

Alternative Dispute Resolution: Control Your Destiny

By Geoff Drucker

The good news about a recent survey of litigators on alternative dispute resolution (ADR) is that it yielded no surprises.¹ How boring. Why is that good news? Because the findings reinforce lessons learned over the past 30 years about how to deploy ADR wisely. This article summarizes the survey results and their implications for corporate counsel. The bottom line message is clear: ADR processes can promote a variety of interests. To align ADR with the interests of their company, corporate counsel should exercise as much influence as possible over how these processes are deployed.

Lesson #1: Control How the Process Is Designed

Part one of the survey asked litigators to compare their experiences with court-ordered ADR, voluntary ADR arranged through a court, and privately arranged ADR. (See graphs on page 11.)

As would be expected, litigators accorded the lowest ratings to the process over which they have the least control, mandatory ADR, and the highest ratings to the process over which they have the greatest control, privately arranged ADR. The biggest gap is in satisfaction with neutrals. On average, litigators rated neutrals assigned by courts as slightly above acceptable and neutrals they chose as slightly above very good. Neutrals chosen from a court list of volunteers were rated midway between acceptable and very good.²

The best way for corporate counsel to exercise control over ADR is to put the right process or series of steps in place before disputes arise. Many companies include or incorporate ADR clauses in contracts with customers, suppliers, employees, and business partners. These clauses fall into three categories: (1) a general commitment to attempt to resolve differences through ADR; (2) a commitment to use a particular ADR process during the performance of a

contract; and (3) standardized contract language setting forth specific procedures for resolving disputes.

A general commitment works best when it is hard to predict what type of dispute, if any, might arise. For example, an agreement to develop or market a new product through a joint venture could give rise to disagreements about responsibility for performing tasks or paying expenses, rights to intellectual property, liability for claims, control over decisions, and a host of other issues. Is mediation, arbitration, early neutral evaluation, or a mini-trial the right type of ADR? There is no way to know until the dispute takes shape. Thus, corporate counsel should avoid tying their hands in advance to a format that might not match the fuss.

Implementing a process on a contract-by-contract basis works best for large-scale projects on which disputes are likely to fall into predictable patterns. An excellent example is the use of partnering agreements and dispute review boards to resolve issues that arise on construction projects. Partnering has two primary benefits: It fosters positive working relationships between key personnel, and it creates a methodology for resolving disputes efficiently (ideally between officials at the lowest possible level in each organization). Although partnering was created for and remains strongly associated with the construction industry, there is no reason why it cannot work well in other contexts.

Standardized contract language containing or incorporating detailed procedures is appropriate where a company enters into a large number of similar contracts and anticipates certain types of disputes to arise. Examples are routine contracts for employment, sales, and purchases. ADR clauses that require parties to use or at least consider mediation, neutral evaluation, and other nonbinding processes in advance of litigation reduce the number of cases

that make their way to court. Arbitration clauses bypass courts entirely, unless their validity or applicability is challenged.

Lesson #2: Control When ADR Is Used

Part two of the recent survey of litigators asked respondents about factors commonly cited as barriers to the voluntary use of ADR. While the highest rated factor was a court-sponsored mandatory ADR program,³ coming in second and third were “the other party won’t agree,” and “my client won’t agree.” (See graph on page 12.)

Again, the results are anything but a surprise. While lawyers are becoming increasingly familiar with mediation, the most commonly used ADR process,⁴ most laypeople still have little or no concept of what mediation is or how it works. It is not hard for people to understand what a judge or an arbitrator does, even if they have never previously been a party to litigation, because society is full of decision-makers. But a third party with no formal power, who facilitates dialogue between disputants and helps them reach their own conclusions about how to proceed, is beyond the realm of common experience. Thus, convincing litigants to give mediation a try is often challenging.

Prelitigation clauses allow corporations to make corporate decisions about when and how to use ADR, thereby reducing the amount of discretion individual participants may exercise. Job applicants can be required to use a corporate ADR program as a condition of employment, and prospective customers or suppliers can be required to mediate and/or arbitrate disputes as a condition of sale. Corporations also may want to bind their own managers to use ADR. For example, if a line employee requests mediation of a workplace dispute, corporate policy may require his or her immediate supervisor to participate in good faith.

