

Relationships Drive Support for Mediation

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15 Alternatives to the High Cost of Litigation 95 (1997).

Business lawyers and executives widely support mediation. According to a recent study, however, that support is not based on dissatisfaction with courts or perceived advantages of mediation, like lower costs. In fact, business lawyers' and executives' support for mediation is related to perceptions about the effects of mediation on business and organizational relationships.

This analysis is based on 178 telephone survey interviews conducted in 1994 as part of a doctoral dissertation. The survey included randomly selected outside counsel, inside counsel, and executives in medium- and large-sized companies in four states.

On a scale ranging from "never" to "always," respondents were asked their opinion about how often mediation is appropriate in business disputes. This is referred to in this article as "support for mediation." Fifty percent of the respondents said that mediation is appropriate in more than half the cases, compared with 20% who said that it is appropriate in less than half the cases. Perhaps surprisingly, outside counsel favored use of mediation more often than executives. Sixty percent of the outside counsel supported use of mediation in more than half the cases, compared with only 35% of the executives. Inside counsel were closer in their views to outside counsel, with 53% supporting mediation in more than half the cases.

This study used statistical techniques to "control" many different variables to determine their relationships with support for mediation independent of other variables measured in the study, such as whether a respondent was an attorney or executive. The survey interviews were complemented by 13 indepth interviews of attorneys and executives.

Preserving Relationships

The respondents' support for mediation is strongly related to their beliefs about whether mediation helps preserve relationships and whether mediators and arbitrators are sensitive to the needs of the business community. A general counsel of a company with \$6 billion in annual sales illustrates how preserving business relationships is a top priority:

"Many of our businesses, for example, are with an industry in which it's primarily a customer-dominated market. In other words, if I have a dispute with a car company,...the overriding consideration is the long-term relationship. Whether

we win, lose, or draw, the economics, how strong our case is-none of that matters.”

Eighty percent of the respondents believe that mediation helps preserve relationships. Not surprisingly, those who believe that mediation generally helps preserve relationships are likely to believe that it often is appropriate to use mediation in business disputes. Sensitivity to businesses’ concerns also is related to support for mediation. A majority of respondents believe that mediators and arbitrators are sensitive to business community needs. Indeed, more than three-quarters of the respondents gave higher ratings of sensitivity to business needs in a question about mediators and arbitrators than in a comparable question about the legal system generally.

The survey respondents are sensitive to opinions of key players in their professional lives, and the respondents’ own opinions are related to their perceptions of key players’ beliefs. For example, support for mediation is strongly related to perceptions that litigation results are unsatisfying for top corporate executives and that mediation results are satisfying for these executives. While these questions focus on concrete results, the tone of respondents’ answers suggests that the responses reflect a strong sensitivity to how the executives feel about disputes. Indeed, the respondents overwhelmingly believe that executives are usually satisfied with the results of mediation and dissatisfied with litigation results. One inside counsel provided some insight on why mediation may be more satisfying to executives than traditional litigation: “Sometimes business people may intuitively know or have a belief that there may have been a mistake made, but it’s very hard for them to go to their superior and say, ‘Look, we’re wrong here.’ If a third party-not the other side, because they’re the devil-but if a truly neutral third party can objectively and cogently state why [you’re wrong], it’s a lot easier to go back and say, ‘Well, so-and-so’s a judge and he or she is like the judge who’s going to hear this and they say we’ve got a problem here.’ You know, people are more accepting of objective advice and I *96 think once you start that process and there is a recognition of relative fault-yours and others’-it’s a beginning to starting a true dialogue.”

Although executives probably do not like to be told that they are wrong, sometimes they recognize that they may be wrong legally and at serious risk of losing their case. While they cannot trust their opponents’ evaluations, executives may not really trust (or even want) their attorneys to provide a non-partisan evaluation. Thus executives may indeed value a process where they will sometimes be told that they are wrong and can really believe it. Of course, they may especially value such a process if the third-party tells the executives’ opponents that the opponents are wrong. For example, one attorney described a case in which an ADR proceeding affected the opposing party’s evaluation of the case, thus facilitating settlement: “I’m thinking of one particular example where there was clearly some exposure on the part of my client. We were the defendant. ... The plaintiff was completely unrealistic about the merits of his claim and particularly about his damage claim and what he was likely to recover. This is a

case where we went through the summary jury trial and the result of that was that there was a finding of liability but an award of damages that was in the neighborhood of what we had always expected would be an appropriate damage award and at least a decimal point away from what the plaintiff had ever been at before in terms of settlement. ... I consider that to be a favorable result for my client even though we ended up spending approximately a quarter of a million dollars in settlement. Before that time, we just couldn't get the plaintiff down under \$2 million."

