

Kluwer Mediation Blog

A Sense Of Place

Jonathan Lloyd-Jones (Independent Mediators) · Monday, May 18th, 2020

Entering into a cathedral or court of law, before listening to the music, the words, or indeed before taking in very much at all, one is generally struck by the architecture of the building, the rising columns, the soaring roof, or just the sense of solemnity the place evokes. There was a reason they were designed the way they were, to produce that reaction in the individual.

As mediators we have, by and large, abandoned formal environments in which to hold mediations and the current lockdown and the transference of our work to online platforms has taken this process to its next stage.

There has been much discussion about the use of online platforms such as Zoom. These discussions tend to have focussed on a number of key points such as security issues, ease of use, the inability to “read the room” and gauge the reactions of all involved in the mediation and, of course, user fatigue, both in the mediator and the parties. All critical issues as we mediators get used to this new way of working. Indeed there are many who think that not only is online mediation here to stay but that the market will prefer it.

However, I wanted just to spend a couple of moments commenting on another aspect of the conflict resolution process which I think is important in enabling the parties to move forward, and that is the physical environment in which the process takes place. There is a major difference psychologically between having to travel to a venue for a purpose and dealing with the issue in your own home. The need to collect your papers as well as your thoughts, the need to travel, and indeed to arrive, all play a role in preparing parties for what is to take place.

Indeed, the parties have to prioritise their travel as otherwise, literally, they don't arrive. There will be a mix of thoughts on arrival, positive and negative. There are the settling in rituals. Greeting strangers and those known to you. Making or collecting the coffee, perhaps for others as well as yourself. Looking at the view out of the windows and perhaps seeing a different view of a city that you thought you knew well. Sharing the new perspectives with your colleagues as well as others. Such collective actions provide plenty of scope for us to use as parallels with what we will be seeking as mediators to do during the day, should we choose to do so. Such physical niceties also give plenty of opportunities for those all important opening remarks whether made by the mediator or one of the parties.

Much of this is lost when mediating online. First, it is difficult to work out in what room each party is based. Is it an office, a home office, a study, the kitchen, a bedroom or the garden shed. Virtual backgrounds can make this process of deduction even more challenging (unless a child or animal

intervenes). I am not aware of any academic studies that have been carried out in this area, but I suspect that taking difficult decisions on your own in a room in your home, even when your advisors are online for you, is a very different process from making such decisions in a more formal environment sat next to your advisors and colleagues.

Secondly, what are the influences that will be working on the parties? To some extent in a normal physical environment, the mediator can control those influences. The temperature of the room, the availability of refreshments, whether it is an internal or external room. Who is in the room and who is not. In addition, the mediator can move the parties around. From a private room to a plenary session, to a joint private session with just the lawyers or just the clients. Perhaps a stroll around the block to have a chat and discuss options with one of the parties. Whilst to some extent these processes can be replicated online, my own view is that the online process is a poor substitute for being in the same physical space as those with whom you are seeking to work.

Now I am well aware that there will be many who will welcome the greater use of online mediation and I have no doubt that post lockdown we will be asking in relation to new instructions whether the mediation is to be conducted in person or online. The benefits of online mediation such as the reduction in travel, the ability to work productively on other matters whilst in your own work space and generally the more productive use of the considerable downtime that is a feature of most mediations will be welcomed, particularly by the professionals who mediate regularly. A number of those in the insurance world for whom the mediation may simply be a method of getting to an acceptable number may welcome the ability to be part of the mediation whilst remaining in their office and getting on with other matters.

Lawyers and other mediation advocates may also look forward to not having to travel and to be able to deal with the dispute from the security and comfort of their own office or chambers.

However, I have a concern that we lose sight of the key person or people in all of this, the disputant or disputants. Thus while the busy CEO or Finance Director may think that the chance of being able to take part in the mediation without the need to leave their office when there are other pressing matters on their desk is a good idea, he or she would also have to consider whether they will be disadvantaged by not being physically there.

As mediators we talk about it being the party's case, not ours and not the lawyers. We stress the importance of the parties being heard. It is their day. It is their story that needs to be told. Of course, this can be done online, but I think there is a difference in being in a room to which you have travelled for the express purpose of telling your story and hearing their story and hearing it from your kitchen or home office. The collective sense of purpose in having gathered physically to try and achieve a settlement is very much more difficult to replicate online.

There will always be some disputes that will lend themselves to online mediation, where for example, it is simply a matter of getting to the right number and the issues of law and fact are agreed. Where because of geography or other commitments, it is almost impossible to find a date or place for the mediation that everyone needed can agree upon. Or where the parties will play little part in the process because the lawyers are effectively controlling it as a consequence of their fee arrangements or their accustomed style of working.

In the mediations that I tend to undertake, which generally last at least a day and usually involve many hours of preparation, the need for the parties to be physically, as well as mentally and

emotionally, present cannot be underestimated. They may arrive at the venue with all the anger, worries and other concerns that have been building over the months and years and the mediator's response to that is one of the early challenges in the mediation process. Addressing such emotions online is very challenging. Furthermore, the physical departure from the venue with a signed agreement and settlement achieved is an important part of the closure that we have helped to bring about. "Shutting the door" on a problem is a well used metaphor for a reason.

Sadly most of the venues in which I have mediated are more similar to an office than a cathedral but each in its own way has a sense of place that I have been able to use. So, notwithstanding the fact that the mediations I have conducted online have all settled, I look forward to the time when I can again see the parties face to face and know that whatever the physical environment in which we find ourselves, we are there together, to work together and jointly to see if we can agree on an outcome.

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