Research Reports

The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?

Jean Poitras, Arnaud Stimec, and Jean-François Roberge

Mediators often do not welcome the presence of attorneys at the mediation table. Because of the apparent contradictions between both professions, many mediators believe that the presence of attorneys is prejudicial to the mediation process. Using empirical data collected from workplace mediation cases, we have explored the actual impact of the presence of attorneys. Our results indicate that the presence of an attorney does not significantly affect the outcome of a mediation, with two exceptions. First, the presence of attorneys in a mediation process reduces the parties' level of satisfaction with the mediator. Second, the presence of an attorney would appear to hinder the level of reconciliation possible between the parties.

Key words: mediation, conflict, outcome, lawyers, workplace.

Jean Poitras is a professor in the department of human resources management at HEC Montréal, Canada. His e-mail address is jean.poitras@hec.ca.

Arnaud Stimec is a professor at the Université de Nantes in Nantes, France. His e-mail address is Arnaud.Stimec@univ-nantes.fr.

Jean-François Roberge is a professor at the Université de Sherbrooke in Quebec, Canada. His e-mail address is Jean-Francois.Roberge@USherbrooke.ca.

10.1111/j.1571-9979.2009.00251.x

Myths about the Impact of Attorneys on Mediation

The impact of the presence of attorneys at the mediation table has been a source of much debate and great tension between dispute resolution professionals (Moore 1996; Boulle and Nesic 2001). At the heart of the debate lies the question of whether the presence of attorneys is compatible with the mediation process. Indeed, the differences between mediators' mission, ethics, and practices and those of attorneys may result in conflicting values. Whereas the mediator emphasizes cooperation between all parties and their autonomy from the mediator, the attorney has an advocacy relationship with just one of the parties and is legally obligated to work toward the best outcome for that client (Stimec 2001). The result is sometimes a perceived incompatibility between the two approaches and, by extension, between both types of professionals.

In training and classrooms, it is common to hear the novice mediator voice concerns that the presence of an attorney at the mediation table will hinder the mediation process. Certain mediators — in particular those without any legal training — have even developed a fearful attitude toward the presence of attorneys in the process, with some even equating the presence of an attorney with the failure of a mediation process. Nevertheless, other mediators instead claim that the presence of attorneys is advantageous to the mediation process. They do not perceive the attorney as an enemy but rather as a partner in the process.

Is the negative impact of the presence of an attorney on the mediation outcome a myth or a reality? Empirical research has yet to confirm or refute this idea. To make up for this shortcoming in the research, we have empirically tested the assumption that the presence of an attorney will hinder the effectiveness of a mediation by comparing mediation results obtained in the absence of an attorney with those obtained in the presence of attorneys.

The Presence of an Attorney and the Effectiveness of the Mediation Process

In this study, we examined the impact that an attorney's presence has on the mediation process by breaking down the effectiveness of the mediation into seven dimensions. First, we compared two *quantitative* aspects of mediation outcomes: settlement rates and the time required to reach an agreement. Second, we contrasted five *qualitative* aspects of mediation outcomes: mediator's usefulness, procedural justice, parties' satisfaction with the agreement, parties' confidence in the agreement, and the level of reconciliation between the parties. For each dimension, we have explored in this article what could explain those negative impacts that we found were caused by the presence of attorneys in mediation.

Impact on Settlement Rates

Mediators often express the fear that the presence of an attorney will negatively affect the settlement rate. (For example, when co-author Jean Poitras has conducted program assessments, he has often heard mediators claim that the presence of attorneys lowers their settlement rates.) Various explanations have been given to substantiate this perception. First, some attorneys may not be highly motivated to reach an amicable settlement. Thus, the attorney's desire to use the case to create a legal precedent could also lead to the failure of a negotiation (Mendelsohn 1996).

Furthermore, some mediators have argued that some attorneys may hesitantly agree to mediation for purely tactical reasons, such as to gain information that will enable them to obtain more advantageous results in litigation (Stimec 1999). In addition, theorists have argued that attorneys' adversarial "litigation mentality" (or litigation orientation) diminishes settlement rates because attorneys pass up opportunities to reach a settlement that accommodates the parties' common interests in favor of seeking one-sided victories (Mnookin, Peppet, and Tulumello 2000; Abramson 2005). Consequently, *Hypothesis One is that the presence of attorneys in mediation significantly reduces settlement rates.*

Impact on the Time Required to Reach a Settlement

Inviting one or more attorneys to take part in the mediation process increases the number of interactions and strategies because there are more people around the table and the attorneys may introduce into the mediation exogenous interests with respect to the parties' situation. We examined how these interactions and strategies affect the duration of the mediation process.

