



Teleconference:
**ADR Practice Development Tips for
Women**

Program Materials

Tuesday, May 14, 2013

12:00 PM – 1:15 PM Eastern Time

11:00 AM – 12:15 PM Central Time

10:00 AM - 11:15 AM Mountain Time

9:00 AM – 10:15 AM Pacific Time

List of Materials

Faculty Biographical Summaries

ADR Practice Development Tips for Women (*slides*)

Women in ADR, *Dispute Resolution Magazine*

CLE Documents

Evaluation

Faculty Biographical Summaries

Gina Miller



Gina Miller is Vice President for JAMS Southwest Region. Since joining the JAMS team in 1989, Miller has become an expert in mediation and arbitration practices. Over the years, she has developed and created numerous programs to train neutrals in marketing, business development, and mediation skills. As Vice President, Miller oversees all of the Southwest Region's Resolution Centers (including Texas and Nevada), ensuring that each one is run in a professional and efficient manner. She is responsible for creating new business opportunities and overseeing the implementation of regional and national marketing initiatives. Additionally, Miller works closely with the regional advisory committee to assist with panel recruitment and serves as the regional representative on the National Operations Committee on the implementation of policy. One of her key objectives is leading her team to consistently focus on superior client service.

Prior to being named Vice President, Miller served as Director of Operations for JAMS Southwest Region and before that, General Manager of JAMS Los Angeles, Santa Monica, Ventura, and Inland Empire Resolution Centers. Her vast experience at JAMS includes managing client services, case management, practice development, and operations, as well as marketing and business development. She has also developed and delivered more than 300 ADR presentations at law firms, bar associations, and insurance carriers. She is a proven leader in the area of operations and has earned the trust and respect of colleagues and neutrals, which has allowed her to be extremely effective in any position she has held with the company.

Miller received an MBA in General Management from Keller Graduate School and a BA at California State University, Long Beach. She also attended the University of Pennsylvania's Wharton School of Business for an Executive Management program. Miller has furthered her education by participating in numerous ADR training programs at JAMS and the Straus Institute for Dispute Resolution at the Pepperdine University School of Law in negotiation, mediation advocacy, and related topics.

Sandra Partridge



Sandra Partridge is the Vice President of the Commercial Division for the American Arbitration Association in New York and New England. In addition to her management activities, she conducts presentations for public and private sector audiences on a variety of ADR-related topics and assists large and small businesses with the design and implementation of ADR programs. Ms. Partridge has been a featured speaker and panelist on various arbitration and mediation topics at the ABA Business Law Annual Conference, the New York County Lawyers' Association and the Dispute Resolution Section of the American Bar Association. She hosted the AAA's *Ask and Answer: Arbitration* program and *Managing Your First Arbitration* program with the College of Commercial Arbitrators. She received her JD from the Dickinson School of Law at Pennsylvania State University where she studied and worked with Professor Thomas Carbonneau, world-renowned arbitration scholar, and served as co-editor of the series of AAA Handbooks on: Arbitration, Mediation, and International Arbitration.

Ms. Partridge received her AB in American Studies and English from Dickinson College. Ms. Partridge has over twenty-five years of experience in retailing and marketing including executive positions and consulting. Prior to joining the AAA, she held several vice president-level positions with Waldenbooks/Borders, Eye Care Centers of America, and Musicland/Sam Goody, where as Vice President of Strategic Planning she developed the Suncoast Motion Pictures video chain. Ms. Partridge is a previous winner of the American Bankruptcy Law Journal Prize, CALI Excellence Award for Highest Achievement Debtor and Creditor. She also served as Senior Editor of the *Journal of American Arbitration*, was a member of the Willem C. Vis International Arbitration Moot Court Team and was a Miller Center Public Service Advocate. She is a member of the Pennsylvania Bar, the New York Bar, City Bar, and the American Bar Association.

Harrie Samaras



Harrie Samaras founded the ADR & Law Office of Harrie Samaras for which she serves as a full time neutral in U.S. and international disputes. She focuses her mediation and arbitration practice on complex commercial cases including intellectual property and business/technology disputes. Since 1985, her private and corporate practice experience has included litigating intellectual property cases, representing clients in mediations and negotiations, ADR counseling, and extensive experience in early case assessment.

Harrie serves as a mediator on an ad hoc basis and for such ADR organizations as: AAA, ICDR, CPR, WIPO, and the U.S. International Trade Commission. She is a Fellow of the Chartered Institute of Arbitrators and the College of Commercial Arbitrators and she is an IMI certified mediator.

In addition training mediators, Harrie has taught mediation advocacy and frequently presents on ADR topics at professional and bar association programs and at universities. She has authored numerous articles on ADR topics for various legal and business publications and she is an author and the editor of the book ADR Advocacy, Strategies, and Practice for Intellectual Property Cases published by the ABA's IPL Section in 2011.

Harrie holds LL.M., J.D., M.S. and B.S. degrees.

Anne Marie Seibel



Anne Marie's practice involves various forms of complex litigation. For example, she has served as counsel to HealthSouth Corporation in wide-ranging litigation related to the corporate fraud committed by some of the company's former insiders. Her complex litigation experience also ranges to managing mass tort litigation in the pharmaceutical arena. Anne Marie enjoys pulling together all the moving parts in multi-forum or multi-plaintiff litigation to work with her clients to successfully face the challenges of litigation in efficient and creative ways.

Anne Marie has handled cases, including trial experience, in jurisdictions ranging from Alabama state and federal courts to the Tribal Court of the Poarch Band of Creek Indians. She has advised her clients on legal matters as diverse as business torts and competitive practices, pharmaceutical litigation, and challenges to arbitration awards.

Inside the firm of Bradley Arant Boult Cummings LLP, Anne Marie served as the Chair of the Interim Diversity Committee and is one of the founders of the firm's Women's Initiative, the Winn Initiative, named after one of the first female partners in the South, Ellene Winn, of our firm. She is also a member of the firm's Associate Committee, an ex officio member of the Diversity Advisory Committee, and is a former member of the Recruiting Committee.

Anne Marie also has served in various subcommittee roles in the ABA Section of Litigation Woman Advocate Committee, for which she was named an outstanding subcommittee co-chair for 2009-2010. She is currently serving as co-chair of that committee for 2010-2011. Related to that work, Anne Marie served on the Editorial Board for the second edition of the ABA's book, The Woman Advocate. In that book, she co-authored a chapter, entitled "Bridging the Generational Divide."

Kimberly Taylor



In her role as COO, Taylor oversees JAMS operations in the United States and abroad. Working directly with the President and CEO, and leading a team that spans 25 resolution centers across North America, Taylor is responsible for the company's day-to-day operating activities. She also provides operational support for JAMS International, headquartered in London.

Taylor has been a key contributor to JAMS since she joined the organization in 1999, most recently serving as Vice President of the East/Central Region, where she oversaw unprecedented growth and expansion efforts, led panelist recruitment, business development, strategic planning and daily management of resolution centers in the region. As Associate General Counsel, and an expert on arbitration processes, she also developed and conducted training of staff and neutrals in arbitration matters and served on the JAMS National Arbitration Committee. She is a frequent lecturer and speaker and has developed ADR programs for business and government agencies. Taylor joined JAMS in 1999 as Business Manager of the Ventura Resolution Center. Prior to taking on the role of Vice President, Taylor served as General Manager in Los Angeles and then New York, where she played an instrumental role in upgrading client service standards, and developing effective processes for case management.

Prior to joining JAMS, Taylor practiced law in Ventura County, California. She earned her J.D. from Ventura College of Law, where she later served as an adjunct professor. She is a member of the California State Bar.

Women in Dispute Resolution (WIDR) Presents

ADR Practice Development Tips
for Women



Meet the Panel

- **Kimberly Taylor** – Sr. Vice President, COO, JAMS
- **Sandra Partridge**, Vice President, American Arbitration Association
- **Harrie Samaras**, ADR & Law Office of Harrie Samaras
- **Gina Miller**, Vice President, SW Region, JAMS
- **Anne Marie Seibel**, Bradley Arant Boult Cummings

Agenda

- Introductions
- The Challenge
- What are Clients Looking For?
- Building a Brand
- Q&A

The Challenge

- Women under-represented in legal profession
 - Partners in Private Practice (AmLaw 200) - 15%
 - Fortune 500 General Counsel – 20%
 - Fortune 501-1000 General Counsel - 15%
 - Fortune 500 C-Suite - 16%
 - Judiciary (Federal) – 25%

The Challenge – Supply & Demand

- American Arbitration Association Roster Diversity
 - Total Women
 - By Practice Area
 - Geographic
 - % of Appointments
- JAMS Diversity
 - Total Women
 - By Practice Area
 - Geographic
 - % of Appointments

What are Clients Looking For?

- Perspective of Litigators/In-House Lawyers
 - How do mediators and arbitrators get selected?
 - Recommendations
 - Qualities for Mediators
 - Qualities for Arbitrators
 - Are women evaluated differently than men?

Building a Brand

- Getting Started
 - Building on your background
 - When to start?
- Getting on Lists
 - Rosters
 - Courts
- Differentiation

Building a Brand - Tips

- Gain experience, but don't rest on your laurels
- Develop a plan and timeline
- Commit to starting over
- Be confident!
- Develop a compelling biography
- Target markets with growth potential
- Network
- Advertise

Building a Brand – Tips

- Write articles or books, lecture
- Value your skills – don't under charge
- Do your best as a neutral!
- Never give up!



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MAGAZINE

SPRING 2012

Women in ADR



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DISPUTE RESOLUTION MAGAZINE

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From the Chair By Deborah Masucci

You've come a long way baby! Remember that long ago slogan? Have women really come a long way?

Women make up 50 percent of law school graduates but only 15 percent of equity partners in Am Law 200 law firms. According to the 2010 Catalyst Consensus, companies surveyed report that women hold 17.7 percent of senior office positions. I provide the law firm and business numbers because arbitrators and mediators include both lawyers and non-lawyers. Women who are equity partners and senior business leaders will surely be successful arbitrators and mediators.

However, a recent study by Gus Van Harten reports the dearth of women arbitrators appointed to resolve investment treaty cases. He reported that of the 631 arbitrator appointments in investment treaty cases through May 2010, only 41 were women (6.5 percent of all appointments). The number of women who are arbitrators and mediators has increased, but based on anecdotal evidence, they are not being selected to serve on cases in proportionate numbers. The full study is available in the February 2012 issue of Columbia FDI Perspectives, <http://www.vcc.columbia.edu/content/fdi-perspectives>.

This bar year, the Section of Dispute Resolution established a Task Force on Women in Dispute Resolution (WIDR). One of the goals of the task force is to undertake a survey to determine the frequency women are appointed as neutrals, the types of cases they resolve, and what motivates the selection of a woman. The goal is not only to collect the information and report the findings, but also to raise consciousness about considering women when determining who to select to resolve a dispute.

The articles in the spring issue of *Dispute Resolution Magazine* focus on gender in negotiation. Professor Carrie Menkel-Meadow broadens the discussion to include the differences that gender makes to parties and lawyers as well as dispute resolvers. She concludes that gender differences may be relevant but when added to other factors when selecting a neutral, may not be as determinative as we would like to believe. Susan Coleman and Dorothy Weaver review the literature written about women and negotiation. They highlight how gender may help or hinder negotiations and offer suggestions to improve negotiation skills. Deborah Rothman writes on gender diversity in arbitrator selection, offering several explanations for the dearth of women on commercial arbitration panels. Gina Miller offers women practical tips on building a practice as a neutral. She includes probing questions to help develop a business plan and focus networking activities. Joe Garrison reports on perceived differences in

arbitrators and mediators that are related to being a man or woman. He discusses gender management styles, how women are evolving in the business, and that as more women break the glass ceiling, there will be a commensurate increase in confidence in women as decision makers resolving disputes.

All of these articles will stretch your mind and push you to think about being more inclusive the next time you are selecting or recommending a dispute resolver. However, what can women do to speed up the process? I suggest that there are a few things that we, as women, can do that will make a difference to be successful dispute resolution professionals.

First, **be yourself**. When I first entered the job market, I went to an interview with a bow tie finishing my business suit. The interviewer quickly disabused me of the fact that I had to dress like a man to get the job. Find your own style or voice. It is a mistake to be like a man or be someone you are not. Your natural style will lead you to success by increasing your confidence and demonstrate your authenticity.

Second, **use your communications skills**. Women are natural communicators. They excel at developing relationships and building networks. Don't be shy about exploiting your network and showcasing your capabilities. No one will tout your horn better than you.

Third, **help others**. In some employment sectors, women are perceived to undermine other women and sabotage their efforts. Women should promote other women.

Fourth, **be a leader**. Leaders engender trust and confidence. If we know one thing it is that mediators and arbitrators are selected because they are trusted to help the parties resolve a dispute. Demonstrating leadership builds that trust and confidence that will go a long way to your next selection.

Fifth, **remember you are always interviewing for a new job**. You never know who will recommend you for your next job. Always put your best foot forward, be sincere, and be natural.

Finally, **take chances**. Be confident in your skills and expertise. Sometimes to get ahead you may need to take chances before you think you are ready. Success after taking those chances is very gratifying. ♦

Deborah Masucci is Chair of the American Bar Association Section of Dispute Resolution and Vice President of the Office of Dispute Resolution at Chartis. She can be reached at chairdrsection@gmail.com.

Take the Next Step

The Master of Laws (LL.M.) in Dispute Resolution degree program provides students with the resources of a major university to design a program of study according to their particular interests in the dispute resolution field. LL.M. graduates are now working in the United States and abroad in a variety of positions.



The LL.M. program greatly improved my abilities as an advocate for and counselor to my clients. I learned how to ascertain the true interests of my clients and opponents, how to explain complex legal problems, and how to develop real and lasting solutions. The program is not just for those who plan a career as a neutral. Any lawyer who litigates or counsels clients would benefit from the University of Missouri LL.M. program.

Lowell Pearson, LL.M. '06
Partner, Husch Blackwell LLP
Jefferson City, Missouri

Earning my LL.M. from Mizgou opened doors for me, enabling me to move comfortably from a mediator in private practice to one who is responsible for the design and implementation of a complex program. What I value most is coming away with a sophisticated understanding of the theories behind the practical issues that come up every day in my job.

Andrea Braeutigam, LL.M. '05
Executive Director
Oklahoma Agricultural Mediation Program, Inc.



When I enrolled in the LL.M. Program, all I wanted was a jump start on an ADR career. I found a discipline far richer than I thought, a faculty that challenged and sharpened my analytical abilities, and the opportunity to make significant contributions to a burgeoning field. My time at Missouri not only opened a new career path, it led me places I never thought possible.

Art Hinshaw, J.D. '93, LL.M. '00
Clinical Professor of Law
Director, Lodestar Dispute Resolution Program
Sandra Day O'Connor College of Law, Arizona State University

My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities and academic development, which I share with others in my country.

María Elena Jara Vasquez, LL.M. '04
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Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers

What Difference Does “Gender Difference” Make?

By Carrie Menkel-Meadow

Introduction: Gendered Justice?

What does it mean to talk about or study “women in dispute resolution” when women play so many different roles in dispute resolution—as party-disputants, lawyer-representatives, witnesses, experts, negotiators, mediators, arbitrators, special masters and other forms of “dispute handlers?” Any dispute involves many of these roles, now played by people of both genders who interact with each other in different substantive contexts, physical sites, and with a great variety of gender composition in groups large and small. In this essay I review how I, a feminist scholar and practitioner in the fields of dispute resolution and gender and law studies, have evolved, as has the underlying research, from a firm conviction about existing gender differences in dispute resolution behaviors to a more nuanced and contextualized approach to the study and practice of gender in dispute resolution. Gender may matter in dispute resolution, but other factors, especially in such

an *interactive* field of behavior, may trump or smooth out or make more complex any gender differences in the pursuit of dispute resolution. In short, *gender matters, but context may matter more*.

Twenty five years ago I wrote an article, “Portia In a Different Voice: Speculations on a Women’s Lawyering Process,”¹ which controversially claimed that with the addition of more women in the legal profession, legal processes would be likely to change, and more use of problem-solving, relational, contextual, and “caring” methods of dispute resolution would alter the way in which legal, social and economic problems would be solved. This article, which adapted and applied the even more controversial work of psychologist Carol Gilligan,² argued for a “different” approach to legal problem solving and dispute resolution based on notions of care and connection for the parties engaged in disputes, the possibility of less brittle and binary conclusions of right and wrong and legal propriety, and a more “mediated” approach to problem solving. The short-cut example of all this came

Although I continue to think that gender *somehow matters, sometimes, in some places*, more recent research indicates that the difference that gender difference makes is quite variable, depending on case type, context, role of participant (e.g. agent or principal) and now perhaps, different generations of disputants and disputes.

from the classic “Heinz dilemma” example from Gilligan’s work, itself derived from the work of moral development psychologist Lawrence Kohlberg, in which Heinz needs a drug to save the life of his wife but he cannot afford it. The question posed to subjects of the moral dilemma study was, is it morally permissible for Heinz to steal the drug? Gilligan reported on gendered responses to this dilemma. Jake, the boy, using rules and legal reasoning, balances property rights against human needs and treats the problem like an “algebraic equation,” requiring a single solution.³ Amy, the girl, prevaricates and looks for other solutions. I argued then, that like a “bad” law student, Amy fought the hypo requiring a single judgment or answer, and instead she looked for both processes and outcomes that could meet the needs of all the parties involved in a dispute. Couldn’t the parties just sit down and talk about it, perhaps negotiating an installment payment plan or some other solution? Wouldn’t women try to resolve such difficult legal, social and human dilemmas differently?

