accredited Mediator,  
London, 12th-16th October

Foundation Accredited Mediator,  
London, 7th-11th December

Please call 0207 353 3936 or email  
support@218strand.com for all  
enquiries.

## A Note from our President ...

*John Sephton, President - August 2020*

Globally humanity faces two significant challenges, that of the Coronavirus pandemic, and that of Climate Change. At a local level people face much in their lives. The aftermath of lockdown, the return to work, or perhaps for some the loss of a job that they enjoyed and provided for them and their family – perhaps the closure of a business, built up over many years. For the young, the interruption to their education and the prospect for those hoping to step into employment for the first time in their lives, an austere labour market. And all of this against a backdrop of the potential for a second wave of infections from Covid-19 as the autumn and winter approach. There is much upon us!

Many identify this as a time to consider how we do things differently ..... an opportunity for change. There will be an increasing enquiry as to “How things were done?” There will likely be disputes and conflict. I therefore invite the community to consider an important facet of mediation ..... it is forward looking – mediation recognises the reality of “Where we are now,” yet is unique, in being able to allow people to look to the future to rebuild and move on. Mediators will have a key role in the years ahead.

I wish the SoM Community the very best and please continue to do your utmost to keep yourselves safe.



## 218 Strand Virtual Office

Working remotely? Need a London address to receive your post and conferencing facilities but don't want to pay London rent?

218 Strand is now offering our new virtual office deal with reception staff, a London postal address and up to 20 hours meeting spaces a month - one of our many new deals starting from £200 + VAT pcm!

Please email [support@218strand.com](mailto:support@218strand.com) with your enquiry.



## *Our First Annual Society of Mediators Survey!*

The Society of Mediators is proud to introduce its first members only survey. Here is the chance to have your say on how we can improve and to help us collate data on what our members are up to. Just complete the form at the following link [here](#). It should take no longer than 10 minutes.

# The 2018 Eighth CEDR Mediation Audit

*Joseph Mulrooney - August 2020*

The 2018 Eighth CEDR Mediation Audit remains the most recent mediation audit. In gathering the data CEDR received responses from 336 mediators. Their report states that this represents over 50% of the individual membership of the Civil Mediation Council.

The aim of the survey was to assess how the mediation market, and attitudes towards mediation, have changed between 2016 – 2018.

The aim of this article is to provide a brief review of the report, and to pull out some information that I feel might be of interest.

## **Mediation Marketplace**

The 2018 Eighth CEDR Mediation Audit report finds that approximately 12,000 mediations take place each year in England and Wales. This represents an increase of 20% since 2016.

The report confirms that direct ad hoc mediation referrals have stabilised since 2016, but the use of mediation schemes has risen by 45% since 2016 and now accounts for some 4500 mediations annually.

Finally, the report confirms that 85% of all non-scheme commercial mediations are referred to just 200 mediators nationally.

## **Mediator Experience**

Of the 336 mediators who responded to the survey, they could be split into 3 categories:



**Joseph Mulrooney - Trustee**

- 1.62% = Advanced Mediators – described as ‘reasonably’ or ‘very’ experienced as lead mediator (up from 54% in 2016)
- 2.19% = Intermediates – described as having ‘some’ or ‘limited’ lead mediator experience (down from 22% in 2016)
- 3.19% = Novices – described as being qualified but having no experience as lead mediator. (down from 24% in 2016)

## **Mediator Diversity**

- The average age of the female mediator has increased by one year to 51, whilst the average age of the male mediator has increased from 57 to 59.
- 35% of respondents to the survey were female (no change from 2016).
- 10% of respondents described themselves as black, Asian and minority ethnic.
- 49% of respondents were from the legal profession (up from 43% in 2016).
- 5% of mediators reported a disability
- 2% of mediators identified themselves as lesbian, gay or bisexual

## Mediator Fees

The report finds that the average fee for a one-day mediation for the less experienced mediator is £1512.00 (down from £1545.00 in 2016), whilst the average for more experienced mediators is £3627.00 (down from £4500.00 in 2016).

Breaking down the figures in more detail, 44.6% of the average mediator fee for a one-day mediation was between £501.00 – £2000.00 (up from 34.8% in 2016). The next highest category was £2001.00 – £2500.00 which covered 18.2%. Pro bono work has reduced from 10.4% in 2016 to 3.1% in 2018 – I think this may reflect an increasing appreciation of the mediation process by those professions which engage it.

