

Are You Talking To The Right People?

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These days, I don't go to that many mediation conferences. I haven't lost my interest or passion for mediation. I just find that the conferences are all full of mediators talking to mediators. And while some of my best friends are mediators, I don't need a conference to talk to them.

The harsh truth is that mediators find it rather too easy to talk to each other, and perhaps not easy enough to talk to those who might challenge us – and above all to those who hire us to help them resolve their disputes.

So for me it was an easy decision to go to the recent UK launch of the Commercial Mediation Group, an informal body bringing together commercial users of mediation. Yes that's right, *our clients*, in the form of the many law firms who instruct us in the UK. The group aims to provide a policy platform for mediation users to make their views known on issues of mediation reform. Even better the group, under the excellent leadership of Katie Bradford, litigation partner (and mediator) at Linklaters in London, has taken the time to survey the UK's top 50 commercial law firms to see what they wanted from, and thought about, us mediators.

I'll give you some of the results of that in a moment, but we should just pause here to reflect on how critically important it is for mediation users to have a voice, not just to policy makers but back to us mediators. It is too easy for mediators to be self-protective about our own precious ways, and not risk exposing ourselves to the cold winds of proper feedback. Indeed, the whole privacy of the process and lack of clear and open feedback is behind initiatives such as the International Mediation Institute (www.IMmediation.org). This is not about "the clients strike back", but about a building and maintaining a mature market. It is a reflection of the reality that for complicated negotiations to succeed or be enhanced through the involvement of a mediator, a collaborative effort between *all* those involved is called for. We mediators may think we have the answers (and I am not knocking the power of what mediators can offer) but those on each side of the dispute also have valid, informed and important views, not least about:

1. What they want; and
2. What might work.

Anyway, back to the survey results, and remember these findings reflect UK mediation practice and relevant law:

1. *47% of those who use mediation services think that cost penalties should apply to parties who attend a mediation but who have no intention of seeking a compromise or do not participate in good faith.*

That's a tough one, because it's pretty hard to know where the evidence of that intention should come from, without drawing in mediators. But it's interesting in that it probably reflect a degree of frustration on the part of some mediation users with processes that aren't seeming to deliver much value. Or it may just be the product of power of courts here in the UK to impose costs penalties on those who "unreasonably refuse" mediation. That's for another blog.

2. *56% support an increase in mediators' fees to enable them to increase the time and quality of their preparation.*

Beyond the flippant comment that this is hard for mediators to object to, I suspect the conclusion points to a real awareness that mediators can deliver significant value, which is worth paying for, but that the process has to be taken seriously by mediators. In other words, parties are looking for an in-depth and serious conversation with mediators about the merits of their case. Good on them!

3. *Over 60% believe that mediators should not handle more than two one-day mediations per week.*

Personally, I don't agree with a fixed limit on case numbers, but the *underlying* point is an important one; namely that mediation is a tough, intense and highly-focused process, requiring us mediators to be on top of our game every time. If this is not always the case (presumably, and sadly, this finding indicates that view amongst some users) then parties should feel free to express those views to mediators. Apart from anything else, it's the only way mediators can really learn.

4. *68% believe mediators should take an interventionist role in mediations, suggesting settlement levels.*

It's not easy to second-guess what this springs from, except perhaps a frustration that mediators are not getting "stuck in" enough. However, I suspect it may reflect an assumption on mediators' behalf that the clients would not welcome this. Well, according to this survey, over two-thirds of them would. As always, however, the issue is not just what you do, but the way that you do it (to paraphrase Ella Fitzgerald and Bananarama!). Effective challenging, whilst retaining neutrality and a relationship of trust with parties, is at the heart of what we do.

5. *67% do not support compulsory mediation.*

I'll save that for another blog!

6. *51% believe the courts should recognize an independent 'mediation privilege' to apply to mediation, which protects the mediator even if parties agree to waive the privilege.*

This is a particular UK point, given various recent attempts by the courts to open up mediation discussions in subsequent court hearings. I'll leave the case law for another time – suffice to say for now that if over half of our clients are worried about the degree to which the mediation process is genuinely ring-fenced from the court process, that won't be helping with open debate at the mediation.

So, from this mediator, a heart-felt thank you to Katie Bradford and her colleagues! Keep it up. Make your priorities and concerns clear. We may not always agree, but we absolutely want to talk about it.