This application of controversial empirical and theoretical work in gender studies to law, at the same time as modern “alternative” dispute resolution was gaining ascendancy in both court systems and private dispute resolution, continues to be studied and argued about, as claims of gender difference or similarity in dispute resolution behavior and legal problem solving continue, in my view, without definitively clear, robust and conclusive findings.

This essay reviews some of the continuing efforts to determine whether gender has any significant or predictable impact on dispute resolution behavior. I continue to think this is an interesting, but inconclusive question, especially because dispute resolution is itself an interactive process involving parties, representatives (lawyers) and dispute resolvers or facilitators (negotiators, mediators, arbitrators and judges, among other roles), so that the mix or *context* of gendered participants *interact* with each other and also with *the site* (court, private mediation, quasi-private arbitration, negotiation) and *subject matter* of any particular dispute. Although I continue to think that gender *somehow matters, sometimes, in some places*, more recent research indicates that the difference that gender difference makes is quite variable, depending on case type, context, role of participant (e.g. agent or

principal) and now perhaps, different generations of disputants and disputes.⁴

Parties in Disputes

Much of the work on gender in negotiation or legal disputing assumes that disputants, as principal parties, are much affected by their gender. Women are less likely to view disputes and transactions as negotiable events, as Linda Babcock and Sara Laschever noted in “Women Don’t Ask: Negotiation and the Gender Divide.”⁵ Women are also more likely to compromise or give in to the other side, especially when there is some relationship (friend, family member, repeat player, or workplace superior⁶), therefore requiring a slew of self-improvement advice for how to be better and stronger negotiators,⁷ although when closely examined, most of the advice doled out in such books is not much different for women than what is offered to all in our negotiation canon in such works as “Getting to YES.”⁸ Empirical work on women as direct parties in disputes is actually far more complex, with great relevance for what parties want in disputes, and what they ask their lawyers to achieve in represented negotiations, mediations or arbitration, as well as how they behave themselves as parties. Perhaps most important in such studies is to consider if women are negotiating or disputing directly for their own interest (where they are often perceived to be less demanding, conciliatory and compromising) or whether they are working in a more *representative* capacity (such as a manager of employees, agent for clients, nurse for patients, or mother on behalf of children’s needs), where they are also credited for actually having different,



Carrie Menkel-Meadow is Chancellor’s Professor of Law at the University of California, Irvine School of Law and A.B. Chettle Professor of Law, Dispute Resolution and Civil Procedure at Georgetown University Law Center. She is the co-author (with Lela Love, Andrea Schneider and Jean Sternlight) of “Dispute Resolution:

Beyond the Adversarial Model” (2nd ed. 2011, Wolters Kluwer Law and Business); “Negotiation: Processes for Problem Solving” (2006, Aspen Wolters Kluwer) and “Mediation: Practice, Policy and Ethics” (2006, Aspen Wolters Kluwer), among many other books and articles. She was the first recipient of the ABA Section of Dispute Resolution Award for Outstanding Scholarly Work in 2011. She can be reached at cmeadow@law.uci.edu.

and sometimes “better,” leadership, problem-solving or representative skills.⁹

Recent work on women as parties in disputes, both in mediation and in court settings, indicates that consistent with procedural justice findings generally, process matters independent of outcomes. In one of the most rigorous studies to date of mediation, Tamara Relis has found that women as litigant-parties in mediation processes were more concerned with emotional, not just compensatory, aspects of their mediated cases, were more likely to want alleged harm doers (defendants) to attend mediation sessions and to hope for direct communication with other parties, not just about legal issues, but about “extra-legal” aspects of their disputes.¹⁰ In an earlier study designed to

measure whether both women and minorities fared differently in different dispute resolution processes, researchers in New Mexico rigorously paired cases in litigated settings with court-annexed mediations with

different race, ethnic and gendered dispute resolvers (judges and mediators). Among the complex and varied findings of this study was the interesting result that although many women actually fared better in mediation sessions (in relatively small claims matters) they often preferred court adjudication.¹¹ This was some confirmation of Trina Grillo’s important critique of mediation as being an unfair process for disempowered women many years ago.¹² The *perception of fairness* or other attributes of a dispute resolution process may turn out to be more important than the actual outcomes themselves.

For many years I have been wondering and teaching about the interesting paradox posed by contradictions in both scholarly and popular views of differences in disputing processes. Grillo, Penelope Bryan, Martha Fineman and others have long argued that in situations of informal and non-public or not strong law-enforcing dispute processing (e.g., negotiation, mediation), women are “disempowered” and do less well than they might in more formal, rule and procedure based settings such as full court adjudication (primarily in family and employment matters).¹³ But, researchers outside of law have empirically demonstrated that in fact women are more effective at speaking the language of problem solving which is particularly used in such informal settings as mediation. Deborah Tannen’s bestselling books on gendered communication in both the workplace and in relational contexts demonstrate that women are more forthcoming in communicating their needs, desires and ideas for problem

solving than are men.¹⁴ Thus, in at least some of those informal dispute resolution settings, women are actually more comfortable with the language of psychological needs and problem solving and also potentially more patient. In Tannen’s work, men often are impatient to get to a quick and efficient resolution, rather than spend more time on “relational” work or looking at many sides to the problem. Relis’ recent research comments on this, noting that some women plaintiffs are less comfortable talking and advocating strongly in mediation settings, but that female lawyers are more likely to engage in problem solving and collaborative behavior in mediation settings, suggesting that the role that gender plays in dispute resolution is strongly tied to *role* (professional), as well

as to *place* or *site* of dispute resolution.¹⁵

More recent research on women as parties to negotiation or as parties in settings where others represent them recognize more rigorously that *context* (type of case and setting) and *the*

...[I]n at least some of those informal dispute resolution settings, women are actually more comfortable with the language of psychological needs and problem solving and also potentially more patient.

interactive expectations of opposite parties can affect what happens in a negotiation greatly, so that there is great variance in “performance” in negotiated settings. Borrowing from work in cultural studies, “performativity” in dispute resolution can depend on “triggers,” so that women negotiators working with each other may produce different behaviors than if negotiation dyads are mixed and someone (male or female) makes assumptions of nurturing, problem-solving behavior, or in other studies, overly “aggressive” behavior by women. Expectations of stereotypes may “trigger” particular reactions, but with less stereotyping negotiators are freer to just use whatever strategies and problem-solving skills they have. The point here is that stereotypic assumptions produce reactions (both ways) and that more modern negotiators and dispute resolvers can be taught to read, defuse or “turn” (Deborah Kolb’s term) these stereotypic behaviors into more productive means of dispute resolution.

Knowledge of these stereotypes is important, but newer research of younger generations of negotiators, or those in particular professional contexts such as lawyers, business people, real estate agents, or brokers, seems to be indicating that change is afoot. Neither gender nor negotiation behaviors are immutable. Professional role, time, levels of education, training, preparation, client relations, and dispute context may trump whatever gender variations might seem to some to be “natural” or innate. Gender difference research for decades has debated, without successful conclusion, the relative weights of

“nurture” (socialization and education) and “nature” (biological forces) in forming our understandings of how gender operates, both conceptually and behaviorally. As more women enter professional roles in dispute resolution, more training, experience and knowledge of these research studies may be dampening the perceived earlier gender differences, at least in some contexts. In some other contexts, gender difference may still be salient.

Professionals in Dispute Resolution: Lawyers and Other Representatives

Carol Gilligan’s work in the 1980s produced many studies seeking to discern if there were gender differences in different professions, especially the legal profession, and in different decision-making contexts. One of her students studied differences in ethical decision-making by male and female lawyers and learned that when lawyer ethical rules were relatively clear, there were little to no differences in how male and female lawyers decided what was ethically mandated. But when the rules were more ambiguous, such as whether to turn over adverse evidence to a lawyer on the other side of a case, or when actual harm to a person was involved, such as custody issues for children, women lawyers were slightly more likely to consider “justice” to the other side, rather than “pure” zealous advocacy.¹⁶ Later studies by Gilligan have demonstrated some merging of gender differences, that is, more girls moving to the male (clearer “justice” rule-based) mode of decision-making,¹⁷ while a smaller core of girls and young women remain committed to a “care” and relational approach to moral decision making and problem solving, though studies also demonstrate that newer generations engage in more “cross-over” or context specific forms of reasoning.

Earlier work on women in business and other professional settings demonstrates that to the extent women have something particular or different to offer, there must be a “critical mass” (variable in different sectors) for the message to be accepted on its own merits and be “detached” from a gendered representation.¹⁸ Studies of both law students in negotiation classes and now a few of lawyers confirm that negotiated outcomes do not differ by gender. But perceptions of results achieved (e.g., women are more self-doubting and critical, are more likely to take negotiation courses pass/fail) or assumptions that stereotypic behavior is expected continue to document differences between perceptions and assumptions and the actual outcomes and behaviors in negotiation.¹⁹

Of the more recent studies on lawyer behavior, particularly in the mediation setting, Relis suggests that women lawyers, particularly defense counsel in medical malpractice cases, had greater “extra-legal sensitivity” (the need for non-compensatory items, like apologies, etc.) and concern for parties on the other side of cases than did male attorneys. But Relis also found that more

facilitative female mediators, especially non-lawyer mediators, tended to be overpowered by aggressive male litigators in mediation settings, suggesting that some of the earlier observed gender differences are not yet gone.²⁰ Relis’ study also found that female plaintiffs were more likely to be overpowered by male mediators during mediations than male plaintiffs, demonstrating that the interaction of the gender of the party, lawyer or representative and dispute manager professional (mediator or judge) is complex. It often involves, as Relis eloquently states, “differentially experienced parallel worlds” in mediation by parties, lawyers and mediators, where gender differential is still part of the experience.²¹

Professionals in Dispute Resolution: Judges, Arbitrators and Mediators

When inquiring about gender differences in dispute resolution, people are often concerned most about the gender of dispute resolution professionals who may decide or manage their cases. Both clients and legal scholars want to know, does the gender of the judge, mediator or arbitrator make a difference? A vast scholarly body of work has explored whether the gender of a judge affects both the outcome and the process of judging in adjudicative settings. It is difficult to summarize this literature in a few words, but generally most studies have confirmed little difference by gender, except in a few gender-salient areas — family law, civil rights, employment, criminal law, and domestic violence, and not always in expected directions. Women judges, for example, are sometimes harsher in sentencing female criminal defendants than are male judges, unless there are children present, which can sometimes make a difference. Political party or other background and demographic factors have been shown to have a much greater impact on judicial outcomes than gender alone.²²

In my own recent work, however, building on the path-breaking analysis of some of my colleagues who comprehensively studied differential immigration asylum outcomes throughout the United States, the gender of the immigration judge proved to be one of the most robust findings in a study of gross disparities (mostly by region) in the granting of asylum. An applicant for immigration asylum had a 44 percent greater likelihood of being granted asylum if the immigration judge was female.²³ These data demonstrate the importance of case type on gender-differentiated behavior. Women administrative judges seemed to be more sympathetic to claims of persecution, extreme hardship and family unification, and asylum applicants were likely to fare better with all judges if they already had dependent family members living in the United States. Without belaboring this one context here, it is clear that *case-type* and *legal standard* (asylum is both a difficult, and rigorous, but somewhat discretion-based legal standard where individualized fact-finding is

crucial to the decision) can make gender more salient than in some other areas. Gendered judicial behavior thus continues to be rigorously studied by social scientists as the number of women judges increases at all level of court in the United States and abroad as well.

It has been far more difficult to study what, if any, gender differences or effects there are in the mediation and arbitration contexts, in part because so much mediation and arbitration is confidential and not documented by reported decisions. Though the numbers of female arbitrators and mediators continues to grow, some areas, such as international commercial arbitration and the appointment of special masters/mediators for federal courts and mass and class action litigation, are notoriously known for their underrepresentation of women as dispute managers.

In a rare comparative and rigorous study of mediation and litigation that explored the gendered experiences of parties, lawyers and dispute professionals, Relis found that there were gendered distinctions among mediators and lawyer and party preferences. Although many parties, particularly female plaintiffs, were looking for direct communication opportunities, as in facilitative settings, seeking more than compensatory outcomes, the lawyers were much more likely to want evaluative mediators. Male lawyers were more likely to manipulate or disfavor mediation, and female mediators (particularly non-lawyers) were more likely to use more facilitative methods. Thus, Relis' study, though limited in size, scope and legal jurisdiction, paints a rich and variegated picture of how many variables impact the question of gender difference in dispute resolution: parties and lawyers may have different goals and purposes when they are engaged in dispute resolution, dispute managers/handlers and resolvers may use a wide variety of different techniques, depending on the *site* (court, private, public, hybrid or pure form of dispute resolution), *case type* and their own *personal styles* (facilitative or evaluative).

Though the New Mexico study discussed above²⁴ also revealed some preferences for third-party neutral ethnic or gender "matching" (parties preferring judges, mediators or other dispute resolvers of their own gender or ethnic or racial demographic), such ideas or preferences of gender matching are clearly not possible in complex cases of diverse genders, which may involve many males and females, as parties, lawyers and dispute professionals in the room in a large case. Data on these complex cases with many interactive factors are needed but extremely difficult to obtain. It is hard to know exactly what gendered justice would look like in many kinds of cases, though in my own experience, female plaintiffs in arbitration in the mass medical product Dalkon Shield litigation, certainly a "gender-salient" case type, were clearly happy to have a female arbitrator whom the parties believed would at least understand their literal pain and suffering.²⁵

What Does it Mean, and Where Do We Go from Here?

As both a scholar and practitioner of dispute resolution and gender issues in the law, I remain continuously fascinated by the issues, even though, as I suggest here, research to date does not consistently support universal gendered differences in dispute resolution practice. As a rigorous social scientist and an eclectic (using both facilitative and evaluative techniques where appropriate) and pragmatic mediator and arbitrator, I think that gender difference sometimes matters, when the case is *gender salient* (medical, physical, emotional harms, discrimination, family matters, immigration, perhaps certain welfare claims, etc.). But I also know that so many other variables may trump, modify or make more complex the role that gender difference may play in the resolution of any dispute that I fear we often oversimplify the role that gender may play in dispute resolution. When one looks at many modern dispute resolution settings, in which litigants, parties, witnesses, lawyers or other representatives, experts, and then different kinds of third-party neutrals in the room gather, we are now more likely than when I first started in this field over 30 years ago to see more gender diversity in the different axes of possible interactions. Still, it is difficult to assert any simple line of behavior, causation, analysis, process or outcome that will be gender determined. Clearly, it would be important to study all of this, but I doubt we would be able to develop sufficiently rigorous "controls" for all of the possibly interacting variables.

My old friend, mediator Gary Friedman, likes to say that "the law is certainly relevant in any mediation, but it may not be determinative."²⁶ I think that gender differences, and variations between and within genders, may be relevant or salient in any dispute but, when interacting with other variables, they are not likely to be as determinative as we once thought. All of this, of course, depends on case type, jurisdiction, type of dispute resolution, and, most importantly for me, the continuing issue of the need for continued additional gender representation among those who not only have disputes, but also those who "do" dispute resolution. Without a fair and just representation of women lawyers, representatives, mediators, arbitrators, negotiators and judges, I do know that not all parties would have a fair chance of justice, whether gendered or not. Having professional dispute resolvers and professionals of both genders (and of racial, ethnic and class diversity as well) is essential for democratic representation of the parties in disputes and for the possibility of seeing that how we resolve disputes may be different and depend on greater diversity of ideas for how to solve problems, depending on who is actually there to participate. ♦

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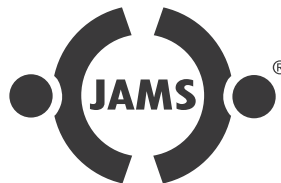


MICHAEL K. LEWIS
and
LINDA R. SINGER



MICHAEL K. LEWIS, ESQ. and **LINDA R. SINGER, ESQ.** are dispute resolution pioneers who have trained thousands of professionals, students and volunteers worldwide. They co-taught the Mediation Workshop at Harvard Law School's Program on Negotiation for Lawyers for 25 years and at the CPR Institute for Dispute Resolution as well. In 1971, they were instrumental in forming Washington D.C.'s Center for Dispute Settlement, which has developed, operated and evaluated various ways of settling disputes—primarily through mediation—in neighborhood justice centers, courts, schools, prisons, hospitals and other organizations. Michael and Linda are highly regarded, nationally known JAMS neutrals who have resolved many high profile disputes.

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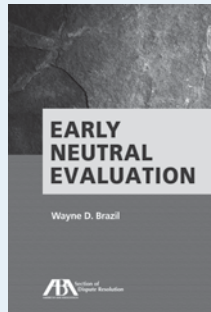


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Endnotes

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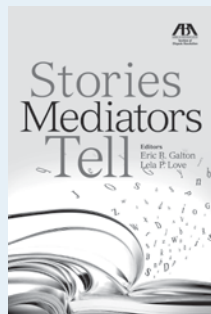
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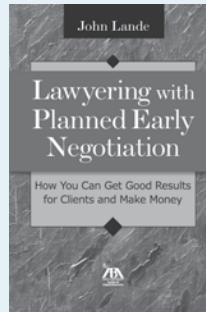
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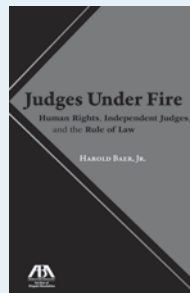
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Women and Negotiation: Tips from the Field

Susan W. Coleman and Dorothy E. Weaver

What does evidence — and the experience of practitioners — tell us about building women's negotiation competence? In this article, based on the substantial literature on women and negotiation in the accompanying article and our own experience as negotiation coaches, trainers, educators and researchers who have worked extensively with women, we provide practical suggestions about what we think are some of the most important things women should recognize and pay attention to regarding negotiation — whether for themselves or on behalf of others.

