Kluwer Mediation Blog

In support of a ‘party-centric’ approach – Did the Judges get the memo?

Alan Limbury (Strategic Resolution) · Sunday, May 22nd, 2022

Online processes in all professions soared during Covid.

The legal profession was transformed.

A multitude of online mediation platforms miraculously appeared and mediators barely skipped a beat.

Benefits emerged – especially in a geographically vast continent like Australia – where advocates and their clients in distant locations saved significant costs in time, travelling expenses and carbon emissions. Concerns about confidentiality in online platforms waned as protections were strengthened.

International mediation became easier, particularly for those of us far away who were interested in greater international participation without the downside.

Anecdotally (and this is certainly true for my practice) online mediations took less time whilst retaining the same high resolution levels as face-to-face.

Many of us see online mediation as the ‘gift’ of Covid and are actively encouraging the regime to continue in a dominant role. The World Mediators Alliance on Climate Change Green Pledge has

been a further gift and a growing number of mediators internationally have committed to minimising the climate impacts of their mediations for themselves, the disputants and their representatives.

Covid appears to have enhanced the shift toward an inclusive, **'Party-Centric'** approach to dispute resolution heralded in The GPC Series 2016–17. The January 2020 GPC North America Report noted that: "The distinction between defining 'DR' as litigation and 'ADR' as alternatives to litigation is increasingly irrelevant because litigation is no longer the default. Mediation and arbitration are now so widely accepted and embedded that they stand independently alongside litigation as legitimate options for resolving disputes."

Challenges to the 'party-centric' approach

But challenges are emerging – at least here in Australia.

The recent conference of the Australian Bar Association (reported in the Australian Financial Review on May 6th 2022) saw a number of judges expressing resistance to the idea that court proceedings should be conducted online.

What Judges are saying

High Court Justice Patrick Keane warned that government finance departments see the possibility of reducing costs by having court proceedings online and "will insist that if costs can be reduced by doing things this way, that's the way it should happen".

Justice Keane said finance departments are not sympathetic to the argument that it is better for all parties to be in court for the "collegiality" that is fostered by working together and that those who fund the courts "can't put a finger on collegiality or how the bar works".

New South Wales Chief Justice Andrew Bell said "I don't think it's just the departments of finance; I think it's the other branch [of the legal profession], the solicitors' branch. The opportunity to get people out of the office to go hot-desking and maximise profits is a big thing."

Moving from 'either/or' to 'and'

Federal Court judge John Middleton said: "They see it as just saving costs for the client, and the greater picture is not seen". He said he believed there should be a presumption that all matters be heard in person.

For me, the argument that collegiality – cooperative interaction among colleagues, including members of the bench and bar – requires face-to-face interaction in court proceedings, places the interests of judges and barristers above those of the parties to the litigation. It places parties at the periphery as the largely invisible litigation funders.

Minimising those costs is a common interest of all litigants. None of the judges is reported as saying justice can't be done online. The technology has developed to such an extent that mediators and the parties find the experience as good as meeting face-to-face.

So the idea that the collegiality of bench and bar is under threat and must be preserved by hearing all matters in person is a judge-and-barrister-centric concept of dispute resolution (the "greater

picture"), entirely at odds with the party-centric concept of mediation, arbitration and other facilitated forms of dispute resolution that have been slowly progressing since Ptolemaic Egyptian times, and somewhat more rapidly over the last 40 years.

The increasing appeal to disputants of online mediation and arbitration platforms contrasts with the insistence of judges in Australia that court hearings take place in person.

Collegiality is precious – however it can and does flourish in the online environment. Let us be advocates for the importance and value of online, party-centric dispute resolution processes which also promote the collegiality of bench and bar.

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