First, attorneys may delay the settlement of a dispute through mediation for financial reasons. For example, the payment of professional fees on the basis of hours worked could motivate the attorney to delay the settlement of the dispute to increase the number of hours billed to the client (Mendelsohn 1996; Korobkin 2002; Abramson 2005). Such nonfinancial reasons as a desire to build or preserve a reputation for "hardball negotiating" in highly publicized cases could also motivate an attorney to delay settlement of the dispute (Mendelsohn 1996).

In addition, attorneys' (or their clients') commitment to or belief in their case based on questions of justice or other principles could also delay settlement until "defending the principle becomes too costly" (Mendelsohn 1996). Finally, attorneys may wish to justify both their role and their fees with unnecessary interactions. For these reasons, *Hypothesis Two is that the presence of an attorney significantly increases the time required to conclude a mediation.*

Impact on the Perceived Effectiveness of the Mediator

We hypothesize that the involvement of an attorney in a mediation could also affect the clients' perceptions of the mediator's effectiveness. It seems possible that a rivalry could arise between a mediator and an attorney over who has made the greatest contribution to settling the dispute and that the mediator could thus receive less credit for his or her role in facilitating settlement than he or she would have had the attorney not been involved. Furthermore, some scholars have hypothesized that the attorneys' presence could transform the mediation in ways that could also reduce the clients' satisfaction with the process, for example, if the attorney were to suggest that the mediator is unqualified because he or she does not know the law well enough to evaluate the client's case (Pinzòn 1996; Nolan-Haley 1998; Denckla 1999).

In addition, the mediator might be hindered should the attorney adopt an adversarial stance during the mediation. On the other hand, the attorney could display a more problem-solving attitude that could facilitate the mediator's work, even playing the role of an "unofficial comediator." But, in terms of the clients' attitude toward the mediator, the result would be the same in either case: the credit the mediator receives for the outcome would be diminished. Thus, *Hypothesis Three is that the presence of an attorney in a mediation will considerably diminish the parties' perception of the mediator's effectiveness.*

Impact on the Level of Satisfaction with the Mediation Process

Attorneys who maintain an adversarial, competitive stance may also negatively influence the parties' perception of the mediation process itself (Abramson 2005). They could suggest to their clients that mediation is a "second class" or "discounted" form of justice for those who do not have the financial ability to pursue their cases in court. The value of the mediation process could therefore be diminished in the client's eyes.

Furthermore, whereas the mediator may be most interested in *processes*, the attorney may emphasize *procedures* (Stimec 2001). (While a process orientation would emphasize a system — e.g., principles of mediation — and be flexible, a procedural orientation would focus on a sequence of tasks and steps — e.g., interrogation followed by counterinterrogation — to be followed in a strict order.) Thus, the parties could end up being torn between the two approaches. Discussions and compromises between the mediator and the attorney could thus cause the parties to doubt the value of the mediation process itself. For these reasons, *Hypothesis Four is that the presence of an attorney will significantly diminish the clients' perception that the mediation process is fair.*

Impact on Satisfaction with the Agreement

Attorneys' ideas about what constitutes a satisfactory agreement may differ from those of their clients. First, attorneys may incorrectly perceive that their clients will be satisfied with a financial settlement alone (Golan 2002) and may seek to reach a financial settlement at the expense of other dimensions of value to their clients (Weinstein, Song, and Phillips, 1996; Rodney 1999; Contuzzi 2000). Research has shown that achieving a monetary victory — or even the resolution of the conflict — does not always meet all the clients' needs (Folger and Jones 1994). Settlements sometimes fail to take into account a conflict's relational dimensions (Vanderkool and Pearson 1983) such as expected future behaviors or the need for apologies or other gestures of conciliation.

