

# Kluwer Mediation Blog

## Communication after Covid-19

Esther Pfaff (Associate Editor) (Hoffmann Eitle) · Saturday, April 18th, 2020

If not “Covid-19”, then “Home Office” is going to be the topic of the year 2020. Apart from our family management skills, home office work first and foremost challenges our ability to communicate via long-distance means. Even before the pandemic, the increased awareness towards climate change had led to initiatives for a more intensive use of long-distance communication. Companies started to question their carbon footprint and introduced policies to hold meetings via video chat whenever possible. On this blog, the earlier post entitled “The World Mediators Alliance on Climate Change” pleaded for a more eco-friendly dispute resolution system, where mediation should as often as possible be held via long-distance means.

Covid-19 has now given all these initiatives a massive boost. As Yuval Noah Harari, author of the non-fiction book “Sapiens”, stated in his latest article “The world after Corona” (L.A. Times, March 20, 2020):

*Many short-term emergencies will become a fixture of life. That is the nature of emergencies. They fast-forward historical processes. Decisions that in normal times could take years of deliberation are passed in a matter of hours.*

Our pledge became a reality much sooner than expected, we all had to overtake ourselves in these past weeks. While the increased experimenting with flexible and virtual workspaces can be seen as an interesting side effect of this pandemic, it will have long-term effects on our communication culture and the culture of conflict.

Dysfunctional communication is at the core of every conflict. In my experience as a mediator, long-distance communication has a tendency to be much more dysfunctional than we actually realise. My mediation work mostly relates to IP matters, in particular failed negotiations on license and R&D agreements. At the beginning of a mediation, the parties are usually convinced that they have exhausted the negotiation path. They consider their case to be quite hopeless: “There is just no talking to the other party”. The most frequent reason why clients refuse to even try mediation is because they firmly believe they have already communicated their position as clearly and diplomatically as possible.

When then analysing the communication leading up to the mediation, it is often striking how far this assessment is from the reality of the case. Usually, positions have only been expressed in cryptic e-mails before stating a claim. Very rarely, parties provided a full explanation as to why a certain standpoint is taken or why a certain claim is justified. In most cases, there was never an opportunity for the parties to build a (working) relationship of trust before the conflict arose. No

face-to-face meetings were held allowing for a detailed discussion. If a face-to-face meeting was held, it was often preceded by communication via email or phone calls which already contributed to numerous misunderstandings and escalated the conflict further.

When discussing the preceding communication with the parties, my observation is that most people are not aware of the impact their communication or the tone of it will have in a certain context. In other words: they are not aware in what emotional landscape their calls or e-mails will land and how they will shape it from there.

The number of practical examples is endless. A standard situation when negotiating an agreement is the exchange of drafts. The other party will perceive it as very rude, when a draft with amendments is simply responded to with another draft including some rejections and some further amendments. Many of these alterations might be acceptable to the other side – if explained properly. However, clients frequently reject the idea of an explanatory phone call or e-mail upfront. If an e-mail is written, little thought is put into the choice of words. As it is all so clear in their own mind, it is believed that their intentions will be clear from the amendments suggested- and the new version is thrown in the ring with nothing more than a “here you go”. The other party inevitably gets upset about such rude communication and begins to shut down- which is interpreted as malicious. A good opportunity to come to a deal is often lost at this early stage already.

Other examples illustrate the immense scepticism and hostility which exists between parties who did not have the chance to build a good (working) relationship. In the preparation for a mediation between a senior academic and an international company (the parties had never met prior to the mediation), the company inquired whether the mediation could be conducted in English, their standard language of operations. The senior academic considered this a strategic move to put him at a disadvantage and almost cancelled the mediation. It turned out to be an innocent question which appeared overly hostile when asked out of context in an e-mail.

Experience shows that people do not expect to be misunderstood. It is worth noting that we have developed our communication skills as cave men and a scientific fact that our DNA has only marginally changed since then. Human beings only used to talk to a person who was a trustworthy group member – everybody else might very well be a potential enemy- and rarely talked to. All communication will therefore be interpreted against the backdrop of a relationship of trust and in context with body language.

It always seemed to me that it would take a long time to adapt these skills to long-distance communication, without observing increased stress levels and frequent conflicts. The challenges of long-distance communication are one main reason why I advocate that mediation mechanisms should be an integral part of modern conflict management systems. We need the mediator as a midwife to our communication, because modern communication is lacking – and we often fail to see it.

While I still believe this to be true, my impression from the past days is that also here the learning curve has become radically steep.

In the past, as long as both direct and long-distance communication were at least a theoretical option, not much skill and effort seemed to be spent on conducting communication via long-distance means. Best practice guidelines certainly existed but were rarely applied. I have often experienced commercial projects beginning in a group telcon, where no real introduction of team

members took place, no rules for communication were established. Often, the plan was to hold an in-person kick-off meeting in the future. Due to time or financial constraints that in-person meeting then never happened. The lack of team spirit carried on, making the handling of any upcoming conflicts increasingly difficult. I often heard team members say “Well, we had better put that in an e-mail...” as a general expression of frustration over telephone conferences.

Lately, I have participated in a number of telephone conferences and video chats with a very different vibe. These calls were thoroughly organized, in full awareness of the challenge that bonding and working in a team via a screen represents. The calls started with an introduction round, making sure everybody is fine and giving everybody a good understanding of who is actually on the call (in part because everybody is kind of excited about the new working situation, but still). There was a clear agenda circulated before and rules of communication agreed on. Many of these calls happened in a pleasant and productive atmosphere, we actually got a lot done. Because it clearly was the only option.

I have the impression that only now do we truly realise that long-distance communication is actual communication (which was actually the case in all those years before when looking at the vast majority of our communication) and therefore we finally give it and our communication partners the attention it and they deserve. We make the necessary effort to warm up to people and build a working relationship. Over time, my expectation would be that a much more sophisticated ethical and social code will develop around long-distance communication. And the more it becomes established, the less likely long-distance communication will be the root cause for so many commercial conflicts. On this long and bumpy road, I believe mediators have a worthwhile contribution to make. This work begins with raising awareness of the incompleteness and challenges of long-distance communication. A second step might be providing alternative, and equally convincing interpretations of statements by the other party, which could completely alter the course of the negotiation/mediation. After this exercise, it becomes easier to draw attention to the fact that the same is true for the party’s own communication.

Ideally, the mediation experience leads to the establishment of mechanisms which help to avoid the escalation of future disputes. Some companies have made it a policy to include a clause which establishes a mediator as a general point of contact for the parties, for example in agreements on projects where communication will foreseeably be challenging. This goes beyond the general mediation clause, and creates an early acceptance among the parties that some kind of support might be needed along the way.

Perhaps this is a bright note to end on in an otherwise challenging time. Stay healthy everyone!

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