

PERCEPTION IS REALITY: THE LINK BETWEEN A MEDIATOR'S GENDER AND THE OUTCOME OF MEDIATION

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I. INTRODUCTION

Much has been written about how the gender of a participant impacts the process and outcome of mediation. This comes as no surprise since countless studies have concluded that individual differences exist between men and women which affect how each understands and engages in conflict and conflict resolution.¹ One gender-related area that remains relatively unearthed, however, is how the gender of the *mediator* affects the mediation. What my research has revealed, and what this paper posits, is that the link between the mediator's gender and the outcome of the mediation lies in the eyes of the disputants. More specifically, the outcome of the mediation is influenced more by the participants' *perceptions* of the mediator's gender than the mediator's *actual* gender.

Because mediation is a voluntary process, working with participants who potentially perceive that a mediator is unfavorable or ineffective because of the mediator's gender has critical implications for the success of the mediation.² The million-dollar question then, if mediators are to have any chance at all of conducting mediations which disputants perceive as having a favorable outcome despite gender biases is, "*What then influences participants' perceptions?*" This is not to suggest that mediators should attempt to manipulate the participants in order to receive a favorable rating, but rather to stress how important it is for mediators to be

¹ Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28, (1) Conflict Resol. Q. 23, 24 (2010).

² Melissa G. Morrissett & Alice F. Stuhlmacher, *Males and Females as Mediators: Disputant Perceptions*, 3, IACM 2006 Meetings Paper. Available at SSRN: <http://ssrn.com/abstract=913737>.

aware of gender biases that exist and understand the effects they have on the mediation process. It is only through awareness and understanding that mediators will be able to employ any necessary mediation tactics within the confines of the professional and ethical rules governing mediators that will facilitate a favorable outcome in the face of any gender biases.

This paper begins by defining gender and discussing the origin and evolution of gender roles. Next, the paper describes the interrelated concept of gender role stereotyping and discusses the impact of gender stereotyping on male and female social interactions. Before presenting the thesis of this paper, I will discuss some actual and perceived differences between men and women and in particular between male and female mediators and how those differences play out in a mediation setting. The next section of this paper details several recent studies the results of which support the thesis of this paper; that is it actually the disputants' perceptions, i.e. gender stereotypes, which have the most profound effect on the mediation process and outcome. Finally, after analyzing how a participant's perceptions of the gender of the mediator affect the process and outcome of the mediation, this paper poses an inquiry into whether the identified effects are such that they should or even *can* be minimized. I will conclude this paper by discussing my theories on if and how mediators can minimize or neutralize any effects of gender bias at play during the mediation without manipulating the perceptions of the participants and without altering the process in such a way as to prevent an authentic outcome.

II. GENDER ROLES AND GENDER STEREOTYPES

*Sugar and spice and everything nice,
That's what little girls are made of.
Snips and snails and puppy dog tails,
That's what little boys are made of.*

--Robert Southey

A. Gender 101

What exactly *is* gender? Loosely defined, gender is a set of characteristics distinguishing between male and female.³ I say “loosely” because this definition oversimplifies what gender is and what it encompasses. Gender is much more than “male” or “female.” In fact, the male/female view of gender is by today’s standards a rather antiquated concept.

The origin of the term gender at least in light of how we think of its meaning today may be surprising. Until about the middle of the 20th century, the term gender was used almost exclusively to refer to grammatical categories.⁴ For example, in some languages, nouns are classified according to the gender of the pronoun that can substitute for them, e.g., *he* is a masculine pronoun while *she* is feminine.⁵ As author and esteemed sociology professor J. Richard Udry recalls in *The Nature of Gender*, “When I was young, the term *gender* referred to the grammatical inflection of nouns. In those days . . . using gender to refer to male/female classification was a joke.”⁶

In 1955, however, the term *gender* took on a new meaning when controversial psychologist and sexologist John Money coined the phrase “gender role.”⁷ According to Money, gender included not only one’s status as a man or a woman but also physical and behavioral differences that go beyond male and female genitalia. Gender signifies “all the ways, nongenital as well as genital, in which masculinity and femininity are privately experienced and publicly

³ Wikipedia, http://en.wikipedia.org/wiki/Gender#cite_note-27 (last modified on 22 April 2011).