Moreover, psychological factors involved in decision making can influence the parties' satisfaction with a settlement. How an attorney presents a settlement offer — as preferable to the status quo or as less preferable than what might have been achieved through litigation — could ultimately influence the client's level of satisfaction with the settlement. Therefore, *Hypothesis Five is that the presence of an attorney will significantly reduce parties' level of satisfaction with a mediated agreement.*

Impact on the Parties' Confidence in the Agreement

When attorneys speak on their clients' behalf, the client's role in using his or her own power to achieve resolution through mediation may be diminished (Nolan-Haley 1998; Gordon 2000). In addition, attorneys' preference for a "calculus-based trust" versus the more relational "knowledge-based trust" typically developed by mediators (Lewicki and Bunker 1995) may diminish the parties' trust in each other. (While calculus-based trust presumes that parties trust each other when they feel the other has no incentive to harm them, knowledge-based trust assumes that parties will trust each other when they know each other better.) The attorney may also foster distrust by maintaining that the other party is an adversary who will refuse to cooperate in finding and implementing a solution (Allred 2000). *Thus, Hypothesis Six is that the presence of an attorney will significantly reduce parties' confidence in the agreement.*

Impact on Reconciliation between the Disputants

Attorneys who maintain an adversarial stance in a mediation — treating parties as defendants and plaintiffs with conflicting interests rather than as partners seeking mutually satisfactory solutions — could also exert a negative influence on the parties' level of reconciliation (Menkel-Meadow 2000). Such attorneys might privilege achieving a monetary settlement at the expense of addressing the conflict's less quantifiable elements, such as the disputants' relationship (Golan 2002).

Attorneys can also hinder the process because they may discourage expressions of regret, sympathy, and apology that they fear may later be interpreted as admissions of responsibility should mediation prove unsuccessful. But such statements often lie at the heart of effective reconciliation processes.

Finally, another possible impediment is the attorneys' practice of speaking on behalf of their clients. While this may be necessary during trial, the contrary is true in mediation. Indeed, in mediation, conflicts are often solved when the parties speak directly to each other. By filtering the communication, the attorney protects his or her client but hinders the direct dialogue that can be critical to reconciliation (Regis and Poitras 2003). For these reasons, *our final hypothesis, Hypothesis Seven, is that the presence of attorneys will significantly reduce the level of reconciliation between the parties.*

Method

This study was conducted in partnership with the Commission des Normes du Travail du Québec (CNT), an organization whose mission is to inform the public on labor standards, supervise the application of labor standards, receive complaints from employees, and compensate workers according to the province of Quebec's labor standards and regulations. One of the organization's roles is to promote fair and balanced labor relations between employers and employees. The organization examines grievances arising from dismissals, allegedly illegal work practices, and psychological harassment complaints and provides mediation services in these cases.

Data Collection

Participants in the study are employees and employers involved in workplace disputes mediated by a professional mediator appointed by the CNT. Participants were recruited by thirty-six CNT mediators in eight regions of Québec. Mediators were invited to take part in the experiment on the basis of two criteria: they had at least two years of experience as mediators and at least one year of experience on a full-time basis. The mediators' main role in the study was to serve as intermediaries between the researchers and the parties by distributing the questionnaires at the end of each mediation according to a predetermined protocol to ensure the scientific validity of the data collection process. Respondents returned their questionnaires to researchers using a prepaid return envelope to maintain anonymity. We collected the data in May and June 2006.

Sample Description

Once the data had been collected, 177 valid questionnaires were retained for statistical analysis purposes. At 48 percent, the response rate is satisfactory for this type of study. Mediation led to agreement in 68.8 percent of the cases. Respondents were nearly equally divided between employers

(50.3 percent) and employees (49.7 percent). Women respondents (60.5 percent) outnumbered men respondents (39.5 percent). Respondents' average age was 41.1 years. Approximately 25.9 percent of respondents were university graduates, 31.4 percent of respondents were graduates of a two-year college, and 42.7 percent of respondents held a high school diploma. Finally, respondents' average length of service in the current position was 6.7 years, and their median salary was $37,500 (Canadian), which was close to the median salary in Quebec at that time.

To assess attorneys' impact on the mediation process, we divided our sample into two groups: mediation in the absence of an attorney ($N = 145$) and mediation conducted in the presence of an attorney ($N = 32$). It is important to note that we found no significant sociodemographic differences between the groups.

