Kluwer Mediation Blog

Online Resources for Unrepresented Clients in Mediation: Enhancing Participation

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Thursday, April 26th, 2018

My guess is that most of my fellow authors on this blog, and probably a high proportion of readers, work in a mediation environment is which clients are represented by counsel. Indeed, if you track back over a number of entries in which matters of process are discussed, it seems typically assumed that counsel are key players – in assisting clients; in shaping (or undermining) the process; in shifting the conventions of mediation away from the joint session and so on. The assumption that counsel will be key players at the table also underpins the main student mediation competitions in Paris and Vienna; and has led to important texts on mediation advocacy. Mediation courses, especially in law schools, are clearly as much for prospective counsel in mediation as they are for mediators (and, almost coincidentally, for those who find themselves as disputants). Those of us who have been involved in mediation teaching and training over the years have had to adjust content and delivery to reflect this shift in emphasis. Useful recent research, such as that by Dr Grant Morris at Auckland University, and written up in this blog (May 30, 2017), points to the influential and not always constructive role of lawyers as the gatekeepers in commercial mediation. And underpinning the whole process of the Global Pound Conference series was, I think, the expectation that lawyers (as counsel rather than as mediators) were always going to be key players in the world of commercial mediation.

The barriers to access to justice, or dispute resolution remain; and indeed expectations may have been diminished to the extent that the twin barriers of information and affordability rest still in the hands of lawyers. If we recall the original motivation for ‘alternative’ dispute resolution, it was in part at least to enhance the prospects of access and participation, and the now rarely seen language of disputant ownership of disputes. It makes sense to drop the ‘alternative’ part of the original labels for processes such as mediation, as it is as mainstream as litigation and arbitration; but that mainstreaming may also serve to undermine or at least disguise the aspirational element of the original “movement” (as it then was), and to leave us still with the realities of unmet legal needs and inaccessible processes.

One feature in particular of the modern landscape is the rise of self-represented litigants (SRLs) or litigants in person (LIPs), and their impact on dispute processes and the courts. There are two elements to this: one is the recognition that many of the original barriers to litigation (cost, comprehensibility, time etc) remain; and the other is the impact on the courts, administration, and the judicial role. Anecdotal evidence at least from the courts in New Zealand on this second point is the the proliferation of SRLs leads to poor pre-trial documentation, places demands on the time

of court administration, leaves unrepresented litigants at a disadvantage in court (which the more heartless might dismiss as a risk willingly assumed), and risks placing judges in the invidious position of assisting, or at least appearing to assist, the unrepresented party and thus departing from the neutral role of the adversarial conventions. Equally, the absence of assistance may lead the litigant into the wrong form of 'narrative' – not only do SRLs lack substantive and procedural knowledge; they also lack the conventions of presentation and articulation. This last aspect, of course, was at least one of the imperatives behind the moves towards ordinary language and informal processes, where straying from the forms and conventions of legalese was not a barrier to participation. Now, in a curious form of crossover, the lawyers have moved into mediation and the unrepresented have moved into court.

In part to respond to the persistence of barriers to participation, and to address unmet legal needs, online developments and the provision of resources for prospective litigants and courts have proliferated in recent years. I touched on some of this in and earlier blog (November 25, 2017). Without attempting to summarise the increasingly bewildering array of legal-tech options that now dot the legal and governmental landscapes, we can note that they fall into at least these categories:

1. The provision of online legal information, by way of
– online and digital templates (e.g. wills, lease documents);
– document management;
– Apps and bots (the latter are small software applications that run repeated tasks, usually far faster than humans can, and usually taking out much of the drudgery of repetitive tasks. Predictably, bots range from the useful and benign to the malicious and invasive.);
– and the enthusiastic assumption, seen recently on a t-shirt, that "algorithms will swallow law"; the implication being that law, like all human tasks, can be reduced to binary code. The plausibility, let alone the ethics, of that claim, must remain for a later conversation. [By way of recent parallel, note the new feature on Amazon's "Echo Look" that apparently provides fashion advice. Style and taste, it seems – and possibly fairness and justice in our contexts – can apparently be captured in binary and prescriptive forms.]

2. Institutional developments through the development of online courts and tribunals, enhancing remote access, such as:
– the possibility of resolving online claims up to 10,000 GBP;
– fully online divorce application;
– 28 month pilot online court under way in UK;
– The Prisons and Courts Bill of the Online Procedure and Online Procedure Rules Committee:
– Briggs Report, which not only envisioned an online court but also a court that was only the final step in a digitally-mediated sequence of stages for claimants;
– British Columbia Civil Resolution Tribunal.