We offer five suggestions: Becoming proficient at “win-win” strategies, viewing “negotiation” with a wide lens, taking extra time with competitive or distributive problems, being a life-long learner of negotiation, and walking your talk.

“Win-Win” is a Breakthrough for Women: Become Proficient at This Strategy

Researchers have known for a long time that there are two main strategies in negotiation — competition

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The Literature on Women and Negotiation: A Recap

By Dorothy E. Weaver and Susan W. Coleman

Thirty years of research on gender and negotiation have yielded a complex picture. Although research has established factors and contextual situations that appear to enhance women's willingness to speak up and negotiate, most studies have been conducted in laboratory settings using cases and simulations.¹ What remains to be fully researched and understood are the factors that support women as they learn to speak up and negotiate in the "real world" of the workplace and home environment. Yet, some studies remind us that women can—and often have—learned to speak up and negotiate.² These journeys are ones that deserve close examination and discussion in our field.

From our perspective as practitioners, we have seen women have tremendous breakthroughs in their attitudes and understanding of what negotiating can be. When women experience success in negotiation, even in simulated cases during negotiation training sessions, we have witnessed life-changing moments.

At the same time, we recognize that negotiating is often seen as anathema for women. Women can have barriers in the form of mindsets or attitudes that appear to hinder, or even stop, their willingness to consider learning about negotiation. We are conscious of the risk of reinforcing stereotypes and conclude that our role is to help women move past these barriers by enhancing their understanding of their personal strengths and potential as negotiators.

Since the 1970s, a plethora of studies have been conducted about negotiation and gender. In the early years, studies examined whether men were better at negotiation than women in terms of one variable — the negotiated outcome, or who "won." The findings from these early studies were inconclusive and at times contradictory.³ In Deborah Kolb's overview of the past 25 years of research on gender and negotiation, she notes that this early research had an "essentialist" concept of gender differences, trying to identify an innate or "hard-wired" difference in how men and women negotiate.⁴ While dozens of studies have sought to answer if men and women negotiate differently, it turned out that the story was far, far more complex.

Much of today's research on gender and negotiation is shaped by the thinking of authors who believe that individuals "construct" their understanding of situations (and the behaviors required in those situations) based on the details of the particular context and their own individual backgrounds. In this social-constructivist view, gender is not a fixed notion or simple unchanging attribute like a person's eye color. The constructivists view gender "as an institutionalized system of social and cultural practices" that can change as a person moves through different communities and institutions.⁵

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Women and Negotiation: Tips from the Field

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and collaboration. Competition, or win-lose, is more of a power-struggle negotiation characterized by low trust, holding one's cards close to one's chest, and one-upsmanship. Collaboration, or win-win, is the opposite and is based on skills for building trust, sharing information, creating value for both sides. For both of us, being introduced to collaborative negotiation was life-changing.

We have seen a similar reaction for the thousands of women we have coached and trained over the years: relief at finding a way forward that is not about confrontation, fighting and aggression, but rather addressing both sides' needs and interests, integrating emotions, and respecting cultural differences. Learning collaborative negotiation enhances one's ability to be a good listener and helps build and improve relationships. We see that many women respond positively to this kind of negotiation; it feels safer and in keeping with their values. Armed with the collaborative negotiation skill-set, they become more willing to engage in difficult conversations and more confident in general about their ability to negotiate. They also advocate for their interests within this framework and do not simply accommodate (lose-win).

So, for these reasons we recommend that women fully incorporate win-win (integrative) negotiation into their repertoire and use it wherever appropriate.

View "Negotiation" with a Wide Lens

To be most skillful in negotiations, women need to think long-term and relationally, understand the range of negotiation tactics and strategies to use where each is warranted, and to always pay attention to their BATNA. (Note here BATNA is a term frequently used in negotiation for "Best Alternative to a Negotiated Agreement").

Most negotiations don't happen in a vacuum; they happen in the context of a relationship. Whether we are talking about an employment situation, a marriage, an

interaction in the community, or just a first-time salary negotiation, the parties have been and will continue to interact. In our experience, solid negotiation outcomes often build from an acknowledgement of the importance of maintaining the relationship. This should come as a relief to anyone who takes a more relational approach to life, including many men and women.

Pablo Restrepo, a seasoned negotiation consultant from Colombia,

encourages his students and clients to consider the "negotiation architecture," see tandemadr.com. As he once explained in a conversation with one of the authors, "negotiation must be looked at beyond the traditional tactical view because negotiation begins long before we sit at the table, and requires much more than an effective interaction." It involves, for instance, developing the value and influence you bring to the table. And, he would add, negotiation is worthless without effective implementation which may involve many other smaller negotiations, as well as re-negotiations over time. Thus, negotiations are made up of multiple impressions and interactions over perhaps years with periodic heightened focus on exchanges, or the resolution of specific conflicts as they arise. Consequently, if the relationship is being attended to regularly, and a problematic situation arises, it will be far more likely to be handled with ease.

Let's take, for example, the simple interactions and transactions that are necessary to get regular maintenance on one's vehicle. Assuming one employs the same service provider over the lifetime of the vehicle, there will inevitably be "stuff" that happens — conflicts that occur between the service provider and the owner of the vehicle. If one takes the time to create respectful and relational interactions with the people running the garage and a conflict breaks out, chances are that conflict is going to be handled in a less adversarial, more problem-solving way.

Women should always pay attention to strengthening their alternatives in any given negotiation. It is fundamental.



Susan W. Coleman, J.D., M.P.A. has taught negotiation and mediation to tens of thousands of professionals around the world from law schools to the United Nations, coaches executive women in negotiation, and has worked with individuals, groups and large systems to build collaboration and resolve conflict. She is currently a partner with C Global Consulting in New York City, cglobal.com. She can be reached at susan.coleman@cglobal.com.

Dorothy E. Weaver, Ed.D., creates and teaches a wide range of workshops, designed to improve individuals' competence in interpersonal communications, negotiation, and conflict resolution, including seminars for female professionals about negotiating at work. Dr. Weaver brings her experience as an executive in the non-profit sector where she has worked for many years, including Barnard College/Columbia University, New York University and the American Museum of Natural History. She can be contacted at deweaver1@verizon.net.

A narrower, more tactical view of negotiation is still prevalent in the minds of so many, including researchers. While relationally-oriented accommodations might seem like a mistake to some, for certain situations, they are precisely the right choice. We would like to see research that not only measures economic outcomes, but other criteria and longer-term considerations of the parties as well, such as solidifying trust, building respect and good will, and creating value that will be reciprocated over time.

Women should also become proficient with the complete range of negotiation skills — competitive to collaborative — and apply the right tool for the right situation. Win-win is a great strategy and not used nearly enough. Nonetheless, if one's counterpart in a distributive negotiation is a bully (using tactics of fear and intimidation), the win-win skill of listening for needs and reflecting them back will probably not work nearly as well as setting clear limits of engagement and implementing the best distributive tools. Knowing the spectrum of techniques to both create and claim value, therefore, and being strategic about when to apply them is key for success in negotiation.

Finally, regardless of the specific negotiation, women should always be clear about their BATNA. There are two things that give you power to influence a negotiation — your ability to meet or thwart the needs of the other side and the quality of your alternatives should the negotiation not work out (i.e. your BATNA.) Women should always pay attention to strengthening their alternatives in any given negotiation. It is fundamental. We must also remain mindful of the societal backdrop, which can strengthen or weaken our BATNA in specific negotiations. For example, in applying for a job, it may be easier for white, well-educated people to find other work if they are unable to negotiate their preferred terms in an employment negotiation. Worldwide, evidence of the backdrop of gender imbalance is hard to ignore — from the trafficking of women, to barriers to income and education, to women being silenced entirely. In the United States, we still have not ratified an Equal Rights Amendment, women still do not get paid the same as men for equal work, and according to the National Survey of Families and Households in 2008, women are still doing two-thirds of the housework, even in dual-earning households. These realities more often than not affect the walk away alternatives with which women enter negotiation and must be countered with wise strategic preparation.

Take Extra Time with Competitive or Distributive Problems

As stated above, negotiation is a skill-set that incorporates a wide range of “hard” (distributive, positional, quantitative, competitive) to “soft” (integrative, win-win, relational, collaborative) skills. It is our belief, after years of experience with many different kinds of people, that

the soft skills are truly the hard skills because they are generally more difficult for people to master. Nonetheless, for women who are less comfortable applying distributive skills, and because of their own and other's stereotypes, we advise extra attention when facing a highly competitive negotiation problem. We often see gendered preferences when it comes to negotiation. Many male law students will perk up and say things like “I'm glad we are getting to the real stuff” when we introduce a competitive case that requires crunching lots of numbers and the application of concepts such as BATNA, reservation price, and aspiration. The research comparing men and women in negotiation suggests that men and women can negotiate equally, but both genders will often assume that the men will do better than women at the more quantitative and distributive cases. But these stereotypes, both about negotiation and about gender, are fluid and can be manipulated.¹ As we work with women from all walks of life, we need to remind them that all women can learn to negotiate, and it is urgent that they do so before a life-changing negotiation presents itself, such as a divorce or entrenched problem with their boss.

Especially when faced with high conflict situations in which claiming value will be key, we believe that women must dive into their preparation. Let's say business partners, a man and a woman, are breaking up the partnership, are now alienated from one another and are on the brink of litigation. The climate has gotten very hostile and the male partner is a “scrappy” fighter who uses name-calling, gender-based slurs and hard bargaining. The issues they are fighting about are primarily financial, and the female partner knows that she can fall into stereotypical patterns when it comes to numbers. In such a case, she needs to take heed and put in extra care and attention. This involves thorough preparation — analyzing for both sides — position, interest, BATNA, worldview, reservation price, aspiration, and offers and counteroffers. Her BATNA may include her prospects in litigation; she may need to get solid input from a good lawyer. She can get advice, but she should control the negotiation whether she is using a lawyer or not. She should understand the concepts and be bold about using them.

Commit to Being a Life-Long Learner of Negotiation

Many people still think of negotiation as an art, not a science. But years of negotiation research, and our years of training, have shown this not to be true. You can learn good negotiation techniques either through reading, the support of a negotiation coach, or training. To a great extent, negotiation skills are simple and common sense; it's the complexity of our humanity that make them difficult. Mastery takes a life-long commitment to challenge one's skills and build awareness. Given the inequities women face—for example the relative poverty

of older women who are single, widowed or divorced, learning negotiation must be a priority for women. When women increase their negotiation skills, they can improve relationships, gain greater control over the treatment they receive in the workplace, and secure more financial independence as well as real dollars to invest in their priorities and preferences.

Weaver conducted a study of how women learned to negotiate during their careers. She asked her study participants what factors helped or hindered their ability to speak up on their own behalf in the workplace. The women identified: learning from one's mistakes, getting training or support from others, and seeing one's worldview or cultural lens clearly.²

Learn from Your Mistakes; There is No Failure — Just Feedback

In the aforementioned research, a substantial number of women cited a choice that went wrong as a major factor that altered their thinking about how to handle negotiation and conflict. Each of these women recounted an incident early in her career that she handled either with silence or other “gender-conforming” behaviors. Each recounted how this choice resulted in a bigger problem rather than a

solution. Women who did not want to live through such a negative experience a second time often made pledges or promises to themselves to handle a situation differently if the need arose. For example, a businesswoman recounted staying silent in her early career in the face

of sexual harassment from her boss. She grew up in the South and was taught that women were to keep quiet. She did not want to make trouble and felt afraid of “rocking the boat” by complaining to Human Resources. Her friends encouraged her to just deal with it. However, the situation turned worse. When she refused to keep dating the boss, he fired her, and at that point she realized she had lost her opportunity to complain and possibly keep her job. She was young and did not have the resources to hire a lawyer. She was humiliated and out of a job. As the years passed, she was increasingly angry at herself for not speaking up to file a formal complaint. Several decades later in her career, when she faced a hostile and harassing boss, she did speak up for herself. With the appropriate guidance from the Human Resources department, she negotiated a resolution in a face-to-face discussion with her boss. Commenting on why she “had to” speak up, she said, “I wasn’t the only one, and I couldn’t just let this keep happening.”³

Trained negotiators avoid escalating or accommodating unnecessarily; they stay focused and constructive even if they are dealing with an adversarial negotiator or bully.

Get Support from Training Programs and Knowledgeable Others

We know from the literature that programs and people can support women as they learn to negotiate. A “goal setting” protocol can help women anticipate obstacles and make plans to overcome them during negotiations.⁴ Training programs such as ours, see cglobal.com, can guide participants to make changes to longstanding interpersonal habits.

An educator in Weaver’s study described being scared to defend herself in her early career as she thought it would be out-of-line to talk back to the person she worked under as a student-teacher. She was raised to be “a good girl” and to respect authority. Decades later, as an assistant principal working with students, parents, faculty and other staff members, as well as a highly opinionated principal, she realized that she would need to negotiate regularly. She studied books on the topic and found a mentor with whom she could discuss upcoming negotiations. She realized there is a system — a map — to help her, and she uses it in conjunction with planning and role-playing to get comfortable with how she might react to various scenarios. While she still isn’t comfortable negotiating, she “does it anyway.”⁵

If you are the type of woman who would just as soon not engage in difficult negotiations, training can help. In our experience, it’s the “untrained” in the field of negotiation who are often the most adversarial — perhaps out of fear, lack of sophistication, or simply inexperience. One of the signature models

of our training programs identifies five communication behaviors used in negotiation — *Attack, Evade, Inform, Open* and *Unite*.⁶ *Attack, Evade, Inform* are more typically concentrated in a competitive negotiation (essentially fight/flight characteristic of our “old” reptilian brain) and *Inform, Open* and *Unite* more so when one uses a collaborative strategy (the “new” brain or cerebral cortex of logic and reason). It’s easy to observe that the untrained, both male and female, typically use more “attack” behaviors and are often unduly competitive when the situation does not warrant it. For instance, a female NASA engineer working on a joint space project with the Russian space agency and well-trained in negotiation recounted to Coleman how she received initial correspondence from the Russian team addressed as follows: “Dear, Jim, Sam, Tom, Larry and Mrs. Thompson.”⁷ She assumed it was going to be difficult for her to work as a woman on this team. Nonetheless, as the negotiations progressed, the men on her team (who had not received the training she

had) constantly used “attack” behavior and, in the end, she became the preferred representative of the American team.

Trained negotiators avoid escalating or accommodating unnecessarily; they stay focused and constructive even if they are dealing with an adversarial negotiator or bully. They know how to look for the integrative potential and stay calm when dealing with the inevitable tension created by zero-sum problems. They will share most information except for BATNA and urgency, they will work to understand the perspective of the other side, and they will not close too early — all skills which will keep one “in the driver’s seat” to reach one’s goals. Of course, when a woman is a trained negotiator and is assertive, she may still be called names. But her training will help her stay above the fray, not react in kind, and keep her focused on a successful outcome.

Build Awareness of One’s Own Cultural and Gender “Lens”

Women who have reflected on what norms they grew up with, and who have perspective and awareness of their gender “lens,” are better positioned to negotiate from a position of strength rather than falling into stereotypical behaviors. Kolb reminds us that when gender is seen as “constructed” within each of us as “an institutionalized system of social and cultural practices,” there is no absolute meaning to the concept of “gender-appropriate” behavior.⁸ In the socio-cultural view, learning must always be considered in and around context. Reflection is the key to such learning: “through reflection on how different contexts influence our experiential learning, we may make sense of our actions.”⁹ For some women, this reflection brings self-awareness about the need to speak up on their own behalf. For other women — often those who were raised to be highly assertive — reflection yields the recognition that they need to be more nuanced and strategic in their negotiation tactics, saving their well-honed competitive techniques for when they are required.

Walk Your Talk

While gender equity may not yet be ours to claim, we can have a huge impact in our own immediate circle of influence. We can each do our best to create fair and respectful workplaces and homes, supporting other women along the way, and doing the inner work required to believe at the deepest level that we are truly worthy of equality.

Create Fair and Respectful Homes

In longer negotiation skills programs we have conducted, where people have time to “warm-up” to each other and talk about what is most important to them, the women participants typically begin to share their frustrations with negotiations at home. More often than not the issues are about sharing household work.

As consultants of almost 25 years to organizations of all types, the authors know only too well the parallels between organizations and families. Even though the language used may be different, many of the same patterns and power struggles play out in organizations that play out at home. In fact, people bring much of what they learned in their original system — their family — and play it out in the workplace depending on their level of awareness. For men and women who are interested in creating more gender equity and partnership in the 21st century, it makes sense to create homes where partnership, respect and equal (age-appropriate) contributions are the norm.

As Terry Real, a highly celebrated couples therapist, puts it, “children learn what they live.” We see too many well-educated mothers still waiting on their sons and allowing them to be disrespectful to women. We also are aware of how many women still live in a culture of violence in their own homes, subjects of verbal or physical abuse. While not specifically negotiation, these bullying and submission communication patterns can set a destructive backdrop for how a woman ultimately negotiates or claims value for herself. Indeed, we would like to see more research done on the parallels between work and home in how women negotiate.