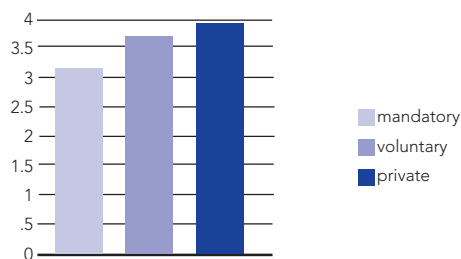
Corporations also may want to dictate

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Satisfaction with Process

Rating Scale

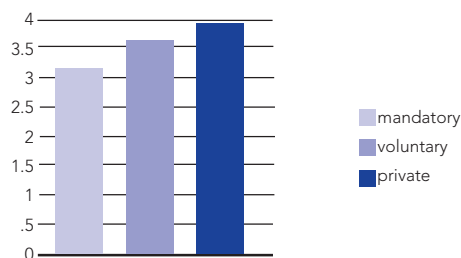
- 1 = very deficient
- 2 = deficient
- 3 = acceptable
- 4 = very good
- 5 = excellent



Satisfaction with Outcomes

Rating Scale

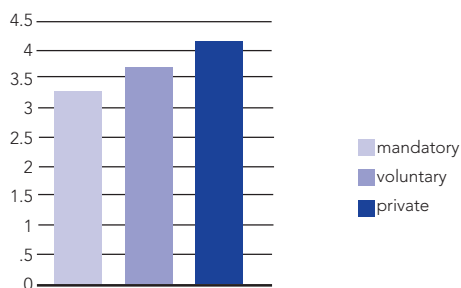
- 1 = very deficient
- 2 = deficient
- 3 = acceptable
- 4 = very good
- 5 = excellent



Satisfaction with Neutrals

Rating Scale

- 1 = very deficient
- 2 = deficient
- 3 = acceptable
- 4 = very good
- 5 = excellent



circumstances under which they will *not* use ADR. If a challenge is raised to a key corporate policy, mediation and other nonbinding forms of ADR may be inappropriate because there is no room to negotiate. It may also be impractical to resolve a dispute in mediation if it involves highly confidential information.

It is particularly important to centralize

control over when ADR is used for workplace disputes because they may arise in any part of an organization and may involve employees at any level. Thus, providing quality education about when and how to use ADR is extremely difficult because of the need to reach all corporate personnel. A smaller universe of employees will have decision-making

authority over disputes with suppliers or customers, so empowering them to make good decisions about ADR on a case-by-case basis is more feasible.

Lesson #3: Control How ADR Is Conducted

When I began my career as a corporate litigator, several mentors told me the three most important things about trying a case are “Know the judge, know the judge, and know the judge.” In ADR, the characteristics of the neutral are just as important. If he or she is a decision-maker, as is the case in arbitration or a summary bench trial, advocates need to adjust their style and approach to suit the neutral’s preferences and predilections the same as they would in court. If the neutral is a process facilitator, as is the case in mediation, the skill, knowledge, and reputation he or she brings to the table can spell the difference between impasse and settlement. Thus, corporate counsel should strive to do in ADR what they cannot do in litigation—select the neutral.

Part three of the recent survey of litigators asked how helpful certain types of assistance would be in using ADR more effectively. Here’s the final non-surprise: What litigators want most is information about choosing neutrals for cases involving particular areas of law. They understand the importance of this choice. (See graph on page 12.)

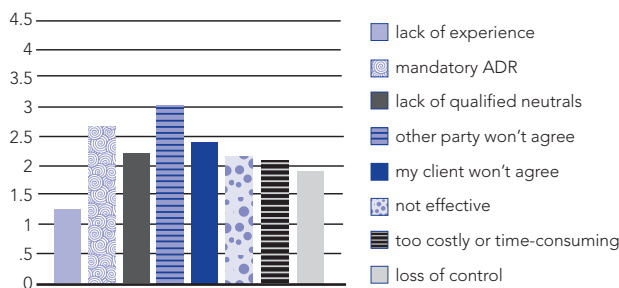
The second-highest rated item was training for neutrals who participate in court and agency-sponsored ADR programs. Several respondents objected to courts assigning mediators to cases outside their area of expertise, claiming they are considerably less effective than mediators with subject matter knowledge. The data actually suggest otherwise. A study of court-sponsored mediation programs showed no correlation between a mediator’s subject matter knowledge and either settlement or the parties’ satisfaction with the process. What did increase settlements was having a mediator with more mediation experience.⁵

Regardless of what this one study found, the debate over what qualifications to look for in a mediator rages on. Litigators by and large firmly believe subject matter expertise is critical for mediators and that process skills can easily be acquired through a few hours of training.

