Kluwer Mediation Blog

"Stand by your devices"; or "Access through the [virtual] looking glass"

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"Stand by your devices"; or "Access through the [virtual] looking glass"

I take the first phrase of this blog title from a throw-away line in one of the recent comments by a student in my current Negotiation and Mediation class. The context is this: my university has implemented an Emergency Preparedness Teaching and Learning [EPTL] initiative, as part of the planning for any recurrence of events (SARS, bird flu, etc) that might require the university to be closed for any length of time. During an earlier outbreak of one or other of those viruses, schools were closed; and last year, during the worst of the "atmospheric haze" (smoke pollution) from illegal burning of forests in Sumatra and Borneo, many schools were closed and it looked likely that the university might do likewise.

What EPTL means is that all faculty need to be in a position to be able to continue conducting classes remotely, whether by synchronous video links or asynchronously through more text-based communication. We also have, as do most universities, a web-based course platform that already allows for discussions, submission and assessment of term papers, sharing of documents (to the extent permitted by copyright), communication with classes, and so on. We've also all been obliged to attend a couple of training programmes on the various technologies available – which might also be seen as part of the gradual slide towards being a university that operates online as much as it does in the conventional classrooms. At the same time, we're regularly advised by the teaching and learning centre that the audience we're dealing with – the "millennials" – have wholly different expectations as to the presentation of materials, presence in class, attention span, and the primary sources of information. The ubiquity of and devotion to the little screen means that this is the medium for connecting – and indeed, in a commercial sense we can see that there is a greater expectation that web sites and other sources of information should be "mobile ready".

At the start of this semester – and the new year – we were advised that we needed to implement at least some elements of this EPTL, by way of trial run. As it happened, this worked well in terms of scheduling and substance for the course: I was going to be in Paris for the ICC's mediation competition, and I wanted to expose the class to trying a wholly online negotiation. The elements of that negotiation practice were:

– I set up a two-party negotiation;
– each "party" consisted of client and counsel;

– only client and counsel could have face to face contact;
– all other communication had to be by some other electronic, digitally-mediated means;
– that communication could take place over a week, but with a set time by which it was to be completed;
– the results were to be written up on the class discussion board together with an evaluation of how the process worked online.

I was fascinated and gratified by the results. Everyone threw themselves into this exercise (though they also do so in the real time, F2F negotiations); and I don't think it's a misinterpretation of the comments to say that it was a constructive experience. Interestingly, only one group chose to use video-based options (in this case, Skype). Otherwise, all relied on text-based, asynchronous communication – which, we could probably say, is simply a normal form of communication for the millennials and, increasingly, for the rest of us. Email tended to be used less than the more abbreviated forms of communication platforms such as Telegram and WhatsApp – again, for the immediacy and familiarity (and, I'm told, for the greater degree of encryption of the former).

Where the "stand by your devices" expression came up was simply in the expectation created in each group that while the communication was largely asynchronous, it could be picked up at any time – and you do need to know that Singaporean students operate on a different time system from the rest of us, such that it's not unusual for me to see emails written some time between 1.00am and 5.00am.

The first point that I'd take from this little experiment is that this millennial generation seems entirely ready to adopt ODR as a perfectly normal facet of doing business and dealing with disputes. That said, their evaluations of the process did show a concern for the usual array of reservations that have been raised about taking dispute settlement processes online: the reduced (if not removed) capacity to "read" gesture, posture, faces; or to hear tone of voice and the nuances that most of us pick up without being fully aware of it; the problems of building and maintaining trust online, knowing that this now requires additional words and actions, and cannot be assumed or developed incrementally over a period of direct interaction. There was less concern – at least in this exercise – about the implications of taking more of the dispute resolution system online.

What was appreciated and widely commented on was the enhanced opportunity to take time over responding to comments or suggestions from the other party. Rather than having to think on one's feet, thinking at one's keyboard (or, more likely, touch screen) has the constructive function of allowing time to think about the right words, and to be more careful about those words than one might otherwise have time to be; and the potentially socially negative consequence of reinforcing a preference for text-based rather than interpersonal communication. The one technological reservation expressed, both in online comments and later discussion, was that the text-based communication Apps (WhatsApp, iMessage etc) allow one to see when the other person is replying, which both raised anticipation and causes anxiety when the reply seems to stop – leading to concerns as to whether some unknown factor has led to a change of mind.

On that latter point of the preference for digitally-mediated communication, any development in this field of ODR needs to be read alongside an awareness of the "soft impact" of these digital technologies – the impact that the expanding use of the technology has on our social interactions. There's no space to deal with this here, but those interested might want to look at the work of Sherry Turkel, who – without being in any way anti-technology – has spent working life exploring the impact of the technology on the capacity for conversation. See, for example,

https://www.theguardian.com/science/2015/oct/18/sherry-turkle-not-anti-technology-pro-conversation and her recent book referred to, on "Reclaiming Conversation". See also Sophie McBain's recent piece in the New Statesman on what our digital dependence might be doing to our memory and – by implication – to that part of our identity which is tied up with memory: http://www.newstatesman.com/politics/education/2016/02/head-cloud. As she notes of the risks of taking digital photos of almost everything: "a digital memory is a poor substitute for the richness of a personal experience revisited, and our autobiographical memories cannot be "retrieved" by opening the relevant online file".

This leads me, by way of a closing comment, to the observation also made by a number of the students following this exercise, either directly or by implication: such is the familiarity and comfort with digitally-mediated communication, there's a risk of it becoming preferred to face to face communication. In earlier blogs, I've adopted a kind of cautious-but-interested curmudgeon view of this, especially in relation to the distraction that digital devices can be from the immediate and fascinating prospect of dealing with the real life and present people across the table, whether it's a mediation table or dining table. However, I get the sense that we've stepped through the looking glass, as did Alice, and the realities have been reversed – now, it's no longer the case that the digital devices distract us from human communication, but rather that working digitally allows us NOT to be distracted by the immediate imperatives of communication and conversation. A recent communication from a judicial – and technophile – colleague in New Zealand suggests, too, that the experience of the generation of "digital natives" as jurors in his court indicates that they are puzzled, and not engaged, by the "orality" and seemingly ponderous pace of a normal criminal trial.

We might say, along with the refrain in Kurt Vonnegut's Slaughterhouse Five, "so it goes"; or, more constructively, with writers like Richard Susskind, that this is less a mark of the decline of conversation (and, with it, human civilisation) than one part of the "disintermediation" and restructuring of professional and social communication that are a result of the advance of the digital technologies.

Either way, it heralds the prospect of a world of online mediation and negotiation that is wholly familiar to those who will largely live with it and make it work – well aware, as they seem to be, that there's still a human being behind that screen, bearing, or hiding all, of the things that still matter – trust, empathy, compassion, fear, animosity, anticipation, uncertainty . . . and we still have to unravel the message through the medium.

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This entry was posted on Friday, February 26th, 2016 at 9:04 am and is filed under Communication, Cross-cultural, Decision making, Developing the Field, Email, Future of mediation, Mediation Practice, Online Dispute Resolution (ODR), Online Mediation, Technology
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