Support Other Women in Their Development

Ideally, all of us can contribute to mentoring younger women to make the workplace as fair and equitable for them as possible. As Leslie Bennetts points out in her engaging book, “The Feminine Mistake,” many women who leave the workforce to “be with their families” in fact were pushed out by a work environment that didn’t support them in any number of ways.¹⁰ Unfortunately, too many women report having difficult experiences with female bosses. Working together to create good work environments for women is something we all can, and must, attend to.

Believe You Are Worthy

As we know, in negotiation there is creating the pie and then figuring out how to divide it up. With respect to the latter, women must believe they are worthy to claim value on their own behalf. On this front, women must grapple with all the ways that culture has taught them to not do this. We must examine internalized messages such as “negotiation is unladylike,” “it is selfish to put oneself first,” “good women do this,” “it’s not nice to challenge,” and “I don’t want to be seen as aggressive.” In the beautiful civil war novel “March” by Geraldine Brooks, a young boy, just freed from slavery, is wounded in a battle and encouraged by a white minister to get up on a mule and allow himself to be carried. The boy can’t do it. For all of his life until that moment, riding a mule would invoke a whipping. Within the

context of the American experience, we recognize that no group's oppression is equatable to that of enslaved African-Americans. Nonetheless, all human beings who have been acculturated to societal norms that do not respect them as equals need to examine the ways they have internalized them. As women, if we believe we are unworthy, then it becomes a self-fulfilling prophecy, both in terms of what we expect for ourselves and what others expect for us. Internalized oppression is probably the largest challenge for all of us, as negotiators and simply as human beings.

Recent research on women and negotiation has shed light on the "double-binds" women feel when they want to speak up and negotiate but are constrained by gender norms.¹¹ Claiming value for oneself seems more a male prerogative and a bit unladylike. Our recommendation to women is to let these constraints go and, within the bounds of best negotiation practice, forge ahead. Life is complex: people are complex. Projection is a fact of human life and, no matter what we do or where we go, others will be projecting on us either in positive or negative ways about our physical appearance, height, class, gender and education.

While there are many, both men and women, who would like to keep women in their traditional roles, there are also many who do not. There are many men in positions of power who believe firmly in creating a climate of fairness and respect between the genders. About a decade ago, Coleman was asked to do a training/mediation program for representatives of Iraqi Kurdistan. When she looked over the participant list, she noticed there were no women representatives and mentioned as much to the Kurdish contacts in Washington. Soon, a woman was added to the list. Later, when talking to that woman (who was a wonderful asset to the program), she told Coleman that her mother and grandmother were totally opposed to her traveling to the United States and it was only because of the support of her father that she was allowed to come. In another assignment teaching intercultural negotiations to a European pharmaceutical company, our instructor team was five women. Murmurs of, "hmm, five ladies" could be heard from the mostly male audience. Nonetheless, these apparent concerns were dispelled when we went on to run a highly successful program. Those who are familiar with the literature around women and leadership know that, in 2003, it was a male minister of business, Ansgar Gabrielsen, who insisted that women should hold 50 percent of the board seats on publicly listed companies in Norway. Nicholas Kristof has made it his journalistic mission to build global awareness about the human trafficking of women. And Jimmy Carter has gone on the record as saying that the situation of women and girls is the single greatest human rights issue of the 21st century.¹²

In coaching our clients, one of the most difficult things for them to hear — especially in conflict situations in which there is a strong desire to blame the other — is that the only person you can really change is yourself. Our thought for women here is the same — pay attention to your own internalized oppression and change it. We are certain that truly believing you are worthy will translate into better negotiation outcomes.

Negotiation skills are critical to moving the meter on key variables of gender equity such as voice, economic well-being, and self-determination. Our hope for our readers is that they will be emboldened to speak up for themselves, to support others who should do so, and to continue to improve — and excel at negotiation. ♦

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The Literature on Women and Negotiation: A Recap

continued from page 13

Research Showing Small Differences in How Genders Negotiate

During most of the 1970s and early 1980s, research on gender and negotiation was directed at discovering if the two genders had different, and perhaps innate, abilities or approaches to negotiation, typically measured by the size of the final negotiated agreement and the conflict resolution style used. One extensive literature review found a “marginal and inconsistent relationship between gender and negotiation outcomes.”⁶

In the late 1980s and 1990s, a majority of research on gender and negotiation focused on identifying individual differences. Walters, Stuhlmacher, and Meyer (1998) conducted a meta-analysis of 62 studies on gender and “bargaining competitiveness.” Their conclusion was that women do appear to behave more cooperatively in negotiations than men. However, when the studies were aggregated, the difference was slight—less than 1 percent of the variance was accounted for by negotiator competitiveness.⁷ They commented that specific constraints on negotiators such as restrictions on communication between the individuals lessen gender differences. In the studies that allowed more communication, and particularly face-to-face communication, the gender differences were larger, and women behaved far more cooperatively than the men. The authors speculate that the setting activated women’s gender stereotypes, or *gender schemas*, eliciting cooperative behaviors. It appears that men and women were interpreting contextual signals differently. The authors note that “even small variations in experimental conditions can eliminate the [gender] differences entirely, or more surprisingly, cause them to change direction.”⁸ This important point deserved further study, which it received in the field.

Research Showing the Impact of Context and Situations

Many studies in the 1990s focused on how specific situations elicited or did not elicit gender differences. Most of these studies used salary and compensation cases as their means to explore this issue. A 1999 literature review of these studies by Stuhlmacher and Walters found that women generally have lower negotiated compensation outcomes but that situational details were key. For example, in some of the studies, the difference

Research in the last decade has shown the diversity—and strength—of contextual factors in terms of how and why individuals negotiate.

in power of the two parties affected the individuals’ negotiating behaviors.⁹ Women given the role of the boss negotiated better outcomes compared to when they were given the role of employee. Other studies indicated that

when cases present the potential for collaborative (or win-win) outcomes, women negotiate better than the men.¹⁰

In short, after another decade of research studies on gender and negotia-

tion, the findings suggested that there are situations where women’s negotiating does not match that of men, *and* there are situations where women’s behavior does match, and sometimes exceeds, that of men.

The idea that women might be responding with gendered behavior under particular conditions became a new focus of research. The field of gender and negotiation started to explore in detail how the context of a particular negotiation might impact a women’s behavior, for example, when a woman reacts to clues in the situation about what is “expected” for women and then fulfills those expectations.

Research on Factors Relevant to Why and How Women Negotiate

Research in the last decade has shown the diversity—and strength—of contextual factors in terms of how and why individuals negotiate. By changing the context, setting, and details of a case study so that women are negotiating on behalf of another (a client or a child) rather than themselves, women improve their negotiated outcomes.¹¹ Women given higher levels of relative power in a case do as well as men.¹² Interviews with women show the impact of many women’s “concern about the relationship” and lack of interest in “winning.”¹³

Factors of Self-Efficacy, Attitudes to Handling Conflict, and Empathy

Research has also shown the negative impact of women’s lack of self-efficacy about their bargaining abilities. In one study, women who did not expect to do well at negotiating made less effort, tending to give in and settle for what was offered quickly rather than bargain.¹⁴ Attitudes to handling conflict and improving over time are also relevant; some individuals believe that they are “bad” at handling conflict and cannot change.¹⁵ These women are unlikely to seek out information about how to learn to negotiate.

Women’s generally higher levels of empathy and skill at reading facial signals may give them a possible

advantage in some negotiations but put them at risk of lower outcomes in other negotiations.¹⁶ For example, when women place a higher importance on the relationship than on winning, they can be reluctant to speak up. It seems that some women seek to be liked and do not want to appear demanding, greedy, or argumentative. This desire to put-the-relationship-first sometimes results in an overly accommodating style, which is often detrimental to their interests.¹⁷

Factor of Explicit Contextual Variables

Individuals are most successful when they make careful decisions about the negotiating styles to use and when they select appropriate tactics based on the specific contextual variables. Edmondson and Smith conducted a study showing how individuals do not always act rationally by presenting the appropriate style. When upset by “hot topics,” many individuals who have been educated about negotiation styles still revert to old negotiation behavior patterns and are unable to negotiate to their full potential.¹⁸ Research by Callanan and Perri shows how individuals of *both* genders are highly attuned to the many contextual variables within negotiations—the question is how they interpret and act on those variables.¹⁹

Factor of Gender Stereotypes

Some gender and negotiation research examines contextual situations and relevant factors supporting women in their negotiations and their learning about how to negotiate. In a series of studies on stereotypes, Kray, Thompson, and Galinsky activated the gender stereotypes by telling male and female MBA students that individuals who are “rational and assertive” rather than “passive or overly accommodating” will do well negotiating a specific case. In this first condition, the males negotiated higher outcomes than the females. In the second condition, the researchers made the statement above and added the following phrase: “Because these personality characteristics tend to vary across gender, male and female students have been shown to differ in their performance of this task.”²⁰ Under this condition, the female MBA students exhibited *stereotype reactance* and rejected the stereotyped behavior; they negotiated higher outcomes than the male MBA students. In a follow up study, the same authors explored what happens when participants are told that “people skills” are key to a negotiation (something that many in our culture believe women are better at than men). In this manipulation, the female students once again outperformed the men.²¹

Factor of Supporting Programs to Guide Planning

In another relevant study, participants were educated on two forms of goals orientation. When men and women received only “goal setting training,” both

genders improved, but the gender difference in negotiated outcomes remained. For the second group, the researchers also used a protocol called *self-management* to support and scaffold the women as they prepared to negotiate. The *self-management training* included short lectures and then class discussions using examples (such as a weight-loss plan) based on these five steps: (1) identifying obstacles; (2) planning to overcome obstacles; (3) setting goals regarding obstacles; (4) picking ways to self-monitor progress; and (5) picking ways to self-reward achievement, and then a written class exercise to develop a plan to follow during salary negotiations. This protocol equalized the negotiating outcomes between the male and female participants.²²

Patton discussed the “Interpersonal Skills for Negotiation and for Life” class that was developed at Harvard. This approach to negotiation training emphasizes individualized work in an “intensive, safe, and interactive environment” so that students can try roles “that they would ordinarily not permit themselves [due to] social or family conditioning.” This course has distinctive features, including regular input and guidance for students from a professional who has advanced training in psychology and family dynamics. The faculty and students report genuine improvement in participants’ interpersonal skills, with many students experiencing an “epiphany” about handling difficult interpersonal situations.²³

Context is Key

From our overview of research relating to women and negotiation, several conclusions are clear. The first, shared by many researchers, is: *for both women and men, context is key*. Who are the participants in the negotiation? What is the environment in which they are negotiating? What is their formal relationship and how well do they know each other? What has already happened that may affect the negotiation? Are the key elements on the table of equal interest to both parties? Are any key elements of more concern to one gender than another? How likely are they to have a long-term relationship? And, of course, how does the backdrop of historical gender relations inform the context? Participants should think through these as well as other elements of the context before they plan a negotiation, and while we know this as ADR practitioners, we should also focus on helping our clients understand that approaching negotiation systematically in this way is something they can learn and incorporate into their daily lives.

Another conclusion is: *the style of negotiating must be suited to the context*. Because studies show that some women avoid negotiating in realms considered masculine such as compensation,²⁴ women should bring a consciousness of what may be gender-conforming behavior, and make the effort not to fall into gender-stereotypical behavior. Another potential gender “trap” is conceding

too much too quickly, especially if a woman is in a self-advocacy situation. Women can learn to reflect and consider what approach to take to specific negotiations, including deciding what style of negotiating is likely to be most effective.²⁵ As addressed elsewhere in this issue, choosing a negotiation style is not a simple dichotomy of a competitive (male) approach versus an accommodative (female) one. Without a consideration of the whole context, any negotiator will find it difficult to select the right style or tactics. Only with a careful review of the relevant elements of the context and an awareness of the potential gender issues involved can a negotiator—particularly a woman—be positioned to make a reasoned, justifiable, and conscious choice about what negotiating style to use.

Our review of recent studies also reminds us that we must continue to emphasize that *any individual can learn to negotiate*. Learning to negotiate certainly takes effort and time; for some individuals, learning to negotiate may require much more time than for others. Learning to negotiate is rarely a quick fix because longstanding habits and attitudes must be examined and changed. Just as learning to drive involves more than taking a single afternoon behind the wheel, learning to negotiate is a process—one that takes practice on stormy as well as sunny days, on highways as well as back roads. To gain a familiarity and comfort using different tactics that are fully suited to the situation and paying attention to creating the best conditions for positive negotiation outcomes takes time, reflection on what works and doesn't work, and increasing self-awareness. As negotiation trainers and coaches, we can remind students and clients of this fact and shape their learning experiences to support the process. ♦

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Gender Diversity in Arbitrator Selection

By Deborah Rothman

The purpose of this article is briefly, and anecdotally, since no reliable data is accessible, to explore the status of women in commercial arbitration as well as the remaining obstacles women face in becoming successful commercial arbitrators, a field in which women continue to face great challenges. Some possible ways to address the remaining obstacles are addressed in the final portion of the article.

It has been almost 50 years since the Civil Rights Act of 1964 was signed into law. And while lawyers have stepped up and actively forced corporate America to diversify its employees and engage in non-discriminatory hiring and promotion practices, not all lawyers have “taken their own medicine.” It is not news that women lawyers have not found the same success as men in American law firms, so it should come as no surprise that women have a harder time getting traction as commercial arbitrators than do men.

The ever-astute Warren Buffett put a humorous spin on this sort of state of affairs when he famously said he was “privileged to work during a period when it was only necessary to compete against half of the population.” Of course, he was not talking about the 21st century!

The situation facing women arbitrators is not far different from that facing women lawyers in general and professional women in the business world. When Sheryl Sandberg, Facebook’s COO, gave a TED Talk entitled “Why we have too few women leaders” in 2011, the video promptly went viral. At last count, it had been viewed over a million times. She shared a disturbing

conclusion — few women are making it to the top of any profession anywhere in the world — and some discouraging statistics:

- While there are 190 heads of state in the world, only nine are women. (An interesting footnote is that while “less-developed” countries have had and continue to have female heads of state, the U.S. never has.)
- In all the parliaments in the world, only 13 percent of positions are currently held by women.
- Women hold only about 15 percent of executive officer positions and board seats in the private sector¹.
- Even in the non-profit world, women are at the top in only 20 percent of organizations.

Women make up 57 percent of all college students, about half of all law and medical school students, and more than 40 percent of students who earn master’s degrees in business. They make up 46 percent of the total private sector workforce and 38 percent of all managers. However, it’s still lonely for women at the very highest rungs of the corporate and political ladder, according to a 2008 nationwide Pew Research Center Social and Demographic Trends survey. Women are just 2 percent of the CEOs of the nation’s Fortune 500 companies. In the political realm, they make up just 17 percent of all members of the U.S. House of Representatives; 16 percent of all U.S. senators; 16 percent of all governors; and 24 percent of all state legislators.

The situation is much the same for women lawyers. Among the top 10 law schools, the rate of female enrollment ranges from a low of 42.6 percent (NYU) to a high



of 52.9 percent (UC-Berkeley). Women's enrollment at law schools overall hit just over 50 percent in 1993 and has been on a steady decline since 2002.² According to the ABA, women comprised about 47 percent of all first-year law students in 2009 to 2010 and 45.9 percent of all law school graduates.

According to the October 2009 National Association of Women Lawyers (NAWL) Fourth Annual Survey on Retention and Promotion of Women in Law Firms,³ women currently constitute 48 percent of first-and second-year associates in law firms. As women become more senior, however, they constitute 34 percent of "of counsels" and 27 percent of non-equity partners, but only 16 percent of equity partners.

NAWL summarized, "In other words, less than one-third of the women who start in the profession ultimately make it into the equity partnership ranks." Further, the study revealed that this statistic has not changed dramatically over the twenty or so years that women have been graduating from law school at the same rate as men.

A 2011 study by NAWL presents a sobering picture of the prospects for women practicing with major law firms: "Not only do women represent a decreasing percentage of lawyers in big firms, they have a far greater chance of occupying positions — like staff attorneys, counsel, and fixed-income equity partners — with diminished opportunity for advancement or participating in firm leadership."⁴

According to the Minnesota-based Infinity Project, housed at the Center on Women and Public Policy at the University of Minnesota, as of October, 2011, 49 (30 percent) of the 162 active judges in the 13 federal courts of appeal are women, and 30 percent of the active district or trial court judges are women.

"There are hundreds, if not thousands, of mediators who are hearing smaller, local disputes among individuals, community or civic groups. It is the higher-income segment that has proved more difficult to crack. In fairness, there are certainly exceptions. There are a number of high-profile, very successful women neutrals. Some are former federal judges and others have parlayed successful law firm careers into thriving ADR practices. But there are far fewer than their male counterparts, and some female neutrals report that while they can get steady work in areas like employment, it is much more difficult to be selected to mediate a huge class action or chair a high-profile tripartite arbitration."⁵ Kathy Bryan, president and CEO of the International Institute for Conflict

Prevention & Resolution (CPR Institute) makes a similar observation: "While there may be sufficient numbers of diverse neutrals, they seem to hit a 'glass ceiling' of sorts in that they experience difficulty in being selected for more complex matters." This observation is consistent with the pilot *Survey of the ABA/Women in Dispute Resolution (WIDR)* first conducted during CPR's 2012 Annual Meeting.