⁴ Richard J. Udry, *The Nature of Gender*, 31 (4) *Demography* 561 (1994).

⁵ George Yule, *The Study of Language*, 83-84 (4th ed., Cambridge University Press 2010).

⁶ Udry, *supra* n. 4, at 561.

⁷ John W. Money & A.A. Ehrhardt, *Man & Woman, Boy & Girl: The Differentiation and Dismorphism of Gender Identity from Conception to Maturity*, 311 (Johns Hopkins University Press, 1972).

manifested, irrespective of genital disability.⁸ Specifically, Money defined the term “gender role” as:

“All those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively. It includes, but is not restricted to sexuality in the sense of eroticism. Gender role is appraised in relation to the following: general mannerisms, deportment and demeanor; spontaneous topics of talk in unprompted conversation and casual comment; content of dreams, daydreams.”⁹

By and large, modern definitions of gender roles have remained consistent with that developed by John Money many years ago. Today, when we think of gender we think of those characteristics of an individual that society views as either male or female. Ergo, gender roles are “socially and culturally defined . . . beliefs about the behavior and emotions of men and women.”¹⁰

John Money made the concept of gender a broader, more inclusive concept than one of male/female. By defining gender as something that was dependent upon the subjective notions of what society viewed as male or female, Money in effect birthed an evolutionary process. Indeed today, over five decades after Money introduced his groundbreaking idea into the psychological and sociological communities, *gender* and by implication *gender roles* remain ever-changing, ever-evolving concepts which have paralleled, to some extent, the evolutionary patterns of society.

As late as the 1950s, “the normative American family consisted of a breadwinner father, homemaker mother and several children.”¹¹ The tables have turned dramatically, however, on the

⁸ *Id.*

⁹ John W. Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms* 1 J. Amer. Acad. Psychoanal. & Dyn. Psychiatry, 397-402 (1973).

¹⁰ Dina L. Anselmi & Anne L. Law, *Questions of Gender: Perspectives and Paradoxes* 195 (McGraw-Hill 1997).

¹¹ Jill W. Bishop, *Family Structure Changes: 1950s to 1990s*, http://bishopfamily.com/Essays/family_structure_changes.htm (last accessed March 12, 2011).

roles once played out in the “ideal” American family. The Bureau of Labor Statistics now reports that the number of women participating in the workforce in the United States has nearly doubled in the 20th century. Women’s labor force participation which was at a rate of 33.9 percent in 1950 increased significantly during the 1970s and 1980s, climbing to 57.5 percent in 1990 and to 60 percent by 1999.¹² Although the rate has declined slightly in years since, falling to 59.9 percent in 2000 and to 59.3 percent in 2005, the rate of women in the workforce in the U.S. is expected to level off in coming years with the participation rate of women projected to be 59.4 percent in 2020.¹³ Conversely, the labor force participation rate of men has been decreasing since the 1950s, having registered 86.4 percent in 1950, 79.7 percent in 1970, 76.4 percent in 1990 and 73.3 percent in 2005.¹⁴ Interestingly, the decline in the men’s labor force participation rate is expected to continue and is projected to be 70 percent in 2020.¹⁵

In addition to the changing roles of men and women in the workforce, society’s attitudes on once taboo topics such as homosexuality are also changing our once seemingly simple definition of gender. Evelyn Hooker, Ph.D., published the first empirical research to challenge the prevailing psychiatric assumption that homosexuality was a mental illness. Her work was the cornerstone for an entire body of research that ultimately led to removal of "homosexuality" from the Diagnostic and Statistical Manual of Mental Disorders.¹⁶ Ms. Hooker would be pleased to learn that a recent Gallup poll reports that Americans' acceptance of gay relations crossed the 50% threshold in 2010.¹⁷ State legislatures are undoubtedly evidence of this new phenomenon.

¹² Bureau of Labor Statistics, *Changes in Men and Women’s Labor Force Participation Rates* <http://www.bls.gov/opub/ted/2007/jan/wk2/art03.htm> (posted January 10, 2007).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Myrna Oliver, *Evelyn Hooker: Her Study Fueled Gay Liberation*, Los Angeles Times 32 (November 22, 1996).

