

GENDER IN MEDIATION: NEGOTIATION & THE GENDER DIVIDE

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First, a word about this paper. At the end I have attached a resource list that includes all the articles and books I read or consulted in preparation and a few others that were recommended but I didn't have time to read. I have not attempted, law review style, to cite to these sources but rather to try to distill a complex and nuanced topic into some thoughts that might be useful to those involved in mediation. Some of my references are second hand – concept rather than precise citation and attribution.

Is this a topic worth talking about?

I'm convinced that it is, based on 25 years of law practice, much involving negotiation and mediation. I would not have come to the same view earlier in my career. I was one of those women who rode in on the coattails of new found liberation for women and enjoyed a modicum of success in studying engineering in college, attending an Ivy League law school and developing a litigation practice. I really believed, based on my own experience, that if you worked hard, achievement was gender blind. I ignored messages to the contrary or dismissed them as due to my own performance. I now believe that I missed some opportunities to have been more effective if I had recognized and acknowledged gender differences in communication styles and behavioral expectations.

A Cobb County, (Georgia, I assume), study of 578 mediations involving 122 mediators yields some interesting results. First, the female mediators had about a 20% higher settlement rate than the male mediators. Looking at only the most popular mediators, most (but not all) who settled cases at higher than average rates were women and the majority who settled cases at lower than average rates were men.

Another study (Professor Bernard, Oklahoma City University School of Law) concludes that while race plays almost no discernible role in mediation, gender does. Possible reasons Bernard points to include that:

- the United States is actually evolving into a color-blind society where the parties and the mediator neither notice nor have a predetermined opinion about color; Or
- at a conscious level, the parties choose to make color a secondary issue; Or

- the mediator steered the parties in a neutral direction or conducted the mediation in such a neutral and respectful way that race faded into the background.

One commentator suggests another possibility: that gender bias lurks at a subconscious level where we operate on autopilot. People tend to think of themselves as neutral, but no one is. We all have biases stemming from stereotypes and our life experiences - family, friends, surroundings, cultural experiences, media, education, etc. It's difficult to remove these biases from our communications and actions without a conscious awareness that we have them. Perhaps because of the heightened awareness of racial bias and stereotypes from the media, from diversity training in the workplace, from the election of a black president, etc., our level of self-awareness has been raised to a point where it is possible to set those biases aside.

In some ways, gender bias is a more complex subject than racial bias and it certainly has not received the same level of attention in the media and our culture. And the attention it does receive tends to reinforce those stereotypes, highlighting studies that show cognitive or behavioral differences between men and women while downplaying similarities.

I'm starting from this perspective as a way of exploring gender in mediation. If we talk about gender differences and expectations we can start to raise their effect to a conscious level of awareness and become more effective in dispute resolution, whether as a mediator, advocate or party.

Nature or Nurture? Examining The Dynamics At Play

From an early age we are sent/sending messages that boys and girls are different in ways that tend to reinforce stereotypes. For example, studies show that girl babies are cuddled more than boy babies who tend to be thrown around more. Even beyond that, babies wrapped in blue blankets are held differently than babies wrapped in pink blankets. A study of children's books awarded the prestigious Caldecott Medal over a 12 year period reveals some provocative statistics:

- Three male characters for every female character;
- 10 men shown in positions of leadership for each woman;
- Male characters hold 140 different occupations, versus 40 for women; and
- As to occupations held by female characters, 50% are housewives, 25% are witches, followed by dancer, singer, musician and queen.

There is also some evidence that the two genders are wired differently (inherently or adaptively), including structural, behavioral and processing differences in male and female brains:

| Women | Men |
|---|--|
| Brains are 10% smaller & 11% more dense - wired for more "gut feeling" | Brains are larger (but size doesn't equate to IQ) |
| More connective tissue between hemispheres | Less connective tissue between hemispheres |
| Wired for human gaze | Not wired for human gaze |
| Larger hippocampus (emotion/memory - women recall more details with emotional events) | Smaller hippocampus (men recall fewer details except when angry or threatened) |
| Talking increases oxytocin & dopamine (pleasure center) | Talking increases dependence |
| Self-esteem is about connecting | Self-esteem is about independence |

