

Perceptions in Litigation and Mediation: New Insights Inform Current Debate

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When someone brings a dispute to a lawyer, that dispute is transformed into a legal claim narrowly focused on outcomes available within the legal system. Generally, these involve only monetary compensation. One of mediation's roles is to reopen the dispute to deal with and resolve issues the legal system cannot, such as a person's need for their story and emotions to be acknowledged by the other side. This is not what happens, argues Tamara Relis in *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge University Press, 2009). Instead, the lawyers maintain control of the mediation, keeping it focused on tactical issues and negotiation of monetary settlement, to the detriment of the parties. This central finding of the study provides ample support to the argument that lawyer control of the mediation process erodes both procedural justice and many of the benefits of mediation.

Relis followed 64 medical malpractice cases that entered mandatory or voluntary mediation in Ontario, interviewing the lawyers and parties before and after mediation about plaintiff and lawyer goals for litigation and mediation, hopes for mediation, and thoughts about the mediation. Mediators were interviewed as well. Through those interviews, she concludes that lawyers and parties inhabit "parallel worlds," with the lawyers' needs and perspectives of the dispute being very different from those of the parties. These parallel

worlds survive despite mediation, with lawyers viewing the mediation from a tactical legal perspective, and the parties maintaining their perspective of it in "extralegal" terms (such as the need for admission of fault, for more information, and for the other side to see the human face behind the dispute).

Relis draws two other conclusions from her research that pose caveats to her parallel worlds theory. One is that exposure to mediation leads lawyers to somewhat reconceptualize the dispute, incorporating extralegal concepts, or at least extralegal language, into their perspective of the mediation and the plaintiffs' needs. The other is that gender plays a role in how the various actors approach and experience mediation, with women being more influenced by and aware of extralegal aspects of the mediation, particularly the emotions involved. The evidence for these two conclusions is not as strong as for the parallel worlds theory, however.

Relis quantifies the results of the interviews to elucidate trends among them and to make comparisons between lawyers and parties, men and women. While the data is interesting and puts the interviews in perspective, it is not reliable, mainly because the conclusions are limited by small, skewed subsets (almost all plaintiff's lawyers were male, almost all hospital lawyers female). This means that although her evidence appears valid and generally provides support for her arguments, further

SUMMARY

New research uses interviews with lawyers, parties and mediators in medical malpractice cases to inform the debate regarding lawyer control of the litigation process and gender differences in approaches to and experiences of mediation.

research is required to replicate her findings.

Relis uses quotes effectively to demonstrate the parallel worlds lawyers and parties inhabit. Moving chronologically from parties' aims in litigation through their experiences with mediation, the quotes show that lawyers' and clients' views and experiences were often completely different. When asked what the plaintiffs wanted from litigation, lawyers unanimously stated it was entirely, or primarily, money. Plaintiffs, on the other hand, discussed a need for explanation, admission of fault by the doctor and/or hospital, and apology. Money was not their focus.

These parallel worlds had a significant impact on the cases, the mediations and the resolutions because lawyers maintained control. This is best demonstrated by the contrary wishes of the lawyers and parties about whether the doctor-defendants, who were not required to attend mediation, should do so. Because lawyers saw mediation as a tactical negotiation process, lawyers on both sides were clear that there was no



need for doctors to attend because they did not have a say in settlement. Many, in fact, saw their attendance as detrimental because the high emotions that could occur from it would be difficult and may impede negotiations. Due to these views, the doctors rarely attended. In contrast, the parties – both plaintiffs and doctors – believed that the doctors should be there. Each wanted the other to hear their story. The absence of the doctors from the mediations enhanced the plaintiffs' belief that the doctors did not care about them or what happened, further alienating parties from each other. The plaintiffs generally did not know that the decision against the doctors' attendance was agreed by their own lawyer.

Relis demonstrates other aspects of the mediation process in which the lawyers' control of the process had a detrimental effect. Parties were not consulted about who the mediator would be or the style of mediation to be used. This led to the selection of evaluative mediators by the lawyers, when the parties, when questioned, felt facilitative mediation better suited their needs.

Mediation did not fully provide the benefits intended to the parties because it was focused on the tactical needs of the lawyers, and not on the emotional and psychological needs of the parties. Thus, although most plaintiffs were satisfied with the mediation and the mediators on the surface, when questioned more carefully, they generally did not come away feeling that they understood the other side better, nor did they change their views of the other party. Additionally, they had mixed feelings about what occurred at mediation, being upset that

the defendant doctor was not present and that the focus of negotiations was on monetary settlement.