Control Variable

One potential confounding variable in our study is the initial level of conflict between parties. More specifically, it is quite possible that cases involving attorneys are more contentious, and this possibility could affect intergroup comparisons. We used an initial conflict level scale to take into account the level of conflict. Adapted from Karen Jehn's (1995) Intragroup Conflict Scale, our scale measured the level of cognitive disagreement and relational tension between parties at the onset of the mediation process. Using this scale made it possible to assess whether the conflicts involving attorneys were substantially more conflictual than cases in which attorneys were not involved. The initial conflict scale comprised four items; for each one, parties specified their level of agreement with the statement using a six-level Likert-type scale ranging from "completely disagree" (1) to "completely agree" (6). We computed the scale by combining the item results (Cronbach's alpha = 0.94). The scale items are reported in Table One.

Settlement Rate and Time Required to Reach an Agreement

After the mediation process, parties were asked to report the outcome of the discussions. More specifically, we asked whether they had reached an agreement or not. Parties' responses were coded as a dichotomous variable (0 = no agreement and 1 = agreement). Furthermore, we asked parties to estimate how long the mediation process had lasted and then coded the estimated duration of each mediation process in minutes. While the settlement rate was assessed on the basis of all cases, we only computed duration for those cases in which an agreement was reached.

Assessment of Mediation Outcomes

We used the Mediation Outcome Standard Evaluation Questionnaire (MOSEQ) (Poitras and LeTareau 2009) to qualitatively assess mediation outcomes. This questionnaire comprises fifteen items. For each item, parties

Table One
Measurement Scales

Measurement Scales	Scale Statements
Initial conflict level *Cronbach's alpha = 0.940*	IC1 There was a great deal of disagreement between myself and the other party. IC2 There was a certain level of hostility between myself and the other party. IC3 I did not at all share the same point of view as the other party. IC4 There was very little empathy between the other party and myself.
Mediator's usefulness *Cronbach's alpha = 0.904*	MU1 The mediator's intervention was determinant in advancing discussion. MU2 The mediator had an important impact on the progress of discussions. MU3 The mediator's contribution was critical to advancing discussion.
Procedural justice *Cronbach's alpha = 0.857*	PJ1 The mediation meeting was run without bias. PJ2 Mediation was run in a neutral and objective manner. PJ3 Mediation took place in an impartial climate.
Satisfaction with the agreement *Cronbach's alpha = 0.940*	SA1 I am happy with the solution we came to. SA2 The settlement of the conflict was satisfactory to me. SA3 I am content with the agreement we reached.
Confidence in agreement *Cronbach's alpha = 0.939*	CA1 I believe our agreement will be applied. CA2 I am convinced the agreement reached will be respected. CA3 I believe we will abide by the provisions of the agreement.
Reconciliation between parties *Cronbach's alpha = 0.924*	RP1 I feel that the other party and I have reconciled. RP2 I feel like my relationship with the other party has been restored. RP3 I believe I have rebuilt my relationship with the other.

Note: Scales having a Cronbach's alpha over .80 are considered statistically consistent.

specified their level of agreement with the statement using a six-level Likert-type scale ranging from "completely disagree" (1) to "completely agree" (6). The scales were computed by combining the individual results. Only mediations that ended in agreement were used to compute the scales. The MOSEQ measures five dimensions of agreements reached through mediation: the mediator's usefulness (three items; Cronbach's alpha $\neq$ 0.90), the fairness of the process (three items; Cronbach's alpha = 0.86), the respondent's satisfaction with the agreement (three items; Cronbach's alpha = 0.94), the respondent's confidence in the agreement (three items; Cronbach's alpha = 0.94), and the level of reconciliation between the parties (three items; Cronbach's alpha = 0.92). The questionnaire items are reported in Table One.

Statistical Analysis

We conducted several statistical tests to assess the impact of the presence of attorneys on the mediation process. More specifically, we compared settlement rates between mediation conditions using a chi-square statistical test. Furthermore, we compared the initial conflict level, the time required to reach an agreement, the mediator's usefulness, the fairness of the process, the satisfaction with the agreement, the confidence in the agreement, as well as the level of reconciliation of the parties between conditions using the equality of means (*t*-test) statistical test. Because we ran multiple comparisons, we set our level of statistical significance at a conservative $p < 0.01$ (likelihood of a false positive less than 1 percent).