One feature of current online court developments worth noting, especially in the UK model, is that a staged and sequenced process is envisaged in which participation in mediation is a necessary stage in the path towards the online court; but mediation only follows a preliminary step in which resources are available to disputants that provide both information and options and pathways.

My particular interest here concerns this early pre-meditation stage which, in a less digitised mode, will typically involve preliminary contact, correspondence, possibly separate meetings to explain the expected mediation process and – in what might now seem an outdated metaphor – a "laying of the table" for the mediation.

If we take my two key concerns here – the rise of unrepresented disputants and the proliferation of digital tools – the question then is as to what we might be able to achieve for those disputants in order to enhance the prospects of effective participation in mediation.

The previously-mentioned UK example of the Online Court envisages a pre-mediation stage in which people may access, through online portals, two key resources (and with real human beings if necessary): reliable information about the putative claim (typically accessed through ordinary language questions and drop-down options); and grounds on which to decide whether or not to proceed. This is seen as a triage stage – though triage with a difference in that the citizen is assisted in making the choices for herself on how to proceed.

By way of parallel, we are in the early stages of embarking on two pilot projects in New Zealand designed to provide disputants with – at least – reliable and accurate legal information and plausible grounds on which to make further choices. In one case, considerable computing power will be called up both to store current legal information, and, following ordinary language inquiries (which do not require anything more powerful than a smart phone), and to provide a "probability score" on the answer to the claim or question. This project involves the management of legal information through algorithm, and uses machine learning – thus artificial intelligence – to allow massive amounts of data to be readily accessed through ordinary language.

The second, perhaps more basic pilot focuses on access to legal information for unrepresented litigants/disputants; looks at accessible forms of delivery, recognising persistence of digital divide. At this stage, it is expected that employment and immigration law will serve as test cases, the former as mediation is a required step in the process on the way to the Employment Authority and Court; the latter as the "client base" are likely to be more vulnerable and less informed.

My question (to which I invite responses) is this: what information and resources, accessible online, would help those disputants attending mediation without counsel or third party help? What would assist in maximising chances of effective participation?

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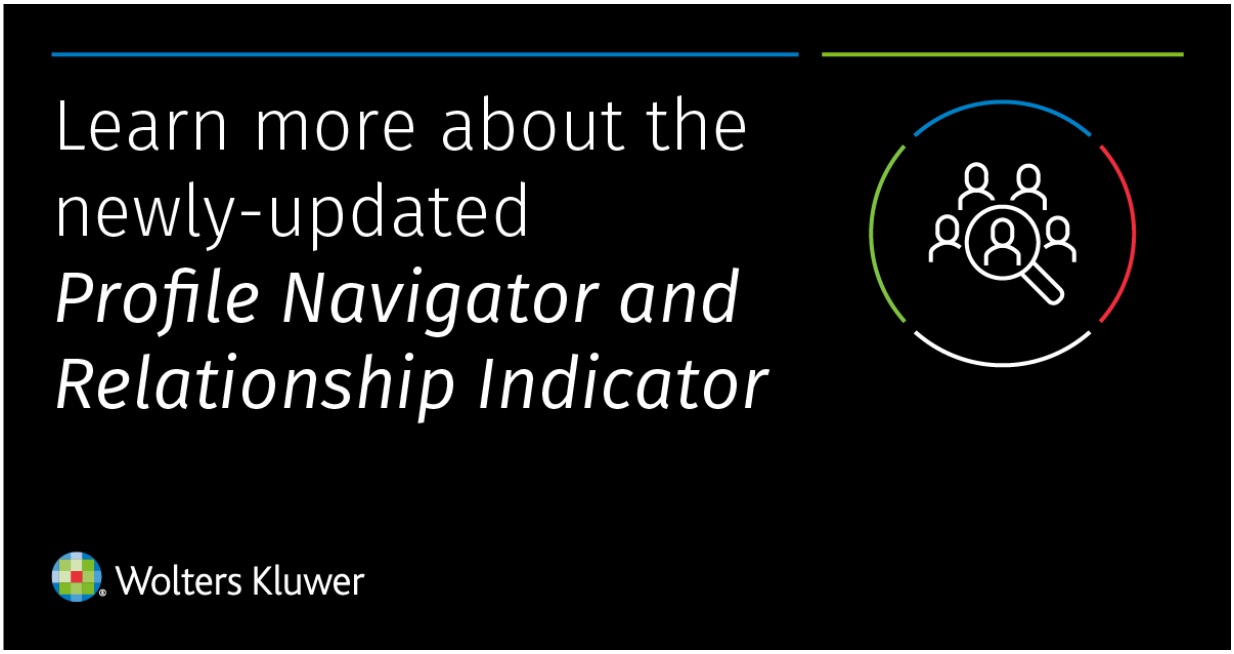

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