Which Planet Do We Come From? Male & Female Communication & Negotiation Characteristics

The popular book by John Gray¹ suggests looking at gender differences as if we come from different cultures. There have been a number of fascinating studies about the behavior, cognitive functioning, and communication and negotiation styles of men and women. Are they an innate part of our DNA or culturally and socially developed or is it a combination? There does seem to be a tendency of women to act consistently with female stereotypes and vice versa for men. Stereotypes develop precisely because they can be useful predictors of behavior. Of course we're all unique beings with our own characteristics. But one way of looking at it is to think of the characteristics identified below along the bell curve for men and women.

| Men | Women |
|--------------------------------------|---|
| Analytical | Emotional |
| Positions | Interests |
| Self-interested | Nurturing |
| Competitive | Cooperative/relationship oriented |
| Direct | Wordy |
| Hierarchy | Connection or intimacy |
| High sense of entitlement | Low sense of entitlement |
| More inclined to boast/toot own horn | Underplay accomplishments - no bragging |
| Dominant | Submissive |

¹ *Men Are From Mars, Women Are From Venus.*

Don't Fit the Mold? Women & Men Are Nonetheless Expected To Comply With Gender Norms & May Be Punished When They Don't

Even if a woman is more competitive than cooperative or a man is more emotional than analytical, other people's biases and filters create an expectation that she or he is (or ought to be) acting consistently with gender norms. Gender based behavioral standards require women to behave modestly and unselfishly and avoid promoting their self-interest. From an early age girls are punished by their female peers for not conforming – not wearing the same clothes as the popular girls – or for bragging – such as about having good grades. Similarly, boys learn early to be tough and not show their emotions. They learn to interact in a hierarchical, competitive way. Sports performance is stressed. They are punished by their male peers for not being aggressive.

In the business world, both men and women can suffer when they don't comply with gender norms. However, many of the male norms are seen as attributes of a successful leader. As a society, we teach women that it is not appropriate or 'feminine' for them to focus on what they want, assert their own ambitions, and pursue their self-interest and we don't like it when they do. Society has a strong expectation that women will abide by their assigned roles and reacts very negatively when they don't. Behavior that can lead to a man to be seen as a straight-shooter or a no-nonsense guy can lead a woman to be seen as too pushy and aggressive. She may be called a bitch - or worse - and find herself closed out of networks or opportunities from which she might benefit.

Women can't necessarily mirror successful male negotiating style. When men express anger they gain status; when women express anger they tend to lose status. Bill Clinton gets points for sensitivity when he sheds a tear, Hilary is perceived to have lost control. A female broadcaster who choked up when the Yankees lost in the playoffs was loudly denigrated even though she was describing the scene of male Yankees coaches crying. In addition, it seems to be more important for women than men to be likeable in order to be effective in influencing people. Studies show that generally likability falls when we boast – but 42% more so for women than men.

The double whammy is that women's relational/transformational stance towards leadership, skills which are strengths and presumably in need in today's organizations, may not serve women well because they are not seen as evidence of competence or demonstrate authority when enacted by women. They may just be seen as doing what women do.

Why Don't Women Ask? Exploring Some Real & Significant Gaps

The book *Women Don't Ask* exposes some startling facts about a negotiation gender gap which leads to well documented economic costs for women. According to the authors, men are significantly more likely to negotiate their starting salary in a new job: and by not negotiating, an individual stands to lose more than \$500,000 by age 60. A study showed that only 7% of women asked for more money in response to initial job offers while 57% of men did. Despite what might be an assumption – that it's a generational issue – this disparity continues today. The book explores the dynamics of gender and negotiation and identifies obstacles that keep women from negotiating effectively for themselves. Some of those obstacles are internal - while men seem to have no trouble negotiating and asking for what they need, women hesitate or fail to ask at all. Social conditioning and cultural expectations are among the causes of these gendered differences. Women don't recognize nearly as many interactions as opportunities for negotiation as men do.