Thus mediation can help attorneys and executives solve the organizational problem of rationalizing settlement to clients and superiors. One should note that many of the respondents referred to an evaluative brand of mediation, or in this case, summary jury trial. The appropriateness of an evaluative approach in mediation is quite controversial. See Kimberlee K. Kovach and Lela P. Love, "'Evaluative' Mediation is an Oxymoron," 14 *Alternatives* 31 (March 1996), and John Bickerman, "An Evaluative Mediator Responds," 14 *Alternatives* 70 (June 1996).

Most respondents believe that their professional leaders have favorable views about ADR; these beliefs also are related to respondents' support for mediation, though not as strongly as the preceding variables.

Local Mediation Culture

The four states in the survey were selected based on the hypothesis that there are distinct ADR cultures in different states and that these cultures would be related to opinions held by key populations in those states. As a preliminary step in testing this hypothesis, six experts familiar with ADR events around the country were asked to rate the ADR culture in 19 of the 50 states. The experts' ratings were highly correlated with each other (as well as with a measure of significant state ADR legislation), providing some confidence for these measures. The ratings suggest that there are especially strong ADR cultures in New Jersey, Colorado, Ohio, Texas, Florida, and Massachusetts. Two states rated as having strong ADR cultures were selected (Florida and Massachusetts) as well as two states rated as having weak ADR cultures (Tennessee and Pennsylvania).

The opinions of the business lawyers and executives in the survey suggest that there is an especially strong mediation culture in Florida as compared with Tennessee and Pennsylvania, rather than a general ADR culture, because there was no comparable difference in support for arbitration by state. Interestingly, there was significantly greater support for mediation by the respondents in Florida than in Massachusetts, which also was rated as having a strong ADR culture. This suggests that norms embodied in local relationships may affect opinions about mediation.

***97 Actual ADR Use**

Surprisingly, the study found that support for mediation is not related to amount of experience as a third party in ADR. About half of the outside counsel, one quarter of inside counsel, and 7% of the executives polled had served as a neutral at least once. Support for mediation, however, is indirectly related to the respondent's amount of experience as a partisan-as a party or advocate-in ADR proceedings. The relationship between the amount of ADR experience and support for mediation appears to be indirect because although experience as a partisan in ADR was statistically significant in simple statistical models, it was not significant when other variables were included.

More than 80% of the attorneys reported participating as an advocate in at least one ADR proceeding. The attorneys in the study had participated in a median of six to 10 ADR proceedings in their careers, which averaged 10 years. A little more than one-third of the executives had participated as a partisan in an ADR proceeding at least once in their careers, which averaged 13 years.

Unexpected Findings

Those results may not be surprising for some readers. But some findings about factors that are not significantly related to support for mediation may seem surprising to Alternatives readers. In particular, one might expect that support for mediation would be related to perceived material self-interest, but the survey does not support those expectations.

For example, although the respondents generally believe that use of mediation saves time and money over litigation without mediation, these beliefs are not related to the respondents' support for mediation. Respondents also were asked about the effect on their personal compensation of increased alternative dispute resolution use by their firm or clients. Expectations about compensation also are not related to respondents' support for mediation.

Considering that many advocates of increased use of mediation base their arguments on critiques of the courts, one might also expect that support for mediation in the study would be related to criticisms of the court system. Surprisingly, however, there was no significant correlation in the survey with a wide range of complaints about the courts except the perception that corporate executives are dissatisfied with results in litigation. In particular, the survey found that support for mediation is not related to respondents' perceptions of a litigation explosion, the frequency of frivolous lawsuits, the quality of jury decision-making, fairness of court outcomes, or whether the courts are good mechanisms for finding the truth.

‘Tantalizing’ Suggestion

The study’s main points: It indicates that there now exists a wide base of favorable opinion about mediation by business lawyers and executives. Moreover, this analysis suggests that support for mediation in business disputes is largely related to beliefs about how use of mediation may affect a range of relationships. These beliefs relate to relationships within the business community generally as well as with key players in the lives of business lawyers and executives. For the most part, the survey suggests that support for mediation is not based on critiques of the courts or perceived material advantages of mediation such as anticipated cost savings.

These results offer a tantalizing suggestion for advocates of increased use of mediation. This research implies that mediation proponents might be most effective in influencing attitudes by focusing on opinion leaders, especially top business executives, and highlighting potential benefits for relationships between and within business organizations. Conversely, the wide support for mediation may shrink if executives and lawyers believe that mediation is becoming overly routinized or otherwise insensitive to important relationships.

This study found a weak connection between favorable attitudes and actual use of mediation. This suggests that, while promoting favorable attitudes is probably important or necessary to affect the actual behavior of deciding to use mediation, such attitudes alone are insufficient. Although there is prescriptive literature suggesting factors indicating when mediation is appropriate, it would be useful to study empirically what factors do affect actual decisions to consider and use mediation.

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