Results

The statistical analyses yielded mostly nonsignificant distinctions between mediations conducted without the presence of attorneys and mediations conducted in the presence of attorneys. We did, however, find significant differences between the two mediation conditions for two variables. Table Two summarizes the results of our statistical analyses.

Nonsignificant Results

We found no significant statistical difference for most of the variables in this study. First, we found no significant difference between mediation conditions with respect to the initial conflict level between parties; thus, parties involved in more intense conflicts do not seem to be more likely to seek to use an attorney during mediation. Second, the settlement rate was virtually identical between the two mediation conditions, rejecting Hypothesis One. Third, mediation conducted in the presence of attorneys requires on average some thirty additional minutes to reach a settlement than when attorneys are not present. Although this difference represents a 20.1 percent increase, it is not significant mainly because of the high variation of mediation durations under both conditions (i.e., variance).

Table Two
Comparison between Mediation without Attorneys and Mediation with Attorneys

Variable	Mediation without Attorneys	Mediation with Attorneys	Significance Level
Initial conflict level	3.42	3.25	0.271
Settlement rate	68.8%	69.0%	0.986
Time required to reach an agreement	147.8 minutes	177.5 minutes	0.100
Mediator's usefulness	5.29	4.65	0.005*
Fairness of the process	5.44	5.10	0.155
Satisfaction with the agreement	4.72	4.18	0.175
Confidence in the agreement	5.36	4.98	0.126
Reconciliation of the parties	3.79	2.68	0.002*

*Significant difference at $p < 0.01$.

Thus, Hypothesis Two is also rejected. Fourth, we found no significant difference between mediation conditions with respect to the respondents' assessments of the fairness of the process (rejecting Hypothesis Four), their satisfaction with the agreement (rejecting Hypothesis Five), and their confidence in the agreement (rejecting Hypothesis Six). In general, these results suggest that the presence of attorneys affects neither the likelihood of reaching a settlement nor the parties' level of satisfaction with the agreement.

Significant Results

We did find that one process variable and one outcome variable both presented significant differences between mediation conditions. First, parties' appreciation of their mediator's usefulness seems to be affected by the presence of attorneys. When an attorney was present, the respondent's assessments of the mediator's usefulness decreased by 12.1 percent, from mean = 5.29 to mean = 4.65, which represents a significant change ($p < 0.01$). Thus, the presence of attorneys would appear to diminish the client's appreciation of the mediator's role in resolving the conflict.

Second, the level of reconciliation between the parties also seems to have been affected by the presence of attorneys: the level of reconciliation of the parties was 29.3 percent less when attorneys were present

(mean = 3.79 to mean = 2.68) which was a significant change ($p < 0.01$). This result suggests that the presence of attorneys can hinder the reconciliation process.

Discussion

The empirical data we collected in this study indicate that the presence of an attorney in a mediation does not significantly affect the settlement rate, the time needed to reach an agreement, the perceived fairness of the process, the parties' level of satisfaction with the agreement, or the parties' level of trust that the agreement will be honored. These results indicate that attorneys have much less impact than is claimed by those mediators who do not welcome their involvement in the mediation process.

Nevertheless, the results also demonstrate that the presence of an attorney does affect mediation outcomes in at least two ways: by reducing the parties' level of satisfaction with the mediator's performance and by reducing the level of reconciliation between parties. These findings have practical implications, which we discuss below.

Reduced Level of Satisfaction with the Mediator

The fact that the presence of attorneys appears to reduce parties' appreciation of the mediator's role is not surprising in itself. The outcome of a mediation process may be attributable — at least from the parties' perspective — to the presence of both the mediator and the attorney. Indeed, a party may pay equal attention to both mediator's suggestions and the attorney's advice. From this perspective, the mediator and the attorney "share the stage."

But while this decrease in the level of satisfaction with the mediator is significant ($p < 0.01$), it is nevertheless small in practical terms (−12.1 percent). Furthermore, the settlement rate and the level of satisfaction with the agreement do not appear to be hindered by the presence of attorneys, which indicates that the decreased level of satisfaction with the mediator does not affect mediation outcomes. In fact, the main impact may be on the mediator's ego: when he or she shares the mediation process with attorneys he or she can no longer claim to be the sole savior in a conflict.