Underlying these results: women are encouraged to behave modestly, unselfishly, and to avoid promoting their own self-interest. There is an implicit *internal* assumption that women should cooperate. More than half of the women studied suffered from a low sense of entitlement (double the rate of men). Illustrating this point, given a task and asked to set a fair compensation for their work, men paid themselves 63% more than women did.

Stereotype reminders seem to also influence those they target. For instance, African-Americans do 25% worse on tests of verbal ability when asked their race. On the other hand, Asian-American students do better on math tests if they are asked their race. There is also a gender impact. A study of female and male college students demonstrated:

- Same performance on math test when they are told that usually there are no gender differences in performance; but
- When told that there are usually gender differences – women's scores dropped by more than half, and men's went up 33 percent; and
- Women do better on math tests when the other people in the room are all women.

Compounding the internal issues are external perceptions and expectations about women that come from early imprint and are difficult to overcome:

- Both men and women offer women less money/reward for the same task;
- Lower initial offers are made to women (who then don't negotiate).

Observations of negotiations show that men and women apply more pressure to concede on women than they do on men. There seems to be an implicit *external* assumption that women should cooperate.

Another study involved symphony orchestra auditions. Historically orchestra musicians were mostly male, and the assumption was that this was due to musical skill and talent. However, the use of a screen during auditions preventing those making selections from seeing the musician resulted in a staggering 50% improvement for women advancing in the auditions and a 250% improvement in getting a seat in the orchestra. Similarly, identical job resumes are rated better if topped with a man's name.

Who Negotiates Better? Both Men and Women

Some aspects of predominantly male characteristics make for positive negotiating skills and the same is true for women. In summary:

Positives in female negotiating styles:

- More likely to recognize and apply a process or rules in negotiation to get to final outcome;
- Take a broad or collective perspective, view elements in a task as interconnected and interdependent;
- See big picture and come up with systemic plan to resolve;
- Comfortable communicating and sharing experiences to work to achieve integrated outcome;
- More concerned with how problems are solved than just getting them solved – ends up with better focus on details that may matter;
- Better at not just focusing on what “they” want and more on what both sides need/want;
- More cooperative view of negotiating consistent with win-win mentality;
- Listening to needs and concerns of other side and trying to find win/win solutions may produce more creative solutions that might have been overlooked in a more competitive or adversarial approach;
- Also tend to preserve and enhance long-term business relationships – burn fewer bridges.

Positives in male negotiating styles:

- Belief that they have a bargaining advantage gives it to them;
- Stronger sense of entitlement to more advantages and rewards causes them to aim higher;
- Greater sense of pride and self-importance that keeps them from backing down;
- Ability to speak up more, use more distributive tasks;
- Want to have questions answered, entitlement to information they believe they need to know;
- Want to make sure people know what their ideas are and to try to get as many people as possible to agree with them;

- Seen as stronger, more aggressive speakers – more willing to push weight around in negotiation and seen as more intimidating;
- Seeking power; believe deserve power;
- Seem to know more than women because better at making it sound as if they do.

What can we do with all this information?

As individuals involved in dispute resolution – as a mediator or an advocate – our goal should be to keep gender issues from becoming a barrier to resolution. A preliminary step is to identify where gender may play a role in the process. Even in a two party mediation there are multiple communication/negotiation dynamics going on at once: advocate and party; opposing parties; mediator advocate/party; opposing advocates. It gets even more complicated when we add in third parties or multiple representatives of the same party (insurance company, spouses, business partners, company president, human resources professional, etc.). This identification is not just limited to opposite gender communications – it is also useful to understand how people of the same gender are interacting with each other.

Once these gender-nuanced dynamics are identified, these considerations may be useful.

1. Recognize Your Own Biases & Preconceptions. We all have them. A female mediator who finds herself bristling at an over-competitive, aggressive male advocate needs to strategically develop a response rather than writing him off as obstructive. A male mediator whose instinct is that the female party representative doesn't have sufficient clout to make a settlement decision should check the facts first.
2. Better Define the Process. Studies show that gender tends to have more of an effect in high ambiguity (open ended, few rules) negotiations than in low ambiguity negotiations where the process is strictly defined and understood. For a mediator or advocate, better articulating and defining the process may help neutralize gender differences and level the playing field.
3. Identify Gender Triggers. Men tend to negotiate better in a highly competitive negotiation while women tend to do better when negotiating for others. Recognize situations that have the potential to trigger subtle or blatant gender stereotypes or role expectations within a certain negotiation context and work to counter those triggers or use them to benefit negotiation performance. For example, men may be encouraged to maximize outcomes by ramping up their competitive drive. Women, on the other hand, may be inspired by reminders that they're

representing not just themselves, but their colleagues, department, company, children.

