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# Knowing what clients want from ADR processes helps them — and you

Experienced practitioners realize that objectives for a successful mediation session as well as underlying interests often differ for the client and the lawyer.

Take, for example, a client frequently wanting to talk about issues unrelated to the legal claims. I once mediated a case involving a commercial real estate transaction where the central issue was the seller's knowledge of latent defects, and one party kept coming back to the topic of how she was treated disrespectfully in relation to the transfer of keys after the closing.

Every time she said the word "keys," I could see the lawyer for the other side squirming with frustration that we were discussing something so irrelevant to the legal case. (Whether it is productive to discuss such matters is a topic for another column.)

It is also no surprise that clients often care about things like apologies — something of limited interest to a lawyer who is working on a contingency case.

The results, however, of a recent survey documenting the gap between what clients want from mediation and arbitration processes in general and what lawyers, courts and ADR institutions prefer are staggering.

In October, more than 150 individuals participated in an international survey at the Convention on Shaping the Future of International Dispute Resolution, hosted by the Corporation of the City of London.

As described by Deborah Masucci, chair of the International Mediation Institute, on the Kluwer Mediation Blog, many corporate representatives participated in the survey, including representatives from leading multinational corporations. The remaining participants were lawyers, expert witnesses, mediators, arbitrators, educators, representatives of ADR institutions and judges and policymakers.

The survey indicates that clients have completely different ideas about many aspects of how mediators, arbitrators, lawyers and ADR institutions should provide dispute resolution services.

According to the survey, two-thirds of users (business people or in-house counsel) and providers (ADR neutrals and institutions) prefer contract clauses that require mediation before litigation or arbitration, but only 16 percent of advisers (outside counsel, experts) prefer such clauses.

When asked whether arbitration institutions and tribunals should always explore other forms of dispute resolution such as mediation in a first meeting, 79 percent of users agreed, while only 48 percent of providers agreed.

Similarly, more than 77 percent of users feel mediation should be used as early as possible in a dispute. Far fewer providers and advisers felt this way, coming in at 42 percent and 44 percent, respectively.

As to why mediation is not used more often, while nearly all survey participants agreed that it is usually because one of the parties is not familiar or experienced with mediation, only the advisers believed that suggesting mediation is perceived as a sign of weakness. None of the users or providers selected perception of weakness as a reason.

Two-thirds of users found cost containment and risk reduction were the two most important factors in choosing a dispute resolution process, while advisers felt that cost containment and focusing on key issues ranked at the top.

BEYOND DISPUTE

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More than 90 percent of users believe that mediators and arbitrators should be certified and held accountable to transparent standards of conduct, but only a third of advisers agreed.

As to mandatory mediation (with an opt-out), 54 percent of users are in favor while only 27 percent of advisers agree.

Contrary to most advisers' views, more than two-thirds of users would like cooling-off periods in arbitration so parties can attempt to settle the case at mediation.

The survey also found that while advisers for the most part disagreed, a large majority of users would like to use mediators in negotiation of contracts even where no dispute has arisen.

The Cornell University Survey Research Institute administered a similar study of corporate counsel in Fortune 1000 companies in 2011, following up on a 1997 study. Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution co-sponsored the survey.

The 2011 study, summarized in an article by Pepperdine professor Thomas Stipanowich, was limited to corporate users of ADR, and the results regarding the reasons corporations use ADR were similar to the October 2014 study. Saving time and money were the paramount concerns of corporate users. The ability of parties to resolve disputes themselves, limited discovery, confidentiality and preservation of relationships were highly ranked as well.

The 2011 study also indicates user preferences in that it documents the great increase in use of mediation and decrease of arbitration since the 1997 study, except in the areas of consumer disputes and products liability cases.

Just as in the recent international survey, the 2011 study showed that corporate users like to use ADR processes early in the dispute cycle. Users are taking advantage of early neutral evaluation and early case assessment processes.

While more research needs to be done, lawyers and ADR providers may need to question their assumptions and pay more attention to what clients want from ADR.

That could mean bringing in a mediator when contract negotiations break down, using processes such as early neutral evaluation or mediation earlier in a dispute, routinely asking arbitration parties if they are interested in mediation at the initial meeting or including a step dispute resolution clause when drafting a contract.

Courts and legislatures may also need to reassess their stance on mandatory mediation and licensing of mediators.