[I]t is still rare to see women serving as arbitrators in the largest commercial arbitrations, and rarer still to see two women sitting on the same panel.

Indeed, it is still rare to see women serving as arbitrators in the largest commercial arbitrations, and rarer still to see two women sitting on the same panel. In fact, for 2010, the American Arbitration Association (AAA) reports that it administered only three arbitrations in which the parties had selected a

panel that was entirely made up of women.

One arguably bright spot is that women find it easier to become successful employment arbitrators than commercial arbitrators. This may be a result of employers' belief that awards rendered in arbitration should be rendered by a group of arbitrators whose demographic makeup reflects, to the extent possible, the demographic makeup of their employees.

In 2010, women were appointed in roughly 15 percent of AAA arbitrations involving claims for money (which excludes a large number of non-monetary labor cases, in which women had a 23 percent appointment rate). One hopeful statistic is that the distribution of cases to women did not drop off as the case values increased—a pattern, known as the pyramid effect, which characterizes the glass ceiling effect. On the contrary, the percentage of female appointments remained constant through the highest-value cases.

While JAMS' statistics were not available, one has only to look at the photos of the neutrals in their newspaper ads to recognize that they, too, have not achieved gender equality on their arbitration roster. Similarly, the CPR Institute reports that in 2011, women comprised 10 percent of its roster of neutrals and 25 percent of the



Deborah Rothman has been a full-time mediator and arbitrator since 1991, and is a member of the American Arbitration Association's Large Complex Case roster and CPR's national roster. She was a member of the first coed graduating class at Yale College, and participated in the first JD/MPA program between NYU School of Law and Princeton University's Woodrow Wilson School. She is the founder of California Women Neutrals and is a member of the Executive Committee of the College of Commercial Arbitrators. She can be contacted at DRthMedArb@aol.com or www.DeborahRothman.com.

Even when women manage to get recruited to the arbitration panels of major ADR providers, they are not as likely to get selected as their male counterparts.

prestigious National Roster and were selected 13 percent of the time.

The situation facing women trying to become international arbitrators is the grimmest of all, according to a Columbia Law School study.⁶ Of 249 known investment treaty arbitrations, just 6.5 percent of all appointments were of women. Worse, two well-known, well-respected women captured three-quarters of the women's percentage. In contrast, the two most frequently appointed men accounted for a mere 5 percent of the men's 93.5 percent of the cases.

Possible Explanations and Contributing Factors

Supply-Side Obstacles: Mark Smalls, vice president and chief marketing officer of JAMS, offers a supply-side explanation for the dearth of successful women arbitrators, saying part of it is a "pipeline" issue: "To become a successful mediator or arbitrator, attorneys need to 1) know that ADR is a viable career option, and 2) build a resume that makes them an attractive candidate to a major ADR provider or have enough experience to successfully maintain their own ADR practice. The most attractive recruits to major ADR providers are former judges with substantial civil court experience or attorneys that have ascended to the senior (i.e., partner) level at major law firms. Women and minorities are underrepresented in both of these talent pools. The same forces that keep many women from reaching the partner level at law firms or attaining the general counsel title at corporations naturally reduce the pool of candidates that transition to a career as a mediator or arbitrator."⁷ By the same token, when there are not enough seasoned, visible women arbitrators, younger women lack the role models and mentors to inspire, encourage and help them to succeed as commercial arbitrators.

McKinsey's 2010 *Women Matter* survey of barriers to gender diversity in top management provides support for the supply-side explanation of why women are not represented in equal numbers as men on the major providers' rosters. The McKinsey study identified the "double burden" syndrome — the fact that child-bearing and child-rearing responsibilities ordinarily fall more heavily on women than on men, even when both are working professionals.⁸ Although most women arbitrators are no longer dealing with small children, this stage of mothering negatively impacts a woman lawyer's ability ultimately to achieve success as a commercial arbitrator.

The McKinsey study identifies a related barrier to women achieving success as top managers: the "anytime, anywhere" performance model, whereby success is equated with 24/7 availability and total geographical mobility. Combined with the double burden barrier, the anytime, anywhere model—equally applicable to litigators as to top managers—saddles lawyers who bear children with almost insurmountable obstacles to success as full equity partners in their firms and later as commercial arbitrators. In other words, many women lawyers can't qualify for recruitment by the major providers for their commercial arbitration panels because the double burden syndrome and the anytime, anywhere model are virtually impossible for women litigators with younger children.

A good number of high-stakes arbitrations involve construction and banking law, two areas in which women are notoriously under-represented at both the law firm and the commercial arbitration level. Thus, until women are integrated into their firms' business and commercial practice and encouraged to and supported in succeeding as counsel on construction and banking matters, women will continue to be excluded from this productive source of arbitration opportunities.

Demand-Side Obstacles: The lawyers who select the arbitrators for particular cases are, not surprisingly, quite senior. Because environmental factors prevent women from being well-represented in the ranks of litigation partners and senior corporate counsel, the very people who might be most likely to consciously select women arbitrators, all things being equal, are not in a position to do so. Unfortunately, women's law school enrollment percentages are falling off, and women's employment with large law firms is also falling off. As a result, the pipeline of both female commercial arbitrators, and women litigators who might be more open to selecting qualified women arbitrators for complex commercial matters, is being negatively affected.

Even when women manage to get recruited to the arbitration panels of major ADR providers, they are not as likely to get selected as their male counterparts. When they receive a strike list of ten potential arbitrators, the law firm drill is to circulate an internal memo to get feedback on the names on the list. At times, the lawyers may solicit input from lawyers at other firms. It is unacceptably risky for litigators, given the paucity of bases for appeal, to recommend that their clients select an arbitrator who appears on paper to be qualified but is not known by that firm's subset of attorneys. This vicious

circle—the better-known the arbitrator is, the more likely to be known by counsel on both sides, and thus to get selected—prevents women from moving along the pipeline to selection.

Implicit Bias: Even the rare woman who achieves the same level of experience, expertise and success as her male counterparts may be selected less frequently as a commercial arbitrator because implicit bias prevents equally qualified women from being perceived as equally qualified. This type of bias is called “implicit” because the individuals explicitly articulate opposite, non-biased values. Because implicit bias resides in the unconscious part of the mind, operates automatically and is in conflict with the espoused values of the individual, it is in some ways more difficult to address than explicit bias.

A Harvard Business School study of MBA students at New York University is illustrative.⁹ At the outset of the study, the students assessed themselves as unbiased. Half were given study packets describing a venture capitalist known as “Heidi,” while half were given packets describing the identical venture capitalist, but named “Howard.” While the students rated Heidi and Howard equally highly as professionals, the students—both men and women—responded negatively to Heidi’s aggressiveness. They weren’t sure they’d want to work with Heidi; they felt she was out for herself. Their attribution of negative qualities to the woman but not the man is an example of implicit bias.

Indeed, when it comes to perceived ability to conduct complex commercial arbitrations, the interviews I conducted revealed absolutely no conscious bias against women arbitrators. The fact remains that women are selected at lower rates than their representation in the legal profession would suggest, and at lower rates than comparably-qualified males on the same strike lists.

As CPR Institute’s Kathy Bryan said, “Implicit bias perpetuates the inability of women to achieve the necessary benchmarks to be perceived as equal to males.” In other words, implicit bias begets fewer opportunities to demonstrate that a woman has the same abilities as her male arbitrator counterparts. Former U.S. Secretary of State Madeleine Albright’s quote is *apropos*: until women have the same opportunities to succeed as commercial arbitrators, “women may have to work just a little bit harder. There’s plenty of room for mediocre men, but no room for mediocre women.”

Women’s psycho-social barriers: Women themselves not infrequently hold self-limiting beliefs that hinder their efforts to be successful litigators and arbitrators. The literature is replete with studies showing that women learn to hide their intelligence, lower their expectations, please others at their own expense, work to be perceived as agreeable, etc. Women tend to under-estimate their

abilities and shy away from self-promotion, while men easily express their confidence in their strengths.

In *How to Become an International Arbitrator without Even Trying*,¹⁰ William Tetley, Q.C., illustrates how the combined power of the old boy network and supreme self-confidence enabled him to get his start in international arbitration. In 1982, two prominent international arbitrators phoned and asked him to chair a major arbitration, stating as an afterthought, “Of course, you know the ICC Rules.” The case concerned the construction of airports, air control and air defense systems in seven districts in Saudi Arabia. He accepted the position even though he had never participated in arbitration as either an attorney or an arbitrator, had no idea what the ICC was, and had virtually no experience with construction law. His co-arbitrators later praised his fine work on the matter.

Having striven to succeed in a male-dominated profession, and believing they had to blend in with the males, successful women litigators are sometimes reluctant to support a well-qualified female arbitrator for fear of bringing unwanted attention to their own gender. Professor Susan Estrich described this phenomenon:

When you talk to women at the very top, it becomes clear that part of their success is due to convincing men that they aren’t like other women. . . . [D]enying their status as women becomes a reflex. So when they get high up enough—far from making a difference for the women who come after them—they’re still in the business of proving to the guys that they’re really *not* one of the girls.”¹¹

Approaches to Addressing the Problem

To improve the gender diversity of commercial arbitrators, a concerted effort will need to be made to remove barriers and increase the number of promising women at every point along the pipeline to success. Similar efforts should be made to improve ethnic diversity in the field as well. Providers and professional and bar associations will have to remain mindful of the importance of gender balance in their advertising and in their public and in-house trainings and presentations. Providers cannot stop at merely recruiting women for their arbitration rosters; they will have to find effective ways to address users’ implicit biases when promoting their women arbitrators to users of arbitration and to the ADR community as a whole.

This entails the ADR community’s identification and mentoring; the major providers’ recruitment, training, mentoring and showcasing; and outside counsel’s selection of qualified women. Until this level of encouragement and support is manifested, many of the most promising women lawyers will be lured to such relatively more female-friendly employers as the public sector, the bench, non-profits, corporate counsel positions and law schools. Not every bright woman relishes the challenge of being a trailblazer.

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Mentoring: The major arbitration providers are actively trying to address this challenging issue. The American Arbitration Association even includes in its mission statement the creation and maintenance of gender and racial diversity on its neutrals roster. Toward that end, the AAA initiated the Leon Higginbotham Fellows Program, which provides a full year of training, mentorship and networking opportunities to up and coming diverse ADR professionals.

CPR suggests that, as a way to assist newer entrants to gain experience and exposure, it would be beneficial to be able to serve as secretary to an arbitral tribunal, much as recent law school grads enhance their experience and CVs by participating in federal and state court clerkships. Serving as a secretary to an arbitral tribunal performs the same function as shadowing while conferring significantly more status upon the mentee.

Professional organizations of highly successful commercial arbitrators such as the College of Commercial Arbitrators and the Chartered Institute of Arbitrators can play an important role in mentoring promising women, even if they do not yet qualify for membership. Adding this to their mission statements would demonstrate and solidify their commitment to this goal.

The Role Arbitration Users Can Play: Corporations have consistently led, not followed, the diversity bandwagon. Law firms' enunciated diversity initiatives did not develop any traction until corporate clients demanded documented progress from their firms, upon pain of losing their legal business. As noted above, it is not the province of law firms to try out women arbitrators with whom no one in their referral circle is familiar. They must be given a green light from their corporate clients to undertake such efforts, arguably reinforced by economic carrots and sticks.

Showcasing Well-qualified Women Arbitrators: JAMS acknowledges that it is tricky for women arbitrators to find opportunities to showcase what they can do. The ABA Dispute Resolution Section's Standing Committee on Diversity identifies as its first objective to "[i]mprove the employment opportunities for ADR professionals of

color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities, by raising awareness of diversity in the ADR field and exploring proactive solutions to eliminating employment barriers these ADR professionals encounter."

With so many stakeholders committed to increasing women's prominence in the field of commercial arbitration, can the day be far away when women will be proportionately represented on the major providers' arbitration rosters, and selected as frequently as their male counterparts? The legitimacy of awards rendered in arbitration demands it. ♦

Endnotes

1 According to a 2011 Harvard Business School Study, women fill less than 15 percent of executive officer positions at Fortune 500 companies and make up just 3.6 percent of CEOs. See Maggie Starvish, *Leadership Program for Women Targets Subtle Promotion Biases*, HBS WORKING KNOWLEDGE, Feb. 21, 2012, <http://hbswk.hbs.edu/item/6885.html?wknews=02222012>.

2 Vivia Chen, *Women Spurn Law Schools*, THE CAREERIST, May 16, 2011, <http://thecareerist.typepad.com/thecareerist/2011/05/fewer-women-at-nations-law-schools.html>.

3 *Report of the Fourth Annual National Survey of Retention and Promotion of Women in Law Firms*, National Association of Women Lawyers (2009), <http://nawl.timberlakepublishing.com/files/2009%20Survey%20Report%20FINAL.pdf>.

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8 *Women Matter 2010*, McKinsey & Co. (2010), http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_2010_4.pdf.

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10 See William Tetley, *How to Become an International Arbitrator without Even Trying*, June 14, 2011, available at <http://www.mcgill.ca/maritimelaw/tetley/arbitrator/>.

11 Ramit Mizrahi, "Hostility to the Presence of Women": Why Women Undermine Each Other in the Workplace and the Consequences for Title VII, 113 YALE L.J. 1579, 1599 n. 115 (2004), citing Kathleen Jacobs, *In Praise of Power*, WORKING WOMAN, Nov. 2000, at 22.

Tools to Help Women Succeed in ADR

By Gina Miller

Recent articles in legal publications have discussed women in leadership roles in the legal industry... or the lack of those roles. According to statistics reported by the National Association of Women Lawyers, women make up 50 percent of law school graduates, but only 15 percent are equity partners in AmLaw 200 law firms.¹ Based on the law school graduate statistics, a higher percentage of women should be in senior positions at law firms and more women should be nationally recognized as ADR experts, but recent research shows women make up only 20 percent of leadership at law firms and ADR professionals. Unfortunately, there still is a glass ceiling when it comes to reaching certain positions and status.

Many factors should be considered as to why the advancement for women is growing at a slow pace. Studies indicate that even though there are an equal number of educated, talented and skilled women with a legal background, women are choosing to work part-time, often for a period of a few years to oversee family commitments.² Others choose to pursue opportunities outside of the legal field. Additional reports suggest law firms, as well as other organizations, have transitioned to what is called the “new norm.” Law firms have begun contracting certain cases out to independent contractors, narrowing the pipeline for senior level positions. Finally, several women are choosing non-legal opportunities as career choices and many of their choices are not ones of senior positions or titles.

However, more and more women are interested in the ADR field. Those who want to develop a successful practice should understand that as ADR becomes more mainstream in the legal landscape, it’s more important than ever to have a strategic plan in place to generate business and build a brand, not just as a woman, but as an expert in the field of ADR.

Naturally, there is quite a bit of sensitivity regarding gender diversity. Many of the women attorneys and judges interviewed for this article, while perceptive of gender biases, are much more interested in focusing on building and sustaining a brand for themselves as an expert neutral. Many women don’t want to be thought of as “the woman” neutral. They much prefer that clients perceive of them as the right fit or one of the most qualified neutrals best at resolving difficult and complex disputes. While the percentage of women neutrals is low compared to men, those who decide to remain in the legal field work hard to gain the appropriate experience and are seeing an increase in business. Some of them generate more revenue than their male counterparts.

Below are some steps women should consider implementing as they develop their ADR practice:

1. Gain significant experience as a practicing attorney, preferably litigation experience. If the objective is to resolve legal matters, ADR goals will be met faster with a strong legal background. Most retired judges experience quicker ramp-up times because they had an opportunity to demonstrate their resolution skills on the bench. That does not mean that attorneys or non-attorneys cannot be successful in ADR, but they will have to spend more time establishing their credibility. One way to do that is to volunteer for court programs and take cases pro bono. Another option is to offer to co-mediate with a successful ADR professional. Work hard at perfecting your ADR craft. Make pre- and post-hearing calls to clients. The goal is to have clients understand that the resolution of *their* cases is just as important to you as it is to them.
2. Develop a plan of action and establish a realistic timeline. In that plan, identify male and female neutrals with successful regional and national practices. Find out what they do to keep their names top of mind because they had to start somewhere. Find someone who would be willing to make an introduction for you. If these successful neutrals are visible in the community, attend the same events. Send them a note complimenting them on a recent panel discussion in which they participated and send an, “it was a pleasure meeting you” email. Try to establish a relationship with other successful ADR professionals.
3. Develop a style and presence. The days when women were advised to dress in blue or black conservative suits have passed. It is perfectly fine to be authentic, unique, feminine or just different. Newer generations appreciate diversity. In some cases, a unique style may capture the attention of a potential client. What’s most important is that clients perceive the process as a valuable experience and have something unique in which to remember you.
4. Develop a compelling biography that provides information about your style and, with permission, list the name of other successful neutrals with whom you have partnered in previous cases, seminars panels and other professional activities. This is an opportunity to name drop some of the well-known neutrals in the industry in which you are aligned.

5. Target markets with growth potential that would be most receptive to your style. Many neutrals believe they can be “all things to all people.” While judges on the bench may have that exposure, in private practice clients are looking for neutral specialists. Ask yourself the following questions: *How knowledgeable are neutrals about certain case types? What personality style will be most effective in getting this matter resolved? Are you empathic in sensitive issues? Are you a head banger? Do you stick with just the legal facts or are you known to have creative solutions?* Ask clients who have used you in the past to be candid with what they appreciated about your approach and style. Once you determine a trend, market your style at every opportunity.

