Building Trust Online
How to Adapt Mediation and Negotiation Techniques to the Virtual Environment

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Abstract. This paper is developed from one section of the course which deals with the problem of how a mediator can develop the necessary level of trust when communicating online and overcome what may at first sight appear as barriers to delivering online the benefits of mediation.

Keywords: Online mediation, trust, online mediator, platform, confidentiality.

1 Introduction

Mediation is a 'person-to-person' process. Experienced mediators will claim that it is not possible to mediate in the truest sense except when in the physical presence of the parties. That is fair and understandable comment but misses the point that mediating online may often be the only option, e.g. when the parties are in different countries, when disability prevents attendance by one party or where the value of the dispute does not justify the cost of an in-person mediation. Additionally, online mediation can offer mediation services in urgent situations that need commencing immediately e.g. if a dispute with one contractor in a large building project holds up the work of other contractors, or when a ship is locked out of port due to a dispute. There are also some situations, e.g. in disputes between former spouses, in which the personal relationship between the parties is such as to trigger so many negative reactions when each are in the presence of the other that avoiding an in-person mediation can help the parties focus better on the issues than on the emotion. An online mediation also offers solutions and facilities not available in-person, e.g. blind bidding, anonymous brainstorming and dispute analysis not to me. Most important of all, the lower costs associated with online mediation as well as the facility to run two or more mediations in parallel, can enable a mediator to earn the same net fees for his time as he does for in-person mediations whilst, nevertheless, charging a lower rate per case and thus, in this way, widening economic access to mediation as a whole.

Given that mediation online may be the only, better or preferred, option available to the parties, then what are the challenges that present themselves to the mediator in developing the level of trust in himself as mediator that will enable him to perform to

an optimal degree? Trust is the key element in mediation. Without it, the task of the mediator becomes extremely difficult. Associated with that question is one about how the mediator can avoid misunderstandings, and provocative discourse that can be negative to the process. These are the issues to which my six years of experience in this field of online mediation has given me answers for sharing in this paper.

2   The Preliminary Stage

The first step is for the mediator to introduce himself as fully as possible to all the parties and to allow them to do likewise. In traditional mediation, this usually this takes the form of a CV being sent by the mediator to all parties and possibly a telephone conversation. In the case of the introduction of the mediator it covers primarily the professional career, the nature of his practice within his profession and his particular experience in mediation, especially cases similar in nature to the one in question. An introduction in real terms to the mediator as a person is usually not fully carried out until the beginning of the mediation meeting when the previously provided written information is expanded on at a personal level. Without the benefit of any personal meeting, the advice in online is to expand the written introduction to add a little more of the person, e.g. home location, family circumstances, interests and hobbies etc. Uploading a photograph or perhaps even a small video will help the parties get to know the mediator better. How much information to give is up to the mediator but obviously it should not be too much. Just enough, perhaps, to enable the parties to begin to identify a real person in whom they can then begin to trust.

It is equally important for the mediator to take additional steps to begin to 'get to know' the parties. TheMediationRoom.com offers mediators use of a personality profiling module that will help identify relevant traits of the parties e.g. whether submissive or assertive by nature. The profiling is entirely voluntary and the parties receive a copy of the report. The parties are then asked the extent to which they believe the report is accurate. It is this aspect that can be very revealing to the mediator. How far you go to find out about people (searching them on social networking sites and forums etc) really depends on the nature of the case. A straightforward small consumer dispute over a product will not require as much personality enquiry as for a dispute between directors of a company. The more the dispute is affected by personality, such as family or boardroom, the more helpful it is to understand the people you are dealing with and , importantly, what drives them and how they themselves deal with people and emotions relevant to the dispute.

As well as understanding as much as you can about the parties, it is also important to try to find out as much about their experience in using the Internet and technology. Ask how competent and comfortable the parties are with the technology and communicating online. Make a note of the response and ensure you keep that in mind when conducting the mediation. Demonstrating concern that the parties understand the technology will help show concern and, in turn, this will reinforce trust.

Try to find out as much as you can about their working environment. When conducting mediation in-person the mediator knows and controls the environment. He will ensure simple rules are followed, such as mobiles phones and MP3 players being

switched off, and that the room contains as little distraction (such as posters on the walls) as possible. This is not as easy to achieve when mediating online. How do you know people are not watching TV whilst responding to your messages? Whilst this may be OK for general email and web surfing, make it clear to the parties that mediation requires total focus and commitment. You cannot prevent such multi-tasking, but can at least set the ground rules and seek specific promises of compliance with them.

When mediating in-person you will know if one party has been drinking alcohol to such a degree as to affect his judgement and level of communication. How can you tell online that one party has not spent an evening in a bar or enjoying a bottle of wine at home, before logging on to the online mediation? The alcohol may well have raised emotions to such a degree that he responds aggressively and without due thought and consideration? You cannot prevent this, of course, save that you can raise the issue at the outset, set down a clear rule and try to identify any such effect such as from the nature of the response or the lateness of the hour when a message has been posted.