Reduced Level of Reconciliation of the Parties

The fact that the presence of attorneys diminishes the parties' level of reconciliation may represent this study's most important result. The presence of attorneys reduced by close to 30 percent the level of reconciliation of the parties during a mediation process, a considerable decrease that makes this result not only highly significant ($p < 0.01$) but also important in practical terms.

We suggest three explanations for this effect. First, attorneys tend to limit conversations to legal aspects, reducing opportunities for relationship-building chitchat between the parties. Second, most attorneys

advise their clients to refrain from apologizing during a mediation, regardless of the circumstances. Third, attorneys often speak on behalf of their clients, which is the essence of legal representation. (The third explanation encompasses the first two.) Indeed, by filtering conversations, attorneys manage to focus them on the legal facts and rid the discussions of any and all apologies.

Furthermore, the presence of attorneys may influence the mediation approach chosen by the mediator — some mediation processes place a greater emphasis on reconciliation than do others. But, on the other hand, some mediation approaches may moderate the attorney's inhibitive effect on the reconciliation process. For example, in the case of an evaluative mediation, which does not seek the reconciliation of the parties as an objective (Riskin 1996), the impact on reconciliation levels will probably be minimal. In the case of transformative mediation, however, the attorney's inhibitive impact could become problematic because reconciliation mechanisms are at the heart of this process (Bush and Folger 1994). The presence of attorneys may thus favor the use of more evaluative mediation approaches.

Strategies to Mitigate the Impact of Attorneys on Reconciliation Levels

In cases in which the reconciliation of the parties is a major mediation issue, the presence of attorneys must be taken seriously. Rather than being defeatist or considering mediation impossible, it is important for mediators to adopt strategies designed to limit the inhibitive impact of the presence of attorneys on the reconciliation process. To this effect, they may use one of three strategies, described below.

Explain the Mediation Framework. As previously discussed, many attorneys adopt an argumentative approach in mediation. This usually reflects both an occupational bias and inadequate knowledge of the mediation process. By correctly explaining the mediation framework and the role attorneys play within it, the mediator could help the attorney develop a more problem-solving approach. Dwight Golan (2002) has suggested that attorneys who do so make it easier to find solutions and may actually encourage the parties' reconciliation.

It may also be useful for the mediator to meet with the attorneys before undertaking the mediation process. Indeed, it is preferable to discuss the attorney's role in the mediation away from the parties to prevent the attorney from losing face in front of his or her clients. This also avoids crystallizing the attorneys' attitude. Obviously, to be effective, this strategy depends on the attorney's willingness to play the mediation game and is therefore designed only to eliminate issues arising from his or her unfamiliarity with the mediation process.

Define the Concepts of "Acknowledgment" and "Apology." A fundamental problem involves apologies: attorneys fear that their clients' apologies may be detrimental to their case should the mediation fail. In other words, they fear that the apologies will be used to prove responsibility at a future trial. Sometimes, the rules governing mediation confidentiality are not enough to reassure some attorneys. To address this concern, the mediator could include in the mediation contract a clause stipulating in explicit terms that any and all apologies or regrets expressed during the mediation process may not be interpreted as admissions of responsibility (Regis and Poitras 2003).

The mediator should explain to the parties why such a clause was included in the contract; they should understand that the clause is not designed to devaluate possible apologies. The mediator should avoid creating a situation in which the parties devalue the apologies and regrets that could be expressed during the mediation process. When both parties recognize their share of responsibility in a conflict, studies have shown that the likelihood of reaching an agreement is dramatically higher (Borg 2000; Poitras 2007).

Encourage Direct Dialogue between the Parties. Our third proposed strategy follows logically from the first two. Once attorneys have "bought into" the mediation's problem-solving mission and have agreed that apologizing does not equate to admitting responsibility, the mediator may consider suggesting to the attorneys that they allow their clients to speak directly to each other. This strategy may prove to be the most important of the three given because direct dialogue between the parties is seen as a major advantage of the mediation process (Picard et al. 2004).

Attorneys, however, cannot be asked to remain silent during the mediation process. To the contrary, they should proactively help their clients to make proposals, fully assess the offers made to them, and sometimes object to certain suggestions. They may sometimes even discuss potential solutions with the opposing party's attorney. It is important that attorneys fully understand the active dimension of the problem-solving approach in order to enable the mediator to take advantage of their presence. Thus, the attorney will no longer be perceived as an obstacle to mediation but instead as a partner in the process.