6. Many national law firms and corporations report that gender diversity is a priority and important to their organization. Get a better understanding about their gender diversity goals and discuss how you might add value in assisting them with managing conflict. Dispute resolution is more than just mediating and arbitrating. ADR consists of conflict prevention, conflict management and conflict resolution. There are opportunities in all three categories and if organizations are pledging their commitment to gender diversity use that as a way to optimize your opportunity.

7. Understand that while biases exist, they are not always gender bias. Some clients prefer judges to attorneys, practice area knowledge over settlement skills, and in some cases a woman is the preferred choice. Use gender as an advantage. Women should make sure that their individual qualifications are known and that the typical stereotypes are not perpetuated in their marketing plan, which can take away from the true focus.

8. Over time, the market will define a neutral’s strengths and weaknesses. Responses from attorney clients who have experienced success with women neutrals find that women neutrals relate to their clients in a way that some male neutrals can’t. Use feedback from past clients to determine if the perception of you is more collaborative and facilitative or aggressive and assertive. Having a flexible approach is ideal; however, being all things to all people takes a lot of time and, in some cases, may have little result. Whatever the reputation, understand the strengths and positive attributes of that character status and use every opportunity to expose them. Similarly, make sure not to be in a situation where weaknesses are visible to clients.

9. Network. Use this as an opportunity to demonstrate your “assertiveness” skills. If you are attending a networking event, invite a known neutral to accompany you or ask if you may sit with him or her.

10. Advertise. While some neutrals may not allow you to include their name specifically in an advertisement, you should consider advertising that you have partnered with nationally known ADR professionals in resolving complex and multi-party disputes.

Based on conversations with former female partners, attorneys at law firms and several female retired judges, many believe that women in the profession may not be limited based on gender alone. Unfortunately, not every woman is capable of achieving the same kind of success as their male counterparts. There are certain realities of the ADR profession. The selection of a neutral is subjective and personal for some clients. A lot of business comes from repeat or referral business, which makes it challenging to break through that barrier.

There is no question that women are capable of holding more leadership titles in the legal industry. Recognizing that those barriers continue to exist, today’s entry into the ADR field is not as difficult for women as it once was. Failing to have a defined plan will make it challenging to have a successful practice in any sector and will certainly take longer.

There is still a lot to do, and it will take time. Change is not always predictable, but the good news is that we cannot prevent it from happening. Without change, we are bound to fail. The newer generations have become much more avant-garde in their way of thinking, communicating and valuing standards.

Most likely there will be a woman president in the coming future. And she will not be wearing a navy blue suit, either. ♦

Endnotes

1 See, e.g., National Association Women Lawyers, Report of the Fifth Annual National Survey on Retention and Promotion of Women in Law Firms (2010), [http://nawltimberlakepublishing.com/files/NAWL%202010%20Final\(1\).pdf](http://nawltimberlakepublishing.com/files/NAWL%202010%20Final(1).pdf); Catalyst, *Women in U.S. Management*, Dec. 11, 2010, <http://www.catalyst.org/publication/206/women-in-us-management>.

2 *Id.*



Gina Miller is Vice President for JAMS Southwest Region. She oversees operations for all of the Southwest Region’s Resolution Centers, which includes Texas and Nevada, and is responsible for creating new business opportunities and overseeing the implementation of regional and national marketing initiatives. She can be contacted at gmillers@jamsadr.com.



Perceived Differences in Male and Female Mediators and Arbitrators

By Joseph D. Garrison

I have represented women as employees over my whole career and in doing so have found that the presence of stereotypical thinking is pervasive and provable in the gender discrimination cases that have merit. Nevertheless, I confess to having had a serious senior moment when I agreed to write an article on the delicate topic of perceived differences between male and female ADR professionals. What was I thinking? I hasten to tell you that the following commentary should not be taken as my own thinking. It is, instead, the product of research that reflected some studies that exist on these perceived differences.

Neither men nor women always behave in gender-stereotypical ways. There are always visible exceptions to the general perceptions of how men and women act in the conflict/negotiations arena. But there are common perceptions. In *Resolving Conflict*, Gregory Tillett listed the following perceived negotiation traits: Men tend to talk the language of fact; women talk the language of feelings. Men talk the language of reality; women talk the language of perception. Men tend not to disclose

feelings; women will disclose feelings. Men tend to focus on problem solving; women tend to talk about changing a relationship. Men tend to talk in the present; women tend to talk in the past and the future. Men focus on content; women focus on relationship. Men tend to be competitive and need to compete even to their disadvantage; women tend to compromise and often appear willing to yield. Men tend to be very concerned about saving or losing face; women are not concerned about losing face.¹

Similar themes have been found in the ADR world. In 2010, Victoria Pyncheon, who writes the Negotiation Law Blog, reported on her “unscientific poll of women in business concerning their skills, attitudes and fears about negotiation.” She used a 1-10 scale for answers, with 10 as the most agreement. Here are some of the results:

“I do not like negotiating over price” — 8.4.

“Before negotiating I plan my arguments to support my offers/counters” — 4.7.

"It is difficult for me to say no." — 5.5.
 "I am afraid I under value myself" — 8.
 "I am afraid that if I ask too much I'll be harshly judged" — 7.7.
 "I am afraid of making offers that others might reject." — 8.1.
 "I am afraid that others will consider me pushy or too aggressive if I negotiate price." — 7.3.
 "I do not like competitive bargaining." — 8.7.
 "I prefer cooperative negotiations to competitive ones." — 9.2.
 "I do not know what to do at impasse." — 7.8.
 "I am afraid of offending my bargaining partner." — 7.9.
 "Relationship is more important to me than money." — 8.2.²

These attitudes tend to show up when mediation styles of men and women are analyzed.

Carol Gilligan, in her book "In a Different Voice," described a significant difference in how men and women think about conflict.³

She suggests that men think of conflict in terms of rights, but women consider conflict in terms of dynamic relationships. Thus, if mediation is a facilitated process, a woman's approach may be more likely to produce settlement. In choosing a mediator overall, if the case argues strongly

for a rights-based approach mediation, this foundation will come more naturally to a man. If the mediation calls for an interests-based approach, women who may be more likely to look to female values of interpersonal connectedness, care, sensitivity and responsibility to the other party may be the more natural mediators. If there remains a preference for male mediators over female, Pynchon in her blog suggests that sometimes the reason may be a fundamental misunderstanding. Advocates choosing mediators in certain cases may believe that they need a mediator who will persuade the other party regardless of what the other party's lawyer thinks. That is, the mediator should overpower the opposition, exerting (what may be false) authority. That line of thinking would compel choosing the judge over the attorney, or the man over the woman.

Mediators Jan Frankel Schau and Nina Meierding, beginning from the premise that men and women tend to argue differently, have reviewed how negotiations and

communications differ in mediation.⁴ They believe that "there are certain ways that men communicate that are distinct from 'a woman's voice.'" One difference is the use of language itself. Schau and Meierding suggest that women use conversations to build relationships, establish connections and share experiences. Men tend to share information. Men also may be more likely to utilize "ritual opposition," which is winning an argument purely through skill and logic. This tactic pays no attention to building any rapport, creating a relationship or allowing another party to save face, and thus it may be interpreted as a personal insult or attack. Gender differences also appear in the context of apologies. Men apologize, but generally only when something was their responsibility or their error. Women may apologize because they are trying to create a bond or restore a relationship, and men may misconstrue the apology assuming that the woman is accepting fault and taking responsibility. Finally, Schau and Meierding found, women are more likely to tell jokes about themselves when they are using humor, but men are more likely to tell jokes about others. Thus, to a man a woman may appear to be putting herself down and

lacking in confidence in her use of humor about herself. But, to a woman, a man may be perceived as making a personal attack when he makes what he considered a joke in describing someone else's conduct. All of these observations are, again, generalizations that are by no means true for every man or every woman, but they provide

decent clues on how to listen to the other gender, in mediation and/or negotiations.

These different ways of looking at conflict, and mediating to resolve a conflict, argue that skillful mediators may be women or men. In the area of arbitration, however, there seems to be more difference in perception.

The most striking disparity between men and women as arbitrators is in the international arbitration field. In 2009, a study found that only 4 percent of international arbitrators were women. While some of them were very

These different ways of looking at conflict, and mediating to resolve a conflict, argue that skillful mediators may be women or men. In the area of arbitration, however, there seems to be more difference in perception.



Joseph D. Garrison, is the managing shareholder of Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, P.C., New Haven, Connecticut, where he focuses his practice on employee rights. Mr. Garrison is increasingly active as a mediator and arbitrator, particularly in employment cases, and is listed as a mediator and arbitrator on AAA's employment panels. In 2009, he was appointed to AAA's Board of Directors. He can be contacted at jgarrison@garrisonlaw.com.

busy and highly respected, the numbers were very small.⁵ Objectively, it would be difficult to point to anything a male arbitrator could consistently do that his female counterpart could not. But referrals in this arena continue to be made to males. This is true even when general counsel or the business decision-maker is a woman. The observations are consistent that women don't refer cases to other women. The exception, of course, is that referrals are made to the very small core group of females who have established themselves as international arbitrators. Perhaps the reasoning is that if a female decision-maker chooses a relatively untested woman as her arbitrator, and her client loses the case, the criticism could be far more intense than if she had chosen as her arbitrator one of those among the large group of male arbitrators. Whatever reasoning it is, it should be re-examined. Just as in the legal community overall, there is a significant supply of female arbitrators who are experts in their field.

Robi Ludwig, a psychotherapist and author, suggests other reasons why it may be so difficult for women to break into the arbitration business. In an article about the challenges facing women as bosses, she cited recent studies about the workplace, where three-quarters of men said they would rather work for a man than a woman. A quarter of women thought that their female bosses were backstabbers who had poor personal boundaries when it came to sharing their personal lives in the workplace. Another study found female bosses to be easily threatened, emotionally unpredictable or irritable. A study by the American Management Association disclosed that 95 percent of women felt undermined at some point in their career by other women. A group of German researchers found that women who reported to female supervisors had higher rates of depression, headaches, heartburn and insomnia than they would have had if their bosses were men.⁶

Hopefully, however, we are in a process of evolution. It remains true that high management positions are scarcer for women than for men. It is certainly possible that female bosses may legitimately feel more threatened and less generous about sharing their positions of power in part because there are fewer opportunities for them. Unfortunately, sometimes women who reach high positions try to manage like male counterparts, but it may not work out well because the same management style will be perceived differently and less generously toward the woman. But because there is evolution as more women break the glass ceiling, it is highly likely that women will increasingly gain confidence in their own management styles. In the meantime, female arbitrators, who must

be chosen by decision-makers who (even if they are also women) have feelings as outlined above in the earlier paragraph, bear the brunt of these problems. People, whether men or women, who feel that female bosses are poor managers may be unlikely to choose female arbitrators to decide an important case.

The agencies administering arbitrations have been working hard to promote diversity in their rosters of arbitrators. Anecdotally, at least, it appears that women are making more and more progress as advocates in arbitration, and women are beginning to lead arbitration practice groups in larger firms. Many of these same larger firms, however, do not encourage partners, whether men or women, to sit as arbitrators. Conflicts of interests can arise, billable rates for arbitrators are often less than rates for advocates and the neutrality required of an arbitrator is more difficult to obtain while continuing to work inside a law firm. If, to become a successful arbitrator, women advocates must retire from their law firms, it will still be a while before women become a numerically strong force in the arbitrator community. In the meantime, that transition will become easier if both men and women who are deciding who to choose to arbitrate a case, more consciously consider women with excellent backgrounds but minimal experience as arbitrators. The more this happens, the more prevailing perceptions will change, all for the better. ♦

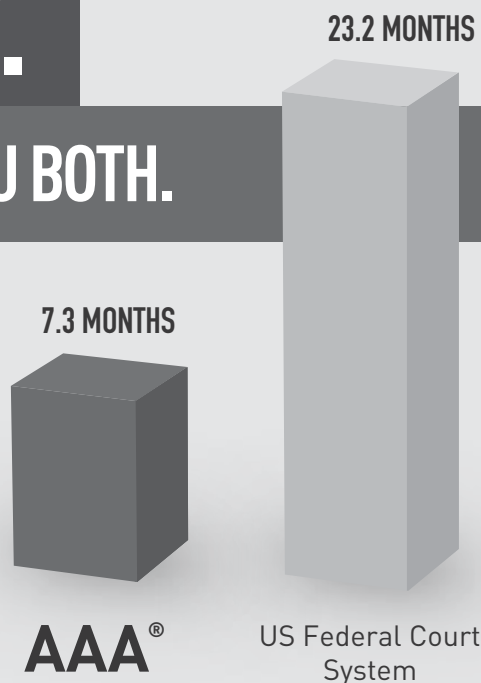
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- 1 GREGORY TILLET, *RESOLVING CONFLICT: A PRACTICAL APPROACH* (2006).
- 2 Victoria Pyncheon, *Women's Attitudes, Skills and Fears About Negotiation*, Negotiation Law Blog (June 2010), available at <http://www.negotiationlawblog.com/she-negotiates/womens-attitudes-skills-and-fears-about-negotiation/>.
- 3 CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993).
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A Change in Focus — Mediation of Claims Under the ADA Amendments Act

By Mark C. Travis



The Americans with Disabilities Act (ADA) was signed into law in 1990 with the stated purpose to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”¹ The law prohibited discrimination by, among other things, failing to make reasonable accommodations to the known physical or mental limitations of applicants and employees. However, in the years following the ADA’s enactment, the Supreme Court began to erode the class of individuals that qualified as having a disability under the ADA to the point that it became increasingly difficult for many individuals to meet a *prima facie* case for a “disability” necessary to bring a claim under the Act. Accordingly, discrimination cases focused on the threshold question of whether the claimant could prove the existence of a disability, often resulting in summary disposition before an analysis of reasonable accommodation was ever addressed.² Similarly, this analysis frequently presented itself in the mediation of claims under the ADA.

The ADA Amendments Act (ADAAA) became effective on Jan. 1, 2009, and the Equal Employment Opportunity Commission’s (EEOC) Final Regulations became effective on May 24, 2011. The primary purpose of the ADAAA is to “make it easier” for people with disabilities to obtain protection under the law, and the regulations provide that the primary focus should be on

whether discrimination has occurred, and not whether the individual meets the definition of a disability, which should not demand “extensive analysis.”³ As a result, both advocates and neutrals in the practice of employment law see this as a potential sea change.

Perhaps the best indicator of this comes from the federal government’s gatekeeper — the EEOC. In the first full fiscal year since the new law’s effective date ending on Sept. 30, 2010, the EEOC’s statistics indicate that charges for disability discrimination increased by more than 3,700 and exceeded the increase in percentage terms over all other forms of discrimination.⁴ This article provides ADR professionals with a summary of how the law has changed and some tools on how to effectively utilize these changes in future mediation of claims arising under the ADA.

The Background

To understand the impetus behind these changes, it is necessary to briefly outline the statutory framework and two significant Supreme Court cases. An individual with a “disability” has always been defined under the act as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁵

In *Sutton v. United Air Lines, Inc.*,⁶ the two Sutton sisters attempted to qualify to become pilots but did not meet the airline’s vision standards without corrective lenses. Because their eyesight was 20/20 with corrective lenses, the court ruled they did not have a disability.⁷ The *Sutton* decision also held that where the individual alleges discrimination under the “regarded as” definition, the individual must show that the employer actually believed that the individual had an impairment that was substantially limiting.

In *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*,⁸ Ms. Williams developed carpal tunnel syndrome, and after various failed attempts to accommodate her medical restrictions by transfer to alternative positions, she was terminated from her employment. Although she had difficulty performing certain repetitive activities at work, she was nevertheless capable of performing personal care tasks and household duties.

The court held that the determination of whether an impairment rises to the level of a disability is not limited to activities in the workplace. Instead, the determination also includes an analysis of whether the individual is limited in the performance of daily activities that are central to the person's daily life. Additionally, the court construed the phrase "substantially limits" to mean that the condition "prevents or severely restricts" the performance of the activity and that the ADA's definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled."⁹

The Changes

In the ADAAA, Congress stated that both *Sutton* and *Toyota* had narrowed the scope of protection Congress had originally intended and that the intent of the Act was to reject the standards enunciated in both cases.¹⁰ The following is a summary of the statutory and regulatory changes.