Ensuring the parties fully understand mediation and its objectives and purpose so as to approach it in a positive spirit is a key element in any successful mediation. In an in-person mediation ,if the approach taken by one or more parties is not good at the outset , then not only will this become readily apparent to the mediator, but he will then be able to address it at an early stage. This lack of a positive attitude may not be so apparent when mediating online, until, perhaps, much later on by which time it may be difficult to change the approach.

Care should be taken, therefore, to assess the attitude of the parties in the early stages such as by asking questions focused on approach and attitude. Any negativity should then be addressed. One advantage here is that the exchange and outcome will be 'on the record' at least to the party concerned and the mediator. This gives the mediator opportunity later into the mediation to refer the party to what was said by way of a reminder and so as to reinforce a positive approach.

3   Adapting Discourse

One of the main problems with mediating online through text is the greater risk of misunderstandings. The Irish playwright, George Bernard Shaw, once famously said of the United States and the UK at "two nations divided by a common language". Words can often have different meanings in to different people. British solicitors will usually come home from their first visit to the USA proudly showing off photographs of signs outside houses saying 'Solicitors Keep Out'. In the US the term refers to door-to-door salesmen. In negotiation, 'my ultimate offer' may or may not mean 'my final offer' or may or may not mean 'my best offer' depending on the respect for literal interpretation by the person using the phrase. If when asking one party what he feels about a proposal from the other party and he replies with the word "that's wicked" you might be forgiven for thinking that he did not find the offer attractive. However, if he is a follower of hip-hop music, that phrase would mean the offer was very much acceptable. The advice is to check carefully for words that can have a double meaning and then check the precise meaning intended by rephrasing and seeking confirmation.

Another problem to address is the difficulty, in asynchronous online discussion, of identifying any hesitancy by a party in answering a closed question. Should, in an in-person mediation, a person hesitate before answering say 'no' to a question from a mediator as to, for example, whether an element of a proposal presents any difficulty for compliance, the mediator can then question the reasons for the hesitation with a view to a potential modification to the proposal that may lead to a more emphatic answer. However, if a party has this hesitation online, the mediator does not notice it when he reads the typed word 'no' in the response which may lead to problems further ahead. The advise for the mediator is that, whenever a closed question of importance is raised, to ask the part to scale his answer e.g. 1-10. A less than 9 or 10 can then open up discussion as to why that is the case.

You may receive a strange response at some stage from a party to the mediation. Always check back with the party, such as by echoing their remarks, especially when words with double meanings have been used. The message with various exclamation marks and gibberish may not be rejection of a proposal in angry terms but just a child let loose on the keyboard!

You'll need to assure the parties that the process in which they are engaged is a positive one. The task can be made all the more difficult when a party's anxiety about both ODR and the possible outcome may even manifest itself in mistrust of you, the mediator. Mediators need, therefore, to be completely transparent both during and before the process, so that there are no surprises. Due process matters online as well as off. If something comes up in the dispute resolution process that is a surprise to one party or the other is can completely undermine the trust they have that the process is fair. Mediators need to make clear commitments and keep them. Under promise and over deliver can be your motto.

It is important to keep to any commitments on time and priority that you have made to the parties and make it clear that you demand the same from the parties

You should clarify in detail how confidentiality is maintained both on the platform you use and in the procedures you adopt. You should never assume that the confidentiality of the system is always trusted by all parties at all times. Constant repetition and confirmation of the privacy of each discussion is important to reassure the parties.

One of the problems of asynchronous online conversation is controlling the number of messages. Its best to encourage a 'speak when you are spoken to' discipline. This will not only speed up the process but ensure people remain, through the disciplines of brevity, focused on the central issues. The mediator should set the rule at the outset that, save in exceptional circumstances where something important has been overlooked, the parties should not post a message unless in direct response from one from the mediator.

The exchange of visual and aural clues in a meeting can transfer 'information' that is not expressed in words. Elements can, therefore, be missed when mediating online. Whilst you will want to control the number of responses they make, encouraging the parties at the outset of the online mediation that, when they do respond, to post messages that give as much background detail and as much expression of their feelings as possible will help ensure as much as possible has been included.

The same should apply to the mediator. When mediating in-person the parties can readily sense when the mediator is fully empathising with, and understanding, their

position. It may be by a physical acknowledgement or other visual or aural clue. Awaiting for disjointed messages in response on an online file may not so easily give that sense of understanding. In order, therefore, to ensure the parties sense fully that they have been carefully listened to and understood, the mediator should take care to respond with messages that fully reflect all he has been told.

