

# Kluwer Mediation Blog

## Reflections on an e-mediation

Sabine Walsh (Sabine Walsh Mediation) · Sunday, February 5th, 2012

I have been interested in, and have been training in various methods of Online Dispute Resolution for some time, so when a case of mine recently converted into a type of online mediation I thought I would take some time to reflect on what I learned from the experience.

First, a few words about how this came about. (Note – the facts of the case have been changed to preserve confidentiality). I had been working with this particular couple for some time. We had had single sessions initially, completed the financial disclosure, and were progressing fairly well, in joint sessions, on the agenda for the mediation. Due to the illness of one of the parties, there was a bit of a hiatus in session but after a while we resumed. Whatever had happened for the parties during this break in proceedings, it was not conducive to productive joint sessions. Both parties showed more hostility than ever before in this joint session which then culminated in one of them having an outburst, or tirade may be a better description, of such force and with such aggression that it left even me shaken. As for the other party, after some time for reflection and recovery, they felt they desperately wanted to continue with mediation but not ever again in joint sessions. In addition to this, the parties now lived in different cities so scheduling appointments had become tricky anyway.

We agreed, therefore, that we would continue the mediation by e mail and telephone, effectively in caucus with each party. At this stage I considered deploying one of the online dispute resolution systems I had trialled, such as Juripax or even just using Wikispaces, but the parties insistence on my being the “translator” for their often highly charged communications meant that simple e mail, with telephone discussions to clarify, would be as appropriate as anything else.

My first reflection, therefore relates to the “space” in which the mediation then continued. In hindsight (and on trying to tidy up my inbox after the case had finished) I did feel that a designated forum such as even a basic Wiki would have been useful, to have a space to store and record all messages and documents relating to the file. The latter became particularly relevant when working on a draft Memorandum of Understanding, which was e-mailed back and forth with ever increasing number of changes from both sides. It became hard to keep track of the changes and the most recent version of it at times. Such a forum may, though I have no evidence backing this assumption up, have made me feel more secure about confidentiality and privacy also, feeling always vaguely uneasy after sending an e-mail about who might read it, such as the couple’s children or work colleagues.

Anyway, negotiation continued, at times exclusively by e mail at times switching to the telephone,



when the clients felt that they needed to vent their feelings (usually anger) to me in person. It does strike me that this latter part would have been significantly more challenging had I not spent so much time with the couple in person and got to know their personalities and communication styles. Still, I was pleased that both still felt they could express their feelings, particularly the party that had been more reluctant to do so in person, could now set things out in an e mail.

By far the biggest advantage of mediating this way was the time that could be taken (though this did not always happen!!) before replying to the other party's comments / suggestions / feedback after thinking about it, rather than in the heat of emotion. I was, and still am, sure that had joint sessions continued face to face, a substantial amount of mediation time would have gone to just managing the parties interactions and setting out and enforcing the rules of engagement.

Interestingly, the parties' communication styles came through even more clearly in the online environment. One regularly replied to me quite quickly, often first by phone and then by e mail, whereas the other one never replied until having slept on it. Again, I feel this gave them more room to honour their own communication styles than the potential pressure cooker of a joint session could have.

As to my role in this, that is something I continue to try to pinpoint and identify. Yes, I neutralised hostile language, re-framed unhelpful comments, emphasised the positive etc. as I would in any mediation, albeit in probably more carefully planned and considered words and sentences than in the heat of a joint session. To what extent did this help though? I'm not totally sure. I think the most important function I fulfilled in this context was as a "buffer" between the parties. The level of hostility between them was such that even receiving a direct e mail from the other triggered large amounts of anger and resentment, and somehow having the contents of such e mails coming from me, and in a somewhat neutralised format, just made it easier to deal with.

In many ways the role I played in this mediation was very similar to that I have played in the civil and commercial mediations that I have done, and gave rise to the same subtle sense of uneasiness about the role I play as translator of the parties positions, needs and interests when they do not communicate directly with each other, but hey, it works.

So did it work in this case? Sadly not. Having agreed absolutely everything, down to whose lawyer would draft proceedings, it all came unstuck over what bank account the sum of money agreed to be paid to one party should be paid into. He said account A, she said account B, I, in desperation suggested a very workable compromise but no, it ended with a brief two line e-mail to me from one of the parties terminating the mediation.

Was it as a result of mediation in cyberspace? Would things have been different if I was with them in person? Could I have pulled them back from the brink if I had been able to work with their emotions with them in person? I honestly don't think so. To give up on an agreement and 8 months of work done over a comparatively small issue can, to me, only mean that for whatever reason, they were not ready to go there, were not ready to put this dispute and their feelings for each other, however negative, behind them. Plus, if I had insisted in further joint sessions, in person, I know we would never have got as far as we did. And then of course there was the extraordinarily destructive input of one of the parties' lawyers. But that is a subject for next month maybe...

For the moment my door, and my inbox remains open if they decide to come back to the table, virtual or otherwise. And I will continue to learn about and use the online environment. It is certainly worth having in one's toolbox.



*PS. As I go to post this several days after writing it, I have received a call from the party who terminated, asking to re-start the mediation...?*

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