Major Life Activities: The act now provides two major categories of "major life activities." The first, which contains many of the activities which the EEOC had incorporated in its regulations under the 1990 Act, deal with social or vocational activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The new second category of activities focuses on medical factors, or major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The regulations go on to specifically provide that the term "major" is not to be determined by reference to whether it is of "central importance to daily life."¹¹

Substantially Limits: The regulations state that an impairment is considered to be a disability if it substantially limits the ability of the individual to perform the major life activity "as compared to most people in the general population," and an impairment does not have to prevent, or even significantly or severely restrict the individual from performing a major life activity in order to be substantially limiting. The regulations contemplate that this determination will generally be made without reference to scientific, medical, or statistical analysis. Rather, the regulations suggest that this determination will include an analysis of the difficulty the individual encounters in performing the activity; the effort required; the pain experienced; how long the activity can be performed and its effect on the operation of a major bodily function; as well as the negative side effects of medication intended to address the condition. The regulations also state that an impairment that is episodic or in remission is still considered a disability if it would substantially limit a major life activity when active and

that the effects of an impairment lasting fewer than six months can nevertheless be substantially limiting.¹²

Perhaps most significant with respect to the "substantially limits" terminology is some strong regulatory language regarding the emphasis (or lack thereof) the courts are to place on this standard. The regulations state, "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."¹³

Regarded as Having a Disability: Considering the interpretation placed on this term by the Supreme Court in *Sutton*, few claims were successful in raising this theory as grounds for a discrimination claim. Under the act and regulations, an individual meets this requirement if he or she has been subjected to discrimination because of an actual or perceived impairment, regardless of whether or not the impairment limits or is perceived to limit a major life activity, and the term "substantially limits" is not relevant under this prong of the disability definition. Prohibited actions include such things as refusal to hire, demotion, placement on involuntary leave, termination, or exclusion from a position for failure to meet a qualification standard. The only real limitation on this definition of disability is that it cannot be utilized if the impairment is transitory and minor with an expected duration of six months or less, but the employer must objectively demonstrate that the impairment is both transitory and minor.¹⁴

Corrective Measures: In response to the holding in *Sutton* dealing with corrective devices and measures, the act provides that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. Examples of mitigating measures include medication, equipment, low vision devices (other than ordinary eyeglasses and contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment, assistive technology, auxiliary aids, as well as learned behavioral or adaptive neurological modifications and psychotherapy. Conversely, the



Mark C. Travis represented public and private sector organizations in employment litigation, labor relations, and civil rights matters for over 20 years before becoming a full-time neutral. He holds an LL.M. in Dispute Resolution from the Straus Institute for Dispute Resolution at the Pepperdine University School of Law, where he

also teaches employment dispute resolution. Mr. Travis currently serves on the panels of the American Arbitration Association, the Federal Mediation and Conciliation Service, the Equal Employment Opportunity Commission, and the Financial Industry Regulatory Authority. In addition to his independent work as a neutral, Mr. Travis also serves as the Director of the Tennessee Center for Workforce Relations. He can be reached at mtravis@travisadr.com or www.travisadr.com.

corrective effect of ordinary eyeglasses or contact lenses that fully correct vision *is* to be considered in determining whether an impairment limits a major life activity.¹⁵

Practical Strategies in Mediation of Future ADA Claims

With the definition of disability broadened, summary judgment for the employer will be less likely. Now, the mediator's task is to focus the parties' and counsels' attention on whether the disabled individual can perform the *essential functions* of the job, with or without a *reasonable accommodation*.¹⁶

Essential Functions: In addressing the first part of that issue, the employee will often acknowledge that while there are certain functions of the job he or she clearly will not be able to perform, those functions are marginal or non-essential, and that the employer cannot use that inability to exclude the employee from the job. Obviously, the employer will disagree. Typical arguments are that the function has always been performed by individuals holding the position in question; that there are an insufficient number of employees to whom the function can be transferred; or perhaps the employee fails to possess some intangible quality the employer feels is important to job performance. In this situation, the mediator must be prepared to facilitate a process of reality testing with the parties, focusing on the objective criteria set out in the statute. Those factors include an analysis of what is stated in the employer's job description (if one exists), the number of employees among whom the function can be distributed, whether the function is highly specialized or the employee was hired to perform that function, the consequences of not performing the function, and the amount of time spent performing the function.¹⁷

Even with this analysis, there will obviously be disagreement among the parties and counsel. Consequently, the mediator may suggest an adjournment and ask the parties to agree to retain an independent third party to conduct a job analysis assessment on these factors, then reconvene the mediation to discuss these issues in more depth. While one or both counsel may balk at the expense involved, it is probable that such an expert will otherwise be retained for the case, if not already retained.

Reasonable Accommodation: Of course, the issue of essential functions does not exist in a vacuum, but must be considered in tandem with reasonable accommodation. If a reasonable accommodation exists which will enable the employee to perform the job, the issue of whether a function is "essential" becomes almost irrelevant. Thus, if the parties reach impasse on the issue of whether a particular function is truly essential, the mediator may suggest shifting the discussion and begin to brainstorm potential reasonable accommodations

that might enable the employee to perform the disputed function. This can possibly generate some momentum toward resolution without remaining mired down in the argument over essential job functions.

A discussion of reasonable accommodation may include restructuring the job by removing marginal functions, part-time or modified work schedules, reassignment to a vacant position, as well as acquisition or modification of equipment, among other things. The duty to reasonably accommodate an individual's disability also encompasses the duty of both the employer and employee to engage in an "interactive process" to determine the appropriate reasonable accommodation for an individual with a disability. Generally, this requires the employer to initiate a process with the employee whereby they jointly evaluate essential job functions, identify the employee's needs and limitations, brainstorm potential accommodations, and select an effective accommodation, if one exists.¹⁸

Often, the employer will assert that the employee never requested an accommodation (which the employee will deny), so the interactive process was never engaged; or that it was otherwise clearly evident that there was no way the employee could continue in the job, with or without a reasonable accommodation, thereby rendering moot the interactive process. The employer may also argue that a reasonable accommodation would appear to provide a preference to the disabled employee and therefore unfair to others. In these situations, the mediator must work to impress upon the employer that while an employee is required to request an accommodation before the interactive process is required, there is a factual dispute over that issue, the employee is now seeking an accommodation, and the mediation is the most appropriate forum for that discussion. The mediator must also impress upon the employer that the question of reasonable accommodation calls for an objective individualized assessment, and neither the employer's unilateral determination nor the attitudes of other employees are valid legal considerations.

On the other hand, it is not unusual for employees to take the position that they offered an accommodation which they felt best fit their individual needs and desires; however, the employer refused to implement the proposed accommodation, offering instead another accommodation which best fit the employer's objectives. While the regulatory guidance and case law are relatively clear that an employer's preference for a particular effective accommodation is entitled to deference, the mediator may wish to reinstate the interactive process and have the parties walk through their respective positions on this issue in an attempt to find some common ground in a neutral setting.

Direct Threat: It is not unusual for an employer to assert that even if the employee could technically perform the job in question with an accommodation,

the employee's performance of that job may present a direct threat to the employee or others. In order to constitute a "direct threat," there must be a "significant risk of substantial harm" to the employee or others that cannot be reduced or eliminated through reasonable accommodation. This includes consideration of: (1) the duration of that risk; (2) the nature and severity of the potential harm; (3) the likelihood that harm will occur; and (4) the imminence of the potential harm. This determination must be based on an individualized assessment of the employee's present ability, considering objective medical evidence, and not on stereotypes.¹⁹

When a defense of direct threat is raised, the employer is often basing their position on an opinion that certain disabilities preclude a safe workplace, and/or that the employee's continuation in the job will present a risk of increased liability for injuries. Employers may also be basing their opinion of direct threat on prior experience with other employees with the same or similar condition or limitations. Conversely, the employee may argue that he or she should be able to assume the risk of harm by continuing in the job, if that is his or her desire. As is the case for any neutral, the resolution lies somewhere in the middle. On the employer's position, the mediator must be prepared to address with the employer that the determination of the employee's ability to perform essential functions must be an "individualized" assessment, and the law does not address the issue of increased exposure to liability costs for an injury as a defense. Similarly, the mediator should be prepared to address with the employee that the issue of direct threat is not confined to the disabled employee, but concerns the risk of harm to co-workers and others as well.

When addressing the issue of direct threat, the mediator would also be well-advised to conduct some background research on the condition at issue in the case in order to more accurately address the risk factors mentioned above. Additionally, it should be remembered that a reasonable accommodation may successfully overcome the direct threat. As always, moving the process to a discussion of reasonable accommodation may effectively bypass specific factual arguments over the level of direct threat.

Conclusion

While most of the issues cited above are not new to the framework of the ADA, it may have been some time since a neutral has found it necessary to analyze them at great length. Here, I point out the kind of factually-intensive analysis that will now come into play in the mediation of these cases. It can be expected that once the element of "disability" is now more readily satisfied,

there will be increased contention over what job functions are essential, whether an accommodation is indeed reasonable, the depth to which the parties engaged in the interactive process, and to what extent the defense of direct threat is applicable. The 21st century mediator must be prepared to address the importance of these issues in the resolution of claims under the ADAAA. ♦

Endnotes

- 1 42 U.S.C. §12102(b)(1)-(2).
- 2 Amy L. Albright, 2006 *Employment Decisions Under the ADA Title I — Survey Update*, 31 MENTAL AND PHYSICAL DISABILITY L. REP. 328, 329 (2007) (finding that out of 272 ADA claims in 2006, employers prevailed in 97.2% of the cases); see also, Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1407 ("By 1996...courts applying the language of the ADA had summarily dismissed numerous cases of alleged disability discrimination on the ground that the plaintiffs were not disabled...").
- 3 42 U.S.C. §12102(4)(A); 29 C.F.R. §1630.1(a)(4).
- 4 <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.
- 5 42 U.S.C. §12102(1).
- 6 527 U.S. 471 (1999).
- 7 See also *Murphy v. UPS, Inc.*, 527 U.S. 471 (1999) (truck mechanic with high blood pressure that prevented him from obtaining Department of Transportation commercial license was not disabled since his condition was controlled by medication); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (truck driver with condition that could not be ameliorated by device but had come to compensate for it over the years, was not disabled under the Act.).
- 8 534 U.S. 184 (2002).
- 9 *Id.* at 197-198.
- 10 42 U.S.C. §12101(a),(b).
- 11 42 U.S.C. §12102(2)(A); 42 U.S.C. §12102(2)(B); 29 C.F.R. §1630.2(i)(1)(ii); 29 C.F.R. §1630.2(i)(2).
- 12 29 C.F.R. §1630.2(j)(1)(i),(ii),(v); 29 C.F.R. §1630.2(j)(4); 29 C.F.R. §1630.2(j)(1)(viii)(ix); 42 U.S.C. §12102(4)(D).
- 13 29 C.F.R. §1630.2(j)(1)(iii).
- 14 42 U.S.C. §12102(3)(A); 29 C.F.R. §1630.2(g)(3),(j)(2); 29 C.F.R. §1630.2(l)(1); 42 U.S.C. §12102(3); 29 C.F.R. §1630.2(j)(1)(ix); 29 C.F.R. §1630.15(f).
- 15 42 U.S.C. §12102(4)(E)(i); 29 C.F.R. §1630.2(j)(1)(vi);(j)(5); 42 U.S.C. §12102(4)(E)(ii)(iii); 29 C.F.R. §1630.2(j)(6).
- 16 42 U.S.C. §12111(8).
- 17 42 U.S.C. §12111(8); 29 C.F.R. §1630.2(n).
- 18 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. §1630.2(o)(3).
- 19 29 C.F.R. § 1630.2(r).

Ethical Guidance in Mediation

May a Family Law Mediator be Involved in Family Law Policy Matters?

By Kimberly Taylor and Roger Wolf

Recently, the ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance was asked whether a family law mediator, who is a full-time court employee, may engage in advocacy regarding family law policy issues, such as custody and parenting time. This advocacy may include, among other things, testifying before legislative bodies, lobbying individual legislators, and being a member of a group or speaking at conferences that advocate particular policy positions on family law issues.

In answering the question, the committee applied the American Bar Association Model Standards of Conduct for Mediators (2005), assuming that the inquiring mediator is not a judge currently serving on the bench, in which case the mandatory Code of Judicial Ethics would supersede the aspirational provisions of the Model Standards. And the committee suggested that if the mediator is a family law practitioner, he or she should also consider the aspirational Model Standards of Practice for Family and Divorce Mediation.

In particular, the committee focused on one of the stated goals of the Standards—to promote public confidence in mediation as a process for resolving disputes. The committee also considered various other ethical standards, addressing the role of parties as the final decision makers in the mediation process, as well as requirements that mediators remain impartial, decline gifts or other items of value that raise a question of actual or perceived impartiality, withdraw if their ability to remain impartial is compromised, make reasonable inquiries to assess conflicts, and disclose any facts that might raise a question of partiality.

Judges are limited in their ability to participate in advocacy activities through a group or organization because of the risk that the public will perceive the judge as fostering, supporting, or subscribing to the public policy, legal philosophy or legal position advocated by the group or organization. That activity may lead the public to conclude that the judge will not remain impartial in administering the law and in issuing decisions on the outcomes of cases coming before him or her.

Mediators, on the other hand, do not face the same constraints. Unlike the highly cautious and preclusive approach taken under the Canons of Judicial Conduct, the Model Standards do not expressly preclude

advocacy-related activities by mediators. In fact, the Model Standards support outreach and educational activities if the mediator conducts them consistent with its provisions. However, the Model Standards do require the mediator to repeatedly assess—before, during and after a mediation—whether the advocacy-related activities might create an actual, potential, or perceived conflict of interest or a source of favoritism, bias or prejudice that could undermine the quality, effectiveness, and “integrity” of the specific mediation the mediator is handling or has handled.

If that assessment reveals a lapse in the ability of the mediator to conduct a mediation in an impartial manner, the mediator must withdraw. Secondly, and arguably of lesser importance under the Model Standards, the advocacy-related relationship or activity should not undermine public confidence in the mediation process as a means for resolving disputes.

The ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance provides advisory responses to requests for ethical guidance. The committee includes ADR practitioners, academics and leading ADR ethical experts from the public and private sector. The committee accepts inquiries from ABA members, non-members and may also consider an issue on its own initiative. While it may draw on other sources of authority, such as opinions or other guidance issued by state ethics authorities, its focus is on interpreting the American Bar Association Model Standards of Conduct for Mediators (2005) (“Model Standards”) and applying them to the issue presented. The committee may, from time to time, also consult with the ABA Center for Professional Responsibility and the ABA Standing Committee on Ethics and Professional Responsibility, as appropriate.

The Committee is accepting inquiries and providing advisory responses to your requests. To submit an inquiry, go to: <http://www.abanet.org/dispute/documents/IntakeFormFINAL.doc>.

If a mediator is engaged in advocacy-related activities, he or she must disclose any facts that might raise a question that the mediator has an actual or potential conflict of interest. Failure to do so might cause a party who subsequently discovers this information to suspect that the mediator was biased toward one of the parties or that the outcome in that mediation was tainted by the advocacy-related beliefs or opinions of the mediator. Disclosure of these activities in advance allows the parties to make a knowing assessment of whether to use the mediator, supports party self-determination and minimizes any suggestion that the mediator was not acting impartially. A mediator who participates in a family law mediation should therefore disclose to the parties his current and past participation in all the identified activities.

The Model Standards prohibit soliciting new business in a way that creates an appearance of partiality or undermines the integrity of the mediation process. A mediator should therefore reject compensation, gifts, or other items of value from an advocacy organization for training, speaking, or playing advocacy roles, if that item of value "raises a question as to the mediator's actual or perceived impartiality." In addition, a mediator using his relationship with an advocacy group to generate new business, through public speaking opportunities or by playing other roles in the organization, would need to ensure that the activities do not make mediating in future cases problematic because the mediator has created "an appearance of partiality for or against a party," or because the mediator's association with those activities "otherwise undermines the integrity of the process."

Further, if the advocacy activities might affect a mediator's orientation to the substantive outcome in the mediation, or give rise to favoritism, bias or prejudice against one of the parties for his or her "values or beliefs," the mediator should withdraw.

Keeping in mind these various issues, the committee concluded that the mediator can engage in advocacy-related activities but should disclose to the parties in a family law mediation his current and past participation in the identified activities so that the parties can then make an informed choice about whether to retain the mediator to handle the particular dispute. The mediator should exercise caution and good judgment in pursuing any advocacy related activities in the family law context. ♦

Ethics Resources Available at the Section of Dispute Resolution

- **National Clearinghouse for Mediator Ethics Opinions**

This searchable database provides comprehensive coverage of mediator ethics opinions from 43 states. The database contains a short summary of each opinion with a hyperlink to the original opinion or document issued by the state or national body.

- **The Model Standards of Conduct for Mediators 2005**

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the organizations revised the Model Standards in 2005.

- **ABA/CCA Annotated Code of Ethics for Arbitrators in Commercial Disputes**

The Code of Ethics provides ethical guidance for many types of arbitration. This Annotation provides citations to judicial decisions and other published writings which cite the Code from 1981 through July, 2011.

**Find ADR Ethics Resources at
www.ambar.org/disputeresources.**

For a full version of Opinion SODR-2011-1, visit the Section of Dispute Resolution's Committee on Mediator Ethical Guidance webpage at <http://apps.americanbar.org/dch/committee.cfm?com=DR589300>.



Kimberly Taylor serves as the COO of JAMS and oversees operations in the United States. Working directly with the president and CEO, and leading a team that spans 23 resolution centers nationwide, Ms. Taylor is responsible for the company's day-to-day operating activities. Ms. Taylor previously served as JAMS associate general counsel. She serves as co-chair of the ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance. She can be contacted at ktaylor@jamsadr.com.

Roger C. Wolf is law school professor emeritus at the University of Maryland Francis King Carey School of Law and is the founder of C-DRUM, the Law School's Center for Dispute Resolution. A long time mediator and trainer, he is the past co-chair of the Section's Ethics subcommittee and is co-chair of the Section's Committee on Ethical Guidance. He can be reached at rwolf@law.umaryland.edu.