The theme of these parallel worlds flows throughout *Perceptions*. However, Relis also sees evidence of lawyers reconceptualizing disputes through the experience of mediation, thus supporting arguments that mediation is moving the legal culture to a less adversarial stance. Lawyers who had previously spoken of their cases in purely legal terms shifted their language when discussing mediation. They mentioned the extralegal benefits of the mediation and of the defendant doctors' attendance. Additionally, lawyer-mediators said that addressing emotional and other extralegal issues in mediation would be beneficial to the parties.

Interviews also indicated gender differences among lawyers and parties in perspective and approach to mediation, and among mediators in their ability to control the lawyers. Female lawyers were more likely to see merit in the emotional aspect of mediation. Female parties were more likely to feel trepidation about the mediation, to be more concerned about how their statements were perceived, to be influenced by mediators' statements and behavior, and to be less likely to talk during the mediation. Female mediators were viewed by the parties as being less in control of the lawyers and the mediation.

Relis' arguments are informed by a rich tapestry of past research and social science theory. This contextualizes her findings, giving them broader meaning. In turn, her research contributes

empirical evidence to the discussions on the impact of gender on parties' ability to negotiate, gendered approaches to conflict resolution, the role of attorneys in mediation, and the need for legal education reform.

Some feminist theory states that women are disempowered in mediation because they are less comfortable negotiating and approach the task relationally rather than competitively. Relis' findings that women were reluctant to meet the defendant doctors, and that they were more likely to accept what took place in mediation and to be influenced by the mediators, point to increased vulnerability for women when entering mediation, thus supporting feminist arguments against mediation. Nonetheless, women tended to gain greater emotional satisfaction from mediation, despite the hardship they felt during the process. This supports arguments that mediation helps women to resolve high emotions involved in disputes.

Other literature argues that men and women confront conflict resolution from entirely different perspectives. Evidence of this gender difference was found among lawyers in the study. Female lawyers were more likely to see the mediation in extralegal terms and to address the emotional side of the dispute in mediation, supporting arguments that women seek to resolve conflict through a relational compromise without winners, while men approach it from a hierarchical, rights-based perspective. However, gender differences were not conclusive because the subset of female lawyers was small and almost entirely made up of hospital lawyers, which may have accounted for some of the differences.



Relis' findings more strongly support arguments that lawyer control of the dispute is erosive to procedural justice and the practice of mediation. Her study clearly demonstrates that lawyers maintain control of decisions regarding mediation as well as the process, emphasizing above all the need to settle the monetary claim. Interviews indicated that by keeping clients out of the decision-making process, controlling their access to the other party, and at times keeping them out of the mediation room, the lawyers diminished their clients' feelings of fairness.

Perceptions' strength, in addition to the firm grounding of the study in past research and current theory, is the juxtaposition of the lawyers' words and parties' words in the same cases and Relis' placement of them within the body of social science literature. The quotes vividly illustrate their very different visions of and reactions to every aspect of litigation and mediation, providing strong support to Relis' theory of their being in parallel worlds. Placed

in the context of previous research and ongoing debate, the quotes gain deeper meaning and become a part of the broader discussion about procedural justice, gender and mediation.

Relis is less convincing when discussing lawyers' reconceptualization of the dispute after participating in mediation. It is apparent that many of these lawyers had participated in mediation often in the past, yet they initially conceived the plaintiff's motives as entirely money-driven. Further, notwithstanding the need for the plaintiffs to meet with the doctors, attorneys for neither the plaintiff nor the defense thought it would be helpful for the doctor to be present, and attorneys tended to view the mediation in purely tactical terms. Even after the mediation concluded, their views of the effectiveness of mediation were based upon whether any progress was made toward settlement, or whether any of their tactical aims were met. Instead of reconceptualizing the dispute through mediation, the argument could be made that the lawyers compartmentalized

their perceptions of mediation, seeing it as the portion in which plaintiffs can tell their story and vent, while maintaining their dominant tactical stance.

Perceptions is a good addition to the mediation literature, building on and adding to past research and theory. The stark contrast between the lawyers' and parties' views and experiences brings to light the impact of lawyer control of the dispute on procedural justice, one of the most integral aspects of a party's experience with mediation, and on self-determination, one of the central tenets of mediation. The research thus supports calls for reform of both mediation practice and legal education. Findings on gender differences in approach and response to mediation provide insight into the feminist debate on mediation and bear further research to better determine whether mediation does disadvantage women and, if so, what can be done to counter this. Because of its thorough research and intriguing findings, *Perceptions* deserves a place on every mediation researcher's shelf.