Limits and Further Studies

In this study, we controlled for the initial level of conflict between parties. We cannot, however, claim to have ruled out all rival explanations in regard to the impact of attorneys on reconciliation. For instance, we did not control for parties' initial willingness to reconcile. It is quite possible that parties coming to mediation with an attorney are less interested in

reconciliation than parties who have not sought legal counsel. Therefore, it might be interesting to include the parties' initial interest in reconciliation as a control variable in future studies.

The legal context of this study is civil law. Would the results be the same in a common law context? Although researchers have noted some philosophical differences between judges practicing mediation under the jurisdiction of civil law and those practicing mediation under the jurisdiction of common law elsewhere in Canada (Roberge 2007), these differences do not seem to apply where the mediation is not practiced by a judge. Because mediations at the CNT are conducted by professional mediators (rather than judges), we can reasonably assume that our results are not significantly affected by the civil law context. Nevertheless, it would be interesting to duplicate the study in a common law context.

In addition, this study is based on workplace mediation. Would the results be the same in other mediation contexts? It would be interesting to further study the impact of attorneys in other mediation contexts. Also, it would be interesting to evaluate whether the study's results apply only to the presence of attorneys. Can they be generalized to other contexts using representatives? For example, do union representative hinder the reconciliation process? Conducting a study comparing the impact of union representatives and attorneys would also be worthwhile.

Finally, our sample was too small to separately analyze the differences between those cases in which both parties in the conflict were represented by an attorney and those cases in which only one party had an attorney present. In such "unbalanced" situations, it would be interesting to compare Party A's responses with Party B's to see the difference between the party who directly benefited from the attorney's involvement and the party who may have felt at a disadvantage. Is reconciliation hindered if there is only one attorney involved? Does the party who does not have an attorney appreciate the presence of the mediator more than the party who does? These are possible questions for a future study.

Conclusion

For many mediators, the presence of an attorney in the process complicates the mediation and is sure to result in failure. These mediators believe that attorneys have a negative impact on the process. Our research submitted this perception to an empirical test. The results generally indicate that the presence of an attorney has no significant impact on the mediation process, except with respect to one aspect. Indeed, only the impact on the level of reconciliation of the parties is significant in practical terms. The presence of an attorney in the mediation process therefore inhibits the levels of reconciliation between the parties.

To defuse the negative impact of the presence of attorneys on the process, we have proposed three complementary strategies. We suggest

that the mediator first coach the attorney to participate more appropriately in the mediation process, namely, by encouraging him or her to adopt a problem-solving approach. Our second suggested strategy is that the mediator explain to the attorney the possible beneficial role of apologies and regrets in a mediation and include a clause in the mediation contract stipulating that apologies expressed in a mediation setting may not be considered as admissions of responsibility. Finally, we suggest that mediators encourage attorneys to allow their clients to speak directly to each other.

To further examine the role of direct communication between parties in mediation, it would be interesting to assess what happens when attorneys speak on behalf of their clients (i.e., short-circuiting direct discussions between the parties). Should the result be significant, the inhibitive effect may be extrapolated to any situation in which parties are represented by a third party speaking on their behalf. Therefore, this effect would not be attributable to the presence of an attorney but rather to the communications protocol.

NOTE

This study received financial support from the Social Sciences and Humanities Research Council (SSHRC) of Canada. The data were collected in collaboration with the Commission des normes du travail du Québec. The author would like to thank Diane Beaudoin, Jean-Marc Gauthier, Daniel Langevin, Danielle Laliberté, Guy Laroche, and Jocelyn Girard of the *Commission des normes du travail du* Québec for their contribution to data collection.

REFERENCES

Abramson, H. 2005. Problem-solving advocacy in mediations: A model of client representation. *Harvard Negotiation Law Review* 10: 10–103.

Allred, K. G. 2000. Anger and retaliation: The role of attribution. In *The handbook of conflict resolution: Theory and practice*, edited by M. Deutsch and P. T. Coleman. San Francisco, CA: Jossey-Bass Publishers.