4. Take Control of the Shadow Negotiation. The shadow negotiation is kind of like the metadata of electronically stored information and is that underlying web that encompasses how people treat each other, who gets heard, how cooperative they will be. For example, you may observe a power struggle going on between parties or directed at the mediator. Taking control may involve countering demeaning, threatening or critical moves by exploring the tactics/emotion behind them. Ask: “can you explain why you feel this way?” Devise a method for diffusing a power tactic rather than backing down or taking it on in a counterproductive way.
5. But Avoid Appearing To Be Judgmental. To be effective, a dispute resolution professional must be able to talk about styles of communicating or negotiating without appearing to be judgmental – particularly when addressing an individual of the opposite gender.
6. Don’t Automatically Identify Competence By Gender Or Gender Behavior. Mediators working in a male dominated industry such as construction should be aware of two dynamics when women are involved as a party or advocate. First, beware of assuming they don’t know what they’re doing in a male dominated world; and second, don’t mistake a more collaborative or cooperative approach to mediation as a signal that the woman is not proficient on the expert subject matter or is caving in because she or client is liable.
7. Don’t Misread Style Differences. A mediator used to men’s negotiating styles may feel women who want to engage in a discussion about how to resolve the dispute are trying to usurp their role as mediator. The response may be to ignore the ideas and limit the discussion to monetary demands, missing an opportunity. It is also important to understand that men may perceive a woman’s focus on relationship, process and consensus as manipulative in a way that was not intended.
8. Properly Perceive The Impact Of An Apology. An apology may play a positive role in mediation. The mediator, advocate or party should be very specific in communications about what an apology signifies because it can mean very different things to men and women. A woman may say she’s sorry in a conversation to express empathy/sympathy/connection, but a man may interpret that statement as her acknowledging it’s her fault. A female mediator might inadvertently communicate to a male attorney that she felt she had erred in some way by saying “I’m sorry”, while actually intending to express empathy over a response to an offer. A female attorney or party hoping to make progress in the resolution by

offering an apology may inadvertently signal to the mediator or opposing party that she's accepting responsibility, thereby acknowledging her position is weaker.

9. Consider The Effect of Gender On Credibility. Credibility plays an enormous role in mediation. The mediator needs to establish it with parties/advocates. Advocates and clients need to establish it with each other as well as opposing parties/advocates. How does gender play a role? Studies about effects of gender on credibility in the courtroom provide some useful information. We can think about credibility as having two components: competence and trustworthiness. Study after study shows that people think men are more competent than women in the courtroom. And there are aspects of mediation where this might be true as well. As noted above, attorneys used to the retired male judge style of a mediator – authoritative, directive – may perceive a woman mediator who begins with a relationship building style to not be competent as a mediator. This may be particularly true if the subject of the dispute is in a traditionally male arena – construction, business, economics, etc. Interestingly, though, studies show that if a woman demonstrates competence in such a subject she may be perceived as being more competent than an equally qualified man. For example, this might involve a female advocate, mediator or party who summarizes a complex issue accurately and succinctly or who performs a difficult calculation. Think strategically about demonstrating competence. Men may need to think strategically about demonstrating trustworthiness.
10. Understand Gender Styles To Keep Them From Interfering. The bottom line really is to identify gender communication problems and neutralize them or even turn them into a positive. An observant mediator may recognize a gender communication gap between a party and his or her attorney and help them understand each other. An advocate may need help from the mediator as to how best to frame a counter-proposal so that it will be understood and considered by the other party. Bringing subconscious biases, assumptions and behaviors into our conscious mind will help us to be more effective in dispute resolution.

