Party Participation and Voice in Mediation

By Roselle L. Wissler

irect party participation in the resolution of disputes is a key distinguishing feature of mediation. Party participation in mediation is thought to facilitate the discussion of underlying interests, which in turn can increase parties' understanding and the likelihood that their concerns will be addressed. Party participation is also thought to enhance "voice," parties' sense that they have had an opportunity to express their views. Voice, in turn, is associated with parties feeling that the mediation process and outcome are fair and legitimate.¹

What effect does the presence of lawyers in mediation have on party participation and voice? What is the relationship between how much parties talk during mediation and whether they feel they have voice? Do party participation and voice have similar or different effects on parties' assessments of mediation?

To explore these questions, I conducted new statistical analyses on existing datasets containing exit surveys of parties who had attended court-connected mediation. The analyses are based on the responses of 1,777 parties in five general civil mediation programs in Ohio and 849 parties in thirteen domestic relations mediation programs in Maine.²

Lawyers' Effect on Party Participation and Voice

Virtually every party in the general civil mediation cases had a lawyer who accompanied them to mediation, making it impossible to look for differences associated with the presence or absence of lawyers. Only descriptive information was available, based on parties' ratings of participation and voice.

Only 25 percent of parties in general civil mediation said they spent a considerable amount of time talking during mediation in speaking for their side. By contrast, 64 percent of parties said their lawyer talked a considerable amount of time, and 57 percent said their lawyer talked more than they did during mediation. Yet 77 percent of parties felt they had a considerable chance to tell their views.

In the domestic relations mediation cases, 84 percent of responding parties had a lawyer, and virtually all of the lawyers attended mediation. Parties were more likely to participate "very actively," as rated by the mediator, when they did not have a lawyer with them in mediation (82 percent when no lawyers were present and 85 percent when only the other party's lawyer was present) than when their lawyer accompanied them to mediation (60 percent when both lawyers were present and 65 percent when only their lawyer was present). But there were no differences in whether parties felt they had "enough chance" to tell their views of the dispute.

These findings suggest that lawyers' presence in mediation had a larger impact on parties' participation than on their sense of voice. This leads to the question of what the relationship is between how much parties talk in mediation and whether they feel they have voice.

In general civil cases, parties who felt they had more chance to tell their views rated the mediator and the mediation process more favorably than did parties who felt they had less chance to tell their views.

Voice Is More Than How Much Parties Talk

In the general civil cases, virtually all parties (91 percent) who said they talked "a great deal" during mediation felt they had a considerable chance to tell their views of the dispute. By contrast, half (50 percent) of parties who said they did not talk at all felt they had a considerable chance to tell their views. And over three-fourths (77 percent) of parties who said their lawyers talked a great deal felt they had a considerable chance to tell their views.

Similarly, in the domestic relations cases, 88 percent of parties that mediators rated as "not at all active" in mediation nonetheless felt they had enough chance to tell their views.

Thus, talking a lot in mediation seemed to guarantee that parties felt they had voice. Not talking reduced parties' sense of voice, but did not preclude some parties from feeling they had voice. And some parties seemed to feel they had voice through their lawyers.

Other studies provide potential explanations for why some parties who do not talk in mediation, or whose lawyers talk a lot, feel they have voice while others do not.³ Whether parties who do not talk feel they have voice might depend on their expectations or preferences regarding participation in mediation, including whether

they choose not to talk or are prevented from doing so. Parties' sense of voice might also depend on their lawyers' approaches to representation and party participation in mediation. And how well the lawyer understands and communicates the parties' interests, objectives, and views might play a large role in parties' sense of voice.

Voice Is More Strongly Related to Parties' Assessments

Given that voice and how much parties talk in mediation are related but different concepts, that leads to the question of whether they have similar or different relationships with parties' assessments of mediation.

In general civil cases, parties who felt they had more chance to tell their views rated the mediator and the mediation process more favorably than did parties who felt they had less chance to tell their views. For example, parties who felt they had more voice thought that the mediation process was more fair, they had more input into the outcome, and they were less pressured to settle than parties who felt they had less voice. In addition, parties who felt they had more chance to tell their views thought that the mediator understood their views better, was more impartial, and treated them more respectfully.

On most dimensions, parties in general civil cases who talked more in mediation had more favorable assessments than parties who talked less. But how much parties talked was less strongly related to their assessments of mediation and the mediator than whether they felt they had voice.⁴ And the relationship between talking and settlement pressure was in the opposite direction of that seen for voice: parties who talked more during mediation felt *more* pressured to settle than parties who talked less. Perhaps this reflects that when parties participate more, they are more directly addressed or questioned, and thus feel more pressured.

Parties whose lawyers talked more during general civil mediation tended to have more favorable assessments of mediation than parties whose lawyers talked less. These relationships also were smaller than those involving parties' voice. And the participation of lawyers seemed to help buffer settlement pressures: parties who said their lawyer talked more felt *less* pressured to settle than parties who said their lawyer talked less.

In domestic relations mediation, parties who felt they had enough chance to tell their views were more likely to feel the process and outcome were fair and were less likely to feel pressured to settle than were parties who did not feel they had enough chance to tell their views. By contrast, how actively parties participated in mediation was not related to parties' assessments of fairness. And parties who participated more actively felt more pressured to settle.

In sum, voice had stronger and more consistently favorable relationships with parties' assessments of mediation and the mediator than did how much the parties or their lawyers talked.

Need to Enhance Voice as Well as Participation

These findings suggest that to enhance parties' experience in mediation, lawyers and mediators need to encourage greater party participation during mediation and to ensure that parties have voice, especially when parties' participation is limited. Future research needs to examine what lawyers and mediators can do both to facilitate parties' participation and to ensure that parties feel their views are expressed.⁵

Endnotes

1 For a summary of procedural justice research, see Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do with It? 79 WASH. U. L. Q. 787, 817-820 (2001).

2 For more details, see the original article from which this is drawn: Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URBAN L. J. 419 (2010).

3 See Lisa B. Bingham et al., Exploring the Role of Representation in Employment Mediation at the USPS, 17 Ohio St. J. On Disp. Resol. 341, 353-55, 366, 370-75 (2002); Craig A. McEwen et al., Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minn. L. Rev. 1317, 1363 (1995); Julie Macfarlane, Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation, 2002 J. Disp. Resol. 241, 253-60, 270-76 (2002); Julie Macfarlane & Michaela Keet, Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program, 42 Alberta L. Rev. 677, 692-93 (2005); Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. Pitt. L. Rev. 701, 725-27, 733-34, 742-43 (2007).

⁴ For example, the correlations between how much parties talked and their views of process fairness, mediator understanding, and input into the outcome were .09, .14, and .21, respectively. By contrast, the correlations between how much voice parties felt they had and their views of process fairness, mediator understanding, and input into the outcome were .42, .39, and .34, respectively.

5 For one proposed way to address these issues, see Leonard L. Riskin & Nancy A. Welsh, Is That All There Is?: "The Problem" in Court-Oriented Mediation,15 GEO. MASON L. REV. 863, 902-32 (2008).



Roselle L. Wissler is Research Director of the Lodestar Dispute Resolution Program at the Sandra Day O'Connor College of Law at Arizona State University. She can be reached at rwissler@ asu.edu.