## Mediator Characteristics

CEDR also surveyed lawyers to find what factors were most important in determining which mediator they would appoint. I set out below the top 5 in 2018 and, for comparison, the top 5 as they were in 2016:

### 2016

- Professional experience – experience & status
- Professional reputation – mediation style
- Sector experience
- Fee levels
- Professional
- Background/qualifications

### 2018

- Availability
- Professional reputation – experience & status
- Sector experience
- Fee levels
- Professional reputation – mediation style

Interestingly, in the 2018 CEDR Mediation Audit, 'Availability' has returned as the most important factor for an instructing solicitor in 2018, as it was in 2014. This might reflect closer relationships between solicitors and individual mediators who are able to work more closely together.

## Mediation Success Rate

Between 2016 – 2018, the overall success rate of civil and commercial mediation has increased to 89% (up from 86% in 2016), and the breakdown of this figure has changed slightly.

The proportion of cases that settle on the day of mediation has increased to 74% (from 67% in 2016), but the proportion of cases which settle shortly after mediation has fallen to 15% (from 19% in 2016).

The CEDR Mediation Audit report also finds that the work of a mediator for each mediation is now an average of 16.3 hours' work – a decrease of 2.3 hours compared with 2016.

## Mediator Performance

83% of civil and commercial mediators were rated by lawyers as performing 'quite well' or 'very well' (up from 81% in 2016). 4% were rated as performing less than adequately (down from 5% in 2016).

## Mediator Style

The report found that whilst mediators still typically begin a mediation in a facilitative style they do tend to move towards a more evaluative approach when the process gets stuck.

## Mediation Contribution Statistics

- The report makes the following observations:
- Ignoring mega-cases, the total value of mediated cases each year has increased from £10.5bn in 2016 to £11.5bn in 2018.
- Since 1990, when civil & commercial mediation was effectively launched in the UK, the total value of mediated cases is now almost £110bn (up from £85bn in 2016).

By resolving disputes more quickly using mediation rather than going to court, commercial mediation is expected to save British business approximately £3bn each year in wasted management time, damaged relationships, lost productivity, and legal fees (up from £2.8bn per year in 2016).



- Since 1990 mediation has brought about savings of £28.5bn (up from £22.6bn in 2016).

In producing the above savings, the aggregate fee income value of the commercial mediation profession is now £30m (up from £26.5m in 2016).

### Changes & Trends

25% of mediators reported a resistance, largely driven by lawyers, to joint sessions at the beginning of a mediation. However, a number found that joint sessions later in the day are becoming more common.

Both lawyers and mediators noted that the quality of mediation bundles have declined and are being supplied to the mediator later than before.

### Future Outlook

In terms of identified growth areas, the most common responses were: commercial mediation; workplace mediation; professional negligence personal injury and probate.

### Mediator Advice

Mediators were also asked what piece of advice they would like to give to participants if they were able to do so. Of the 150 responses, these were the most common:

- *Prepare for the day– not only by thinking about your needs and expectations but also doing the same thing thinking about your opponents. Read ‘Getting Past No’. Arrive early. Check the parking.*
- *Being in the right does not bring anybody closer to a mutually beneficial position.*
- *Reflect on the offer you are making to the other party – if this offer was put to you how would you feel? Is the offer realistic?*
- *Do more preparation! Come to the mediation with a properly executed risk assessment and a realistic range of acceptable outcomes, based on needs rather than just regurgitating a position that has already been stated in correspondence, pleadings and the position statement (which is frequently itself a rehash of the pleadings).*

- *I always want to tell very senior lawyers to try to take their own emotion out of the process – it isn’t about them, it’s about their client!*

### Solicitor Caseloads

Interestingly, the 2018 Eighth CEDR Mediation Audit asked lawyers to breakdown how their cases from the previous 12 months had settled. 45% of cases were reported to have been settled via mediation. The next highest form of settlement was via negotiated settlement before issue of court proceedings (24%), and then negotiated settlement – after issue of court proceedings (12%). Unsurprisingly, only 4% of cases settled at trial.

### My Thoughts

The 2018 Eighth CEDR Mediation Audit shows that the mediation market continues to mature – schemes are becoming more widely used and may be part of the reason for the slight fall in mediation average fees.

The market for direct mediation referrals continues to be dominated by a small group of experienced mediators, but that group is growing.

The CJC have previously consulted on the feasibility of making mediation mandatory. Further information is awaited but if a decision to make mediation mandatory is taken, then the entire market could change swiftly.

What isn’t in doubt is the effectiveness and quality of the mediation process, and the overall quality of mediators in England and Wales. Accounting for 45% of settled cases, mediation appears to be an important tool for the average lawyer to call upon.