GENDER/MEDIATION/NEGOTIATION RESOURCES

Books

Linda Babcock & Sara Laschever, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION – AND POSITIVE STRATEGIES FOR CHANGE* (2007)

Linda Babcock & Sara Laschever, *ASK FOR IT* (2008)

Carol Gilligan, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993)

Pat Heim & Susan Golant, *HARDBALL FOR WOMEN* (2005)

Deborah Kolb & Judith Williams, *THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS* (2000)

Deborah Kolb, Judith Williams & Carol Frohlinger, *HER PLACE AT THE TABLE: A WOMAN'S GUIDE TO NEGOTIATING FIVE KEY CHALLENGES TO LEADERSHIP SUCCESS* (2004)

Deborah Tannen, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (2001)

Deborah Tannen, *THAT'S NOT WHAT I MEANT* (1987)

Deborah Tannen, *GENDER AND DISCOURSE* (1994)

Deborah Tannen, *TALKING FROM 9 TO 5: WOMEN AND MEN AT WORK* (1995)

Brizendine, L. (2006). *The female brain*. New York: Morgan Road Books.

Malcolm Gladwell, *Blink*

Articles

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L. Lloyd Burton, E.D. Famer, L.J. Gee & G. Williams, "Feminist Theory, Professional Ethics and Gender-related Distinctions in Attorney Negotiating Styles," 1991 *Journal of Dispute Resolution* 199-258 (1991).

Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan & Carrie J. Menkel-Meadow. "Feminist Discourse, Moral Values, and the Law -- A Conversation," 11 *Buffalo Law Review* 34 (1985).

Deborah Kolb & Kathleen L. McGinn, "Beyond Gender and Negotiation to Gendered Negotiations," Harvard Business School Working Paper 09-064 (March 19, 2009) available at: <http://www.hbs.edu/research/pdf/09-064.pdf>

Hannah Riley Bowles & Kathleen L. McGinn, "Gender in Job Negotiations: A Two-Level Game," Harvard Business School Working Paper 08-095 (2008), available at: <http://www.hbs.edu/research/pdf/08-095.pdf>

Dina W. Pradel, Hannah Riley Bowles & Kathleen L. McGinn, "When Gender Changes the Negotiation," Harvard Business School, Working Knowledge (February 13, 2006), available at: <http://hbswk.hbs.edu/item/5207.html>

Trina Grillo, "The Mediation Alternative: Process Dangers for Women," 100 Yale L. J. 1545 (1990).

Web Articles/Blogs

Elizabeth Moreno, "Race, Gender, and Class: How Much Of A Role Do They Play In Mediation," <http://mediate.com/pfriendly.cfm?id=5034>

Elizabeth Moreno, "Construction Industry: Women Armed and Dangerous Have Mediators Frustrated," EAMPC

Diane Levin, "Women Don't Ask," <http://mediationchannel.com/2008/04/03/ask-for-it-review-of-babcock-and-laschevers-new-book-on-negotiation-for-women/>

Victoria Pynchon, "Negotiation 101: Gender War or Gender Peace & Prosperity," <http://mediate.com/pfriendly.cfm?id=4892>

Jocelyn Noveck, "The Crying Game: Male vs. Female Tears," USA Today, 10-25-2007; http://www.usatoday.com/news/nation/2007-10-25-1590835410_x.htm

Victoria Pynchon, "Are Women Better Mediators Than Men?" <http://negotiationlawblog.com/2008/11/articles/conflict-resolution/are-women-better-mediators-than-men/print.html>

"Correlation of Mediator Gender to Settlement Rate", <http://cobbmediation.wordpress.com/2008/11/11/correlation-of-mediator-gender-to-settlement-rate/>

Program on Negotiation at Harvard Law School, "Special Report: Gender Matters in Negotiation," www.pon.harvard.edu

Laura Janusik, PhD, Communication, Mediation, and the Brain (presentation to Heartland Mediators Association, March __, 2009)

Reiko Hasuike, "Credibility and Gender in the Courtroom", www.decisionquest.com

Dr. Pat Heim, "The Power Dead-Even Rule, and Other Gender Differences in the Workplace" (videotape lecture).