FINRA Arbitration Panel's Decision Upheld by 5th Circuit

The 5th Circuit Court of Appeals affirmed a lower court ruling holding that the petitioner did not provide adequate evidence to show that an arbitration award was procured by fraud in *Wanken v. Wanken*, 2011 U.S. App. LEXIS 20014 (5th Cir. 2011). Beacon Financial Advisors terminated Wanken, a sales associate, and Wanken filed for arbitration via the Financial Industry Regulatory Authority (FINRA). The FINRA arbitrator upheld the firm's decision to terminate the employee, but granted him arbitration costs and changed his termination status to "no-fault." Wanken argued that the Court should review the arbitration award on its merits, and the Court disagreed.

The Illusion of Illusory Arbitration Clauses: Protecting the Little Guy

Earlier this year, the 5th Circuit Court of Appeals held that an arbitration clause in the defendant's employee handbook was illusory. In *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. App. LEXIS 1339 (5th Cir. 2012), Carey was a sales representative at 24 Hour Fitness and signed the Employee Handbook Receipt Acknowledgement, binding him to the arbitration clause therein. He filed a class action against 24 Hour Fitness alleging a Fair Labor Standards Act violation for not compensating him and other similarly situated employees for overtime work. 24 Hour Fitness submitted a petition to compel arbitration. Carey argued that the agreement was illusory because 24


Hour Fitness "retain[ed] the unilateral right to modify or terminate the arbitration provision" at any time. The Court agreed that one party, 24 Hour Fitness, could unilaterally avoid its promise to arbitrate by modifying the Handbook to eliminate the arbitration provision if it determined that arbitration was no longer in its interest.

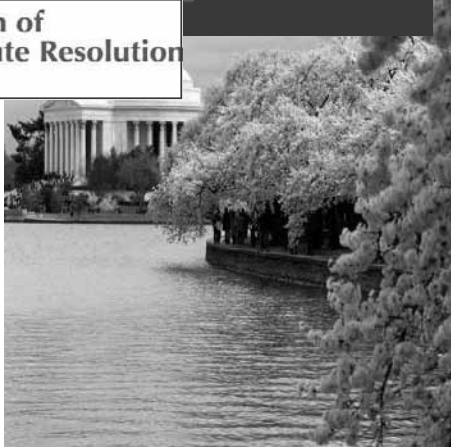
Supreme Court Strikes Down West Virginia Ruling on Pre-Dispute Agreements

In *Marmet Health Care Ctr. v. Brown*, 2012 U.S. LEXIS 1076 (2012), the U.S. Supreme Court vacated the Supreme Court of Appeals of West Virginia's judgment and granted certiorari in two consolidated negligence cases involving patients, nursing homes, and the Federal Arbitration Act (FAA). The parties entered into contracts with arbitration agreements that compelled all disputes, aside late payment disputes, to arbitration pursuant to the FAA. In each case, a family member sued a nursing home for negligence because of the death of a patient. The Supreme Court remanded the cases back to West Virginia, finding that the West Virginia high court incorrectly interpreted the FAA without giving deference to precedent from the Supreme Court. The Court found that West Virginia's rule prohibiting pre-dispute arbitration agreements in personal injury and wrongful-death claims is contrary to the terms and coverage of the FAA in light of *AT&T Mobility*.

Duane Rohrbacher is a law student and Ph.D. candidate at Pennsylvania State University.

Calendar of Events

**Section of
Dispute Resolution**
AMERICAN BAR ASSOCIATION



7th Annual Advanced Arbitration Training Institute
June 21-23, 2012
DoubleTree by Hilton Philadelphia
Philadelphia, PA

ABA Annual Meeting
August 4, 2012
Hyatt Regency
Chicago, IL

10th Annual Advanced Mediation & Advocacy Skills Institute
November 14-17, 2012
Hilton Boston Back Bay
Boston, MA

2013 Dispute Resolution Section Spring Conference
April 3-6, 2013
Chicago, IL

For more up to date information
Visit us on the web:
<http://www.americanbar.org/dispute>

Section News

Nominations for Section Leadership Positions

The Section's Nominating Committee, which is responsible for nominating individuals for Section Council positions, seeks nominations for the leadership positions that will be filled for the 2012-2013 American Bar Association year. The Nominating Committee is now accepting nominations for three at-large Section Council positions, and four executive committee positions: secretary, vice-chair, chair-elect, and the delegate to the ABA House of Delegates.

Council members serve three-year terms and are expected to participate in four quarterly in-person meetings of the Council. In addition, Council members work on task forces, ad hoc and standing committees, as well as various other projects of the Section. The secretary position is a two-year term; the vice-chair and chair-elect positions have one-year terms; and the delegate positions is a three-year term.

To be eligible for election to these positions, nominees must have been Section members for at least one year prior to nomination. Individuals may self-nominate or may be nominated by others by sending a letter and brief biographical statement no later than May 15 to David Moora at david.moora@americanbar.org.

Thursday Afternoon Town Hall Meeting! Should Dispute Resolution Professionals be Regulated?

At the Section of Dispute Resolution Spring Conference in Washington, D.C., the Section will be hosting a Town Hall on whether dispute resolution professionals should be regulated. The question of mediator/arbitrator quality assurance remains unresolved within

the field, and the community continues to debate whether mediators and arbitrators should be credentialed, and if so, what those credentials should be. This event may be the largest single discussion of these issues within the ADR community, facilitated by AmericaSpeaks, a leading facilitator of large deliberative processes (www.americaspeaks.org). Participants will use keypads and groupware simultaneously to instantly prioritize recommendations and ensure that every voice is heard.

New Member Resource *Preparing for Mediation Guides*

A group of ABA members, led by John Lande and Howard Herman, recently completed the guides for *Preparing for Mediation*. These guides are designed to help parties plan to participate in mediation to make it as productive as possible. Lawyers, mediators, courts, mediation programs, and others may suggest that parties read one of these guides before participating in a mediation. There are three versions of the guide:

Preparing for Mediation is a general version that can be used in many different types of mediation, regardless of whether a party is represented by a lawyer.

Preparing for Family Mediation includes information specific to mediation in family disputes.


Preparing for Complex Civil Mediation is designed for parties in complex civil disputes who are represented by lawyers.

The guides can be downloaded from the Section web site: www.ambar.org/disputeresources.

AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION

7th ANNUAL ADVANCED ARBITRATION TRAINING INSTITUTE

Registration Now Open
Space Limited



PHILADELPHIA

JUNE 20-23, 2012

The Training Includes:

- In-depth coverage of the arbitration process from start to finish.
- Practice tips, lessons learned and advice from an expert faculty of seasoned arbitrators and arbitration advocates.
- Opportunity to learn and discuss the latest developments in arbitration practice.

Who Should Attend?

- Litigators wanting to better utilize arbitration & gain insights into how arbitrators approach task.
- Those planning a career move to arbitration or experienced arbitrators wanting to better understand recent developments and trends in arbitration.
- In-house counsel, including those who manage disputes, interested in learning the nuts and bolts of arbitration.

American Bar Association Section of Dispute Resolution
740 15th Street, NW | Washington, DC 20005 | 202-662-1680 (phone) | 202-662-1683 (fax)
Hotel and registration information can be found here: http://www.americanbar.org/content/dam/aba/images/dispute_resolution/2012arbflyer.pdf

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AMERICAN BAR ASSOCIATION

UNIFORM CERTIFICATE OF ATTENDANCE

Required sponsor documentation has been forwarded to and credit requested from MCLE states with general requirements for all attorneys. Within 30 days of this activity (or annually if required), **the attorney must file this Certificate with his/her MCLE state agency of licensed in AR, CO, FL, GA, ID, KY, LA, ME, MS, NH, NM, NV, ND, PR, RI, TN, VA, WV, or WY. Do not file this Certificate with your MCLE state agency if licensed in AL, AK, AZ, BC, CA, GUAM, IA, IL, MN, MO, MT, NC, NY, OK, OR, QC, SC, TX, UT, VT, VI, WI or WA.** Filing of Certificates is optional in all remaining states with MCLE requirements. Attorneys should keep the original or a copy of this Certificate for your files. The ABA pays applicable fees in states where the sponsor is required to do so as well as in states where a late fee may become applicable. Please be aware that each state has its own rules and regulations indicating what qualifies for "CLE" and "Ethics" credits. Therefore, certain programs may not receive credit in some states. You may wish to check with your state for confirmation of a program's approval.

Sponsor: **Dispute Resolution**

Activity Title: **ADR Practice Development Tips for Women**

Date: **May 14, 2013**

Location: **Multisite Teleconference,**

We have **requested**
a total of:

1.25 CLE credit hours based on a 60-minute hour
1.50 CLE credit hours based on a 50-minute hour

of this total

0.00 Ethics CLE credit hours based on a 60-minute hour
0.00 Ethics CLE credit hours based on a 50-minute hour

Note: Depending on your state's rules, Welcome/Opening Remarks may or may not be approved for CLE credit.

Do not return this certificate to the ABA.

TO BE COMPLETED BY ATTORNEY:

[NOT INTENDED FOR USE BY NEW YORK LICENSED ATTORNEYS]

By signing below, I certify that I attended the

- ☐ ABA Teleconference Activity
- ☐ ABA Live Audio Webcast Activity

[YOU MUST CHECK THE ONE ACTIVITY PARTICIPATED IN]

described above and am entitled to claim _____ CLE credit hours including _____ ethics credit hours.

Attorney Name (Print)

Signature

Membership, Registration or Supreme Court Number

Date

State where credits are to be registered

(Complete a Certificate for each state to which you are required to report.)



Acknowledged by:

Margaret Naughton

Margaret Naughton - Associate Director
ABA Course ID# 10451

HOW TO GET THE MOST MCLE CREDITS ...

ADR Practice Development Tips for Women

May 14, 2013

Course ID# 10451

ACCREDITATION FOR MANDATORY CLE JURISDICTIONS

- MCLE states that give accreditation for teleconference have been notified of this program and credit has been requested. Be aware that each state has its own rules and regulations, including its definition of 'CLE'. Therefore, certain programs may not receive credit in some states. Check with your state for confirmation of a program's approval.

STATES NOT ACCREDITING TELECONFERENCES

DELAWARE INDIANA KANSAS OHIO PENNSYLVANIA

(* These States MAY accredit live webcasts as self-study)

UNIFORM CERTIFICATE OF ATTENDANCE

- **All program attendees seeking Continuing Education credits must receive a Certificate of Attendance.**
- Please see the top paragraph of the Certificate for individual MCLE state filing instructions.
- Iowa and Oregon attorneys should contact their respective CLE boards to verify legal ethics credits requested for any program.
- Complete the lower portion of the Certificate. Be sure to fill in your Membership, Registration or Supreme Court ID Number.
- Complete a Certificate for each state to which you are required to report.
- Keep either the original or a copy of this Certificate for your files.
- **Do not** return your Certificate of Attendance to the ABA.

PROGRAM EVALUATION FORM

- Complete your evaluation form and return it to the program registration desk before you leave.
- *Do Not* send the evaluation form to your state agency.
- We value your input and your comments.

ALL ATTENDEES

After the ABA Teleconference (or Live Audio Webcast), please complete the attached Teleconference (or Live Audio Webcast) Attendance Confirmation Form. Include your name, address, daytime phone number, the MCLE State(s) where credits are to be registered, and your State Bar number(s). Include the number of CLE credit hours you are entitled to claim then sign, date and **return this form**. You may fax the Teleconference (or Live Audio Webcast) Attendance Confirmation Form to the attention of the ABA Sponsor and Contact Person listed on the face of the form.

GEORGIA ATTENDEES

Follow these simple rules for Georgia in-house study approval.

- Report your attendance in the teleconference (or live audio webcast) to Georgia as in-house study credit.
- Attorneys can receive a maximum of 6 hours of participatory in-house credit per calendar year.

IOWA ATTENDEES

- Each attorney who attends a teleconference or webcast CLE activity must substantiate CLE Credit in Iowa by attaching the sponsor's certificate of the attorney's attendance at these events to the attorney's annual CLE report when it is filed at the close of the calendar year.

LOUISIANA ATTENDEES

- This "technologically assisted" program format is listed under Louisiana's self-study allotment, which caps at a maximum of 4 hours per year.

SOUTH CAROLINA ATTENDEES

- Participants can earn a maximum of 1 hour credit for participation in this Teleconference or Live Audio Webcast

ARE YOU LICENSED IN A 60-MINUTE OR 50-MINUTE HOUR MCLE STATE?

60-minute states are: AK, AL, AZ, AR, BC, CA, DE, GA, ID, IL, IN, IA, KY, LA, ME, MN, MS, MT, NH, NV, NC, ND, NM, OH, OR, PA, PR, QC, SC, TN, TX, UT, VA, VT, WA and WY.

50-minute states are: CO, FL, GUAM, KS, MO, NY, OK, RI, VI, WV and WI.

Questions?

Contact the ABA Center for Continuing Legal Education MCLE Unit at (312) 988-6217.



HOW TO GET YOUR MCLE CREDITS (FOR NEW YORK-LICENSED ATTORNEYS)

ADR Practice Development Tips for Women

May 14, 2013

ABA Course ID# 10451

The American Bar Association (ABA) has been certified by the New York State Continuing Legal Education (CLE) Board as an Accredited Provider of continuing legal education in the State of New York. Therefore, this program is approved for the CLE credit imprinted on the face of the New York CLE Certificate of Attendance form.

Step One: Sign In and Out

All New York-licensed attorneys and speakers seeking CLE credits must sign in and out of each ABA program attended. If the ABA program consists of multiple sessions, you must sign in and out of each individual session you attend. The sign in and out documentation is used to verify the total number of CLE hours to which you are entitled. If you do not sign in and out, the ABA cannot provide you with a New York CLE Certificate of Attendance form.

Step Two: Complete a Program Evaluation

If you were provided a hard copy program evaluation form, please complete it and return it to the ABA program registration desk before you leave. Otherwise, please complete the online program evaluation at your earliest convenience. Please do not send program evaluations to the New York CLE Board. Thank you for your input and comments.

Step Three: Getting Your New York CLE Certificate of Attendance

All New York-licensed attorneys seeking CLE credits must obtain completed New York CLE Certificate of Attendance forms for their records. A certificate is required for each program attended or, if applicable, each session attended.

If a New York CLE Certificate of Attendance is not available at the end of the CLE program (or session), the ABA will first verify your attendance then send a completed certificate to you within 60 days via email or mail.

Step Four: After You Receive Your New York CLE Certificate of Attendance

For audit purposes, New York-licensed attorneys are required to keep the New York CLE Certificate of Attendance form for four (4) years. Please do not send the certificate to the ABA or the New York CLE Board.

Questions? Please visit <http://americanbar.org/mcle> for more information

TELECONFERENCE or LIVE AUDIO WEBCAST

ATTENDANCE CONFIRMATION FORM

PLEASE PROVIDE ALL INFORMATION FOR PROPER ATTENDANCE VERIFICATION

Sponsor: **ABA Dispute Resolution**

Program Title: **ADR Practice Development Tips for Women**

Date: **May 14, 2013**

Course ID#: 10451

PARTICIPANT INFORMATION: (Please Print)

Name _____

Address _____

Daytime Phone _____

City, State, Zip _____

• • •

***IMMEDIATELY AFTER YOUR PARTICIPATION IN THIS PROGRAM,
PLEASE FILL IN THE BLANKS AND RETURN THIS FORM TO THE ABA.
THANK YOU!***

• • •

TO BE COMPLETED BY ATTORNEY:

By signing below, I certify that I attended the

• ☐ ABA Teleconference activity

[YOU MUST CHECK THE ONE ACTIVITY PARTICIPATED IN]

• ☐ ABA Live Audio Webcast activity

described above and am entitled to claim the CLE credit hours (including any ethics credit hours) listed below for the States I have indicated. *The participation verification code I heard in the program is _____

	State(s) where Credits are to be Registered	State Bar Licensing Number(s) (or Attorney Membership, Registration or Supreme Court Number)	General	Ethics Credit Hours
1)	_____	_____	_____	_____
2)	_____	_____	_____	_____
3)	_____	_____	_____	_____
4)	_____	_____	_____	_____
5)	_____	_____	_____	_____

Attorney Name (Print) _____

Signature _____

Date _____



PLEASE FAX TO: (202) 662-1683

ATTN: Theona Salmon Ponder

or MAIL TO: Dispute Resolution 740 15th Street NW 9th Floor Washington, DC 20005

** If your state requires this program-specific participation verification code, please enter it here to verify your participation.*

**ABA Section of Dispute Resolution
Teleconference: ADR Practice Development for Women**

Program Evaluation

Tuesday, May 14, 2013 12:00pm - 1:15pm Eastern Time

Please take a few minutes to complete the following evaluation of the program.

Use the following five point scale for your ratings:

1=very poor 2=poor 3=average 4=good 5=very good

1. Overall I give this session the following

1 2 3 4 5

2. Please rate the program content:

1 2 3 4 5

3. Please rate the program materials:

1 2 3 4 5

4. Was there sufficient audience participation and interaction (please circle)?

Yes No

5. Please rate the presenters on the effectiveness of their presentations:

Gina Miller	1	2	3	4	5
Sandra Partridge	1	2	3	4	5
Harrie Samaras	1	2	3	4	5
Anne Marie Seibel	1	2	3	4	5
Kimberly Taylor	1	2	3	4	5

6. Other comments about the program and presenters:

7. Would you like to see additional programming on this/related topic (please circle)?

Yes No

Detail:

8. Please rate the marketing of this program:

1 2 3 4 5

Please return your completed evaluation form via fax to ABA DR Section at 202-662-1683 or by mail to ABA Section of Dispute Resolution, 740 15th Street NW, Washington, DC 20005.