Barriers to Use

Rating Scale

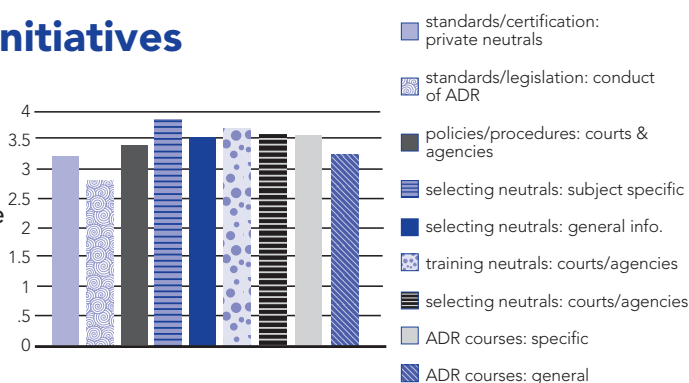
- 1 = no impact
- 2 = a little impact
- 3 = moderate impact
- 4 = significant impact
- 5 = definitive



Possible Initiatives

Rating Scale

- 1 = no value
- 2 = little value
- 3 = moderate value
- 4 = high value
- 5 = top priority



Mediators tend to believe just as firmly that litigators overrate the importance of legal knowledge and undervalue process skills and experience.

Corporate counsel should hedge their bets by considering both skill sets. Subject matter expertise is most important in an “evaluative” mediation—where the parties request an assessment of the strengths and weaknesses of their arguments, or ask the mediator to propose a settlement figure or range. Where the barriers to settlement are more psychological than substantive, process skills may play a much more critical role. Learning to guide parties through emotionally charged encounters and help angry litigants make reasonable choices takes time, so it is wise to use a mediator who has cut his or her teeth by making mistakes on other litigators’ cases.

A mediator’s subject matter expertise may seem much easier for a litigator to assess than his or her process expertise, which may explain at least in part why litigators value the former much more

than the latter. A patent attorney can quickly tell how familiar a prospective mediator is with recent patent law. But what can a résumé or phone interview reveal about someone’s ability to maintain a productive dialogue between disputants, or keep realistic settlement offers flowing back and forth across the table? One technique is to frame the challenges you foresee in settling a case as hypotheticals and ask the mediator how he or she would handle them. For example, you could ask “If the plaintiff makes a demand the defendant considers outlandish so that the defendant refuses to counter until the plaintiff proposes a lower number, what would you do?” Don’t look for a “right” answer to this type of question; there is no magic formula for bridging impasses. Look for an answer that indicates the mediator has good instincts for managing conflict and can infuse optimism and creativity into a tense situation.

Another way to assess process skills is to ask for the mediator’s track record—

the percentage of cases that have settled. But raw numbers do not tell the full story. Has the mediator shied away from accepting difficult cases to keep his or her numbers up? Has he or she used unethical practices to induce settlement, such as sharing confidential information or providing “reality checks” that are unrealistically pessimistic? Ask for and contact references. Mediators quickly develop reputations—both good and bad.

Another form of expertise corporate counsel should consider is knowledge of their organization. Companies may wish to develop a cadre of mediators for employment disputes who understand their workplace culture and can therefore empathize with the challenges faced by both line employees and managers operating within that culture. For construction projects, partnering facilitators, fact finders, or dispute review board members who understand a corporation’s methods of operation and key terminology can make ADR work more efficiently and effectively.

The counterargument is that giving neutrals repeat business will compromise their neutrality in the eyes of the other side (or cause them to bend over backward to please the other side in an effort to appear “neutral”). This is often not the case.⁶ Parties generally approach the choice of an ADR provider pragmatically: They want someone who can help them achieve a fair result. Employees, contractors, and consumers may therefore strongly prefer a mediator or facilitator who knows how an organization ticks—and thus seems capable of getting things done—over an outsider operating on a blank slate.

If a case moves beyond an in-house ADR program into litigation, corporate counsel can still exercise control over the selection of a neutral. Many courts have established rosters of mediators and other neutrals who are available to the parties at little or nominal cost. However, this does not mean litigators are required to use a mediator assigned by the court or to select only from a court roster. Judges routinely grant joint motions by the parties to use a private mediator so long as they agree on how to pay the mediator’s fees. Courts create ADR programs to manage their caseloads. If signing a

motion will increase the likelihood of a case being settled and relieve the court of the burden of scheduling an ADR process, a judge would not stand in the way.