One issue for mediators generally is the extent of his intervention. Whilst mediation processes may vary, most allow the mediator the opportunity to encourage direct discussion and negotiation between the parties. This is especially useful when there is an underlying relationship between the parties the preservation of which after the mediation has been completed may be a desirable outcome. Consideration is also given to whether this direct negotiation should be undertaken in private and without the presence of the mediator. Given that in an online mediation the mediator does not have control to prevent the parties contacting each other direct in any event, it may be wise to address this directly and set up space for direct contact. In this way the online mediator can then ask the parties to report on the result. Dependent on the platform used the mediator may have the opportunity to watch over these direct discussions and thus gain more out of them than can an in-person mediator outside of the conversation.

It is important for the online mediator to make extra effort to try to heighten the feeling of 'presence' with the parties. Whilst asynchronous discussions may offer the benefit of enabling the mediator to work 'in his own time' , little touches such as trying as best you can to respond at a time when the party to whom you are posting a message is more likely to be online and available will help reduce the sense of dislocation. This will also assist you by ensuring replies to your message come while you also are working on, and more 'in tune with', the case without having to re-read earlier messages. It is recommended, therefore, that you ask the parties at the outset for an indication of what times of the day or evening they are likely to go online to deal with the mediation and keep a note of it. If you are in a different country then try, as best you can, to work within the relevant time zone of the party to whom you are sending a message.

In in-person discourse, any need for clarification of words used is requested at the time - "what do you mean by..?". In asynchronous messages the disjoinder of the discussion can delay understanding. Be careful, therefore, not to use words that may require explanation or 'beg a question', without including the explanation at the time. If you criticise a party for using inflammatory language then do not wait for him to ask what are the precise words you take exception to but clarify in full when you make your initial comment. This avoids the party beginning to lose trust because he feels you do not empathise with his thinking and emotion simply because he has not fully understood why you used the words in question.

Whilst is may be normally important sometimes to seem to ignore comments made by a party in order, perhaps, to avoid opening a discussion that may inflame the situation, this is a tactic that should be less employed in online mediation as else the party may think the comment was overlooked. When he says, in the presence of the mediator, that the other party has told a lie he knows he has been listened to and he has made his point. But if he includes such a comment within a message and the mediator says nothing, the party may feel it has been overlooked. Its important, therefore, and even when you feel the party is raising an irrelevant or damaging issue

(e.g. the alleged false statement relates to an entirely irrelevant matter) to respond in your message to each and every such comment by asking the party to clarify identify each statement he believes is false and why. If the issue is irrelevant then of course this can then be stated. In this way whilst you may disagree with the party as to its relevance, you can ensure at least that he knows he has been heard.

In an in-person mediation all parties are together in the same building over a fixed period of time. No-one goes absent. Their commitment to the process is clear. In online mediation, people may have to go away at times or have appointments that may delay their responses. This may give the wrong impression to the other party of a negative reaction to comments/proposals they may have made or, worse, to the process as a whole. If one party senses the other is not interested in the mediation that can be a strong trigger for him to downgrade his interest. He may question why he should be involved in attempting to resolve the dispute if the other party shows less than full interest. To minimise these effects, you should press the parties to declare advance notification of any absence, however short, so as much as possible everyone can maintain a sense of continuing and mutual involvement. If there seems to be a delay not declared in advance, give the person a telephone call. It is advisable to obtain mobile/cell phone numbers for each party for just this sort of eventuality.

In in-person mediation, the mediator is able to control the level of civility. A recognised threat to civility in online discussion, however, is the dynamic of insulting comments posted to forums and social networking sites ('flaming'). It is very much provoked by the apparent permanence of adverse comments posted by others and driven by self image and 'ego'. If an adverse comment has been posted, it is understandable that the target will wish to post a rebuttal. The very fact that the comment is posted and constantly available leads to the target of the insult brooding over it more than would be the case if delivered verbally. The rebuttal inevitably threatens the credibility of the original poster, so he, in turn is provoked to defend himself by renewing, and possibly extending the original insult. This 'tit for tat' exchange can easily develop into a highly damaging thread. The mediator should both impose a rule against gratuitously insulting comment as well as an additional rule that, should it, in his eyes, be broken by any party, that party has to withdraw, issue an apology and reframe the comment. The mediator can reassure the parties that any adverse comment cannot be read by those outside of the mediation. Clearly parties should be free to express their thoughts to include criticism of the other party where appropriate but should do so in a civil manner. In a case in which the mediator fears difficulty in avoiding such insults, then he should consider the options that may be available in the platform he uses that will enable him to prevent the parties from posting comment seen by the other party save after review by himself.

4   Conclusion

I hope that, whilst recognising that, for many mediators, the problems of generating trust and avoiding misunderstandings when mediating online may seem, at first, to negate the validity of the process, that this paper encourages them to take a broader view and understand that, not only does the online medium have a validity of its own

that enables mediation to apply to disputes that otherwise would not have the opportunity for such skills, but that the problems that may at first sight arise can often be overcome with a little care and adjustment to technique.