Borg, M. J. 2000. Expressing conflict, neutralizing blame, and making concessions in small-claims mediation. *Law and Policy* 22(2): 115–141.

Boulle, L. and M. Nesic. 2001. *Mediation: Principles, process and practice*. London: Butterworths.

Bush, R. A. B. and J. P. Folger. 1994. *The promise of mediation: Responding to conflict through empowerment and recognition*. San Francisco, CA: Jossey-Bass.

Contuzzi, P. S. 2000. Should parties tell mediators their bottom line? *Dispute Resolution Magazine* 6(30): 31–32.

Denckla, D. A. 1999. Non-lawyers and the unauthorized practice of law: An overview of the legal and ethical parameters. *Fordham Law Review* 67: 25–81.

Folger, J. P. and T. R. Jones. 1994. *New directions in mediation: Communication research and perspectives*. Newbury Park, CA: Sage.

Golan, D. 2002. Is legal mediation a process of repair — or separation? An empirical study and its implications. *Harvard Negotiation Law Review* 201: 302–330.

Gordon, E. E. 2000. Attorneys' negotiation strategies in mediation: Business as usual? *Mediation Quarterly* 17: 383–384.

Jehn, K. A. 1995. A multi-method examination of the benefits and detriments of intragroup conflict. *Administrative Science Quarterly* 40: 256–282.

Korobkin, R. 2002. *Negotiation theory and strategy*. New York: Aspen Law & Business.

Lewicki, R. J. and B. B. Bunker. 1995. Trust in relationships: A model of development and decline. In *Conflict, cooperation and justice: Essays inspired by the work of Morton Deutsch*, edited by B. B. Bunker and J. Z. Rubin. San Francisco, CA: Jossey-Bass.

Mendelsohn, G. 1996. Lawyers as negotiators. *Harvard Negotiation Law Review* 139: 139–141.
Menkel-Meadow, C. 2000. When winning isn't everything: The lawyer as problem solver. *Hofstra Law Review* 28: 905–924.
Mnookin, R. H., S. R. Peppet, and A. S. Tulumello. 2000. *Beyond winning: Negotiating to create value in deals and disputes*. Cambridge, MA: Belknap Press.
Moore, C. W. 1996. *The mediation process*. San Francisco, CA: Jossey-Bass.
Nolan-Haley, J. M. 1998. Lawyers, clients and mediation. *Notre Dame Law Review* 73: 13–69.
Picard, C., P. Bishop, R. Ramkay, and N. Sargent. 2004. *The art and science of mediation*. Toronto, Canada: Emond Montgomery Publications Ltd.
Pinzòn, L. A. 1996. The production of power and knowledge in mediation. *Mediation Quarterly* 14: 3–13.
Poitras, J. 2007. The paradox of accepting one's share of responsibility in mediation. *Negotiation Journal* 23(3): 267–282.
Poitras, J. and A. LeTareau. 2009. Quantifying the quality of mediation agreements. *Negotiation and Conflict Management Research* 2(4): 363–380.
Regis, C. and J. Poitras. 2003. Aspects juridiques et psychologiques des excuses en médiation médicale. *Revue de Prévention et de Règlement des Différends* 1(3): 51–71.
Riskin, L. 1996. Understanding mediator orientations, strategies, and techniques: A grid for the perplexed. *Harvard Negotiation Law Review* 7: 25–35.
Roberge, J. F. 2007. Comment expliquer la diversité de la médiation judiciaire au Canada? *Revue de Prévention et de Règlement des Différends* 5(3): 1–32.
Rodney, A. M. 1999. Mediation comes of age in Alabama. *American Journal of Trial Advocacy* 32(6): 659–680.
Stimec, A. 1999. Les limites de la médiation. *Bulletin de Liaison du Laboratoire d'Anthropologie Juridique de la Sorbonne* 22(September): 49–58.
— — —. 2001. *Avocats et médiateurs: État des lieux et perspectives*. Working Paper, Centre de Médiation et d'Arbitrage de Paris.
Vanderkool, L. and J. Pearson. 1983. Mediating divorce disputes: Mediator behaviors, styles and roles. *Family Relations* 32(4): 557–566.
Weinstein, J. L., T. Song, and L. R. Phillips. 1996. Winning without trial: Advocacy in mediation. *Trial* 32(6): 28–31.