Is it prudent to incur the additional cost of private mediation? This depends upon the litigator's valuation of the case and assessment of how much more likely it is to settle in the hands of a private mediator. Whether a private neutral would be better qualified than one provided by the court is not the only consideration. Some court programs allot only a couple of hours for mediation or case evaluation, and even if the neutral is not restricted by court rules, he or she may be unable to devote the long hours or multiple days required to settle significant cases. Many mediated cases settle late at night or in the early morning hours. Private mediators are (or should be) prepared to go the distance.

In addition, court rules may dictate when ADR takes place. For example, in the Superior Court of the District of Columbia, mediation or case evaluation occurs at the close of discovery.⁷ Comments received in response to the ADR survey revealed frustration with this policy because litigators often file dispositive motions after completing discovery, and it is difficult for them to agree on settlement terms while such a motion is pending. Opting out of a court program may buy advocates greater flexibility to mediate at the time and place of their choosing.

Conclusion

Our calling as attorneys is to help clients minimize and manage legal risks. Trials are inherently risky because litigators can structure neither the procedures nor the outcome. Thus, a key reason why ADR, particularly mediation, is gaining in popularity is the ability it offers litigators to exercise control over both the process

and the result. But corporate attorneys may fail to take full advantage of opportunities to shape ADR processes to promote their company's interests. This article has aimed to provide practical advice for seizing control. ■

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Endnotes

1. The survey was posted on the website of the District of Columbia Bar Section of Litigation in October 2006, and members were given several weeks to complete it. The results do not represent the views of the Section of Litigation membership as a whole. They represent only the views of the subgroup who opted to respond. Although the respondents practice in a wide variety of specialties, over half identified torts, labor and employment, or commercial litigation as their primary area of expertise.

2. While respondents were not asked to specify which court they litigate in most frequently, it is reasonable to assume that most responses about mandatory mediation reflect experiences with the Multi-Door Dispute Resolution Division at the Superior Court of the District of Columbia. The Superior Court mandates mediation or case evaluation for all civil disputes. *See* DC Sup Ct. Civ. R. 16 and <http://www.dccourts.gov/dccourts/superior/multi/civil.jsp>. Most responses regarding voluntary ADR arranged through a court presumably refer to the ADR program at the U.S. District Court for the District of Columbia. This court requires litigants to confer about the possible use of ADR to reach settlement, and it maintains a roster of neutrals available to litigants on a pro bono basis. *See* U.S. Dist Ct. R. LCvR 16.3 (Duty to Confer) and LCvR 84 (Mediation). However, court rules also permit judges to issue an order to show cause why a particular case should not be mediated. Thus, some survey results about mandatory mediation may reflect experiences in federal court. *See* U.S. Dist Ct. R. LCvR 84.4 (Referral to Mediation).

3. Litigators who practice in courts that do not mandate ADR presumably would rank this item much lower.

4. *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, David Lipsky & Ronald Seeber, Cornell University School of Industrial and Labor Relations, Institute on Conflict Resolution, 1998. A survey in 1997 of more than 600 of America's largest 1,000 corporations found that 88 percent had mediated in the previous three years, and 79 percent had arbitrated. Over 84 percent said they were likely or very likely to mediate in the future, and 69 percent said the same about arbitration.

5. Bobbi McAdoo, Nancy Welsh & Rosselle Wissler, *Institutionalization: What do empirical studies tell us about court mediation?* Dispute Resolution Magazine, Winter 2003, at 8-10.

Note: This study found no correlation between how many years a mediator had practiced law and either settlement rates or the parties' perceptions of procedural justice. It was experience as a mediator, not a lawyer, that mattered.

6. When the U.S. Postal Service rolled out REDRESS, a national program for mediating Equal Employment Opportunity claims in 1998-99, it developed a roster of more than 2,500 mediators, intending to have each mediator handle no more than a handful of cases each year. Because management selected and paid for the mediators, and relations between management and craft employees were quite antagonistic, there was a great deal of concern that employees would perceive the mediators as biased under the best of circumstances. And it was generally assumed that having the same mediator show up time and again would enhance the perception of bias. This fear turned out to be completely unfounded. Employees were grateful for the opportunity to air their complaints through mediation. They saw this as a positive step by management. But they were frustrated by mediators who were unfamiliar with postal operations, terminology, collective bargaining agreements, and workplace culture. Both line employees and managers wanted to be understood. Because postal employees routinely exchange information with one another about mediation experiences and outcomes, they were not concerned about favoritism toward management. Word about that would spread like wildfire. As a result, the Postal Service realized it could run a better and more efficient mediation program by culling its roster to a much smaller number.

7. *See* <http://www.dccourts.gov/dccourts/superior/multi/civil.jsp>