More recently, the impact of Covid-19 is yet to be fully realised. What is not in doubt is that there will be enormous economic disruption as a result of the pandemic. As entire sectors are impacted it is likely that the need for mediation will be widespread. After all, 10 new nightingale courts can only achieve so much....

# 'Connect Mediation'

*Dominic Collis - August 2020*

Note: The word 'remote' conjures up the idea of social and emotional distance as well as physical distance, so Collis Mediation Ltd launched 'Connect Mediation' on 23rd March 2020, detracting from the use of the word 'remote'. However, Connect Mediation is unfamiliar terminology which may confuse people, therefore for this piece we will use the term 'remote mediation' to refer to any mediation which is not face to face.

Used skilfully, remote mediation is remarkably effective. Used badly, it can be disastrous. However, as with all mediations, the success or failure is not due to technology or methodology. It is almost always a result of the judgement and skills of the mediator.

There are several different types of remote mediation, not just video/online:

- Asynchronous/ sequential
  1. Email
  2. Shuttle telephone
- Simultaneous video and/or audio conference
  3. Zoom
  4. MS Teams Meetings
  5. Others

Your choice of platform should depend on the clients you wish to work with, whether you use individual sessions/caucus within the mediation, your own skill, accessibility, and budget.

## **Benefits**

*Accessibility* Remote mediation is more accessible for clients. disabled or physically incapacitated clients, remote areas, or different geographical areas. In poor weather conditions or travel disruptions, meetings can still take place.

*Safety/Comfort/Calm* The parties have more control of their environment. There is little risk of physical violence. Parties are more likely to be relaxed in their chosen environment.

*Privacy/Convenience* Meetings are not bound by venue availability. Discussions can be arranged to suit the parties and the mediator, and all parties can choose what is convenient for them.

*Visibility* Mediator sees all parties faces in face to face, when you turn to face a client, you may not see the other parties' reactions. In Zoom, you see everyone.

*Cost* No venue (cost efficiency), no travel (no essential non-productive time), no refreshments (cost efficiency), less disruption and financial loss if cancelled (cost efficiency) and it means that you as a mediator spend more time 'mediating' (essential productive time).

## **Drawbacks/Considerations**

*Poor Connection/Fear of Technology* It is crucial you remember the participants, most likely, do not use conference calling and/or video conferencing daily, it will be new to them and they will need coaching and mentoring in its use.

*Facial Cues* The facial cues are less obvious with video conferencing, and non-existent on telephone conference calling.

*Attention Span/Distractions* The temptation to check emails or work on the computer instead of listening to the other party. This also applies to the mediator. Isolation can be an issue if breakout rooms are not managed well.

*Visibility/Confidentiality* The mediator's field of vision is limited to what the webcam can see. Can others overhear conversations or attending without you knowing?

*Less Control of Environment* Setting out the right environment is a useful tool for mediators. With remote mediation, you have less control.

### **Not a substitute**

You cannot replicate face to face mediation with remote mediation—it is a different scenario. One needs to understand the limitations and opportunities of the platforms, then decide which method is most appropriate for each mediation.

Many of the techniques which work in person to build rapport may not be as effective in connected mediation. Only the face and upper torso are visible (or none if telephone)—if participants sit further away, body language is visible but not facial expressions.

On the other hand, if the connection and picture are clear, there is a sense of intimacy and sharing of a common experience. Documents are easily shared and the collaboration in composing agreements is simple.

A silence may be construed as a dropped connection rather than a pause.

Mediating via telephone or computer is more intensive and tiring, so long sessions are not recommended. There is no need for all participants to be on the call if you are having a private session with one party.

### **Do:**

- Practice using technology until you are confident and competent
- Prepare yourself and the participants. Clarify process, expectations and do familiarisation meeting
- Get professionally trained in using the technology
- Set up the platform properly for mediation
- Ensure security is set correctly—lobby/waiting room, screensharing, recording off, unable to save chat

- Use passwords
- Check your paperwork & information is relevant for remote mediation
- Set and clarify protocol for signing pre-mediation agreements and outcome process
- Have a backup plan
- Share application or specific tab
- Shorter sessions
- Remain professional

### **Don't:**

- Practice on clients
- Assume it will work or that people can use it
- Assume you are using it correctly because you are using it
- Use default setting
- Assume it is secure
- Send out information too early
- Assume existing paperwork is fine
- Leave it till you are in the mediation
- Assume it will all work on the day
- Share desktop/whole screen
- Have long drawn out sessions, insisting on resolving it by midnight
- Add humour to the mediation, everyone's taste in humour is different



**Dominic Collis - Trustee & SoM Faculty**