¹⁷ Lydia Saad, *Americans’ Acceptance of Gay Relations Crosses 50% Threshold*, <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx> (posted May 25, 2010).

As of March 3, 2010, same-sex marriage is legal in five U.S. states; Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and in Washington, D.C.¹⁸ and is bouncing through the legislatures of several other states including Maryland.¹⁹

The development of another more recent phenomenon that has further blurred the lines of gender is the introduction of the idea of transgender individuals. Simply put, transgender people have all genders or may have none at all. Transgender is a term that describes . . . a broad category of people who are uncomfortable in the gender of their birth.²⁰ Some transgender people are male; some transgender people are female. Among non-transgender people, there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, to name just a few. Among transgender people as well, there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, and many more.²¹ Some transgender people may be transsexual — moving from male to female, or female to male with the help of surgery or hormones.²² Still other transgender people are not moving between sexes; they're parked somewhere in the middle and prefer to describe themselves as "genderqueer" — signifying that they reject the either-or male-female system.²³ These transgender people often identify as trans, tranny, trannyboy, trannygirl, transsexual²⁴ the list goes on and on.

What was once a seemingly simple concept deriving from the “sex” of an individual, *gender* has now become a complex notion that continues to evolve with each passing decade.

¹⁸ Ian Urbina, *Gay Marriage is Legal in U.S. Capital*, New York Times A20 (March 4, 2010).

¹⁹ *Id.*

²⁰ Fred A. Bernsetin, *On Campus, Rethinking Biology 101*, New York Times, <http://www.nytimes.com/2004/03/07/style/on-campus-rethinking-biology-101.html?src=pm> (March 7, 2004).

²¹ Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 Mich. J. Gender & L. 253, 265 (2005).

²² *Id.* at 268.

²³ *Id.* at 265.

²⁴ *Id.* at 266.

Yet despite this evolution, society continues to associate some characteristics and behaviors as predominantly male and some as predominantly female. This is known as gender stereotyping and it is a powerful force, a process of sorts that permeates all male/female social interactions including mediation.

B. THEN ALONG CAME STEREOTYPES . . .

Stereotypes are devices for saving a biased person the trouble of learning.

--Author Unknown

In an experiment performed by the popular ABC TV news show 20/20, several children were shown pictures of two men; one man was black, the other was white. The children were asked to comment on pictures. When commenting on the photograph of the black man, the children made such statements as, "He looks mean." Another referred to him as "FBI's Most Wanted." Still another commented, "He looks like he's a basketball player."²⁵ When the white man's picture was shown, one child said, "He's nice." When the children were asked which one was a criminal, most pointed to the black man. Conversely, when they were asked which one was a teacher, most pointed to the white man. The white man in the picture was Oklahoma City bomber Timothy McVeigh. The black man was Harvard University professor Roland Fryer.²⁶

The children in this experiment were not being mean by pegging the black Harvard professor as a criminal and the white mass murderer as a teacher. Their comments were undoubtedly the result of conditioned responses brought about by the stereotypes, in this case the racial stereotypes, they have learned thus far in their young lives. And it does not end there. Stereotypes, which are too numerous to count, are present in all age groups and are at work in all

²⁵ John Stossel & Kristina Kendall, *The Psychology of Stereotypes*, <http://abcnews.go.com/2020/story?id=2442521&page=1> (posted September 15, 2006).

²⁶ *Id.*

aspects of social interactions. They can be positive or negative. True or not true. They can be based on a person's race, gender, social class, involvement in a certain organization, the way a person is dressed; the list is endless. One thing is for sure, stereotypes have a strong influence over the way people think and consequently, the way they act and it is unlikely that they will be going away any time soon.

So what are stereotypes anyway? Where did they come from and how did they come to be such a powerful, influential force in our society? Stereotypes are “over-generalized beliefs about people based on their membership in one of many social categories.”²⁷ Stereotyping is a way of categorizing things and has both cognitive and psychological roots. From a cognitive standpoint, “quick and ready categorizations, even from momentary encounters, help us process huge amounts of information we receive about the people we encounter.”²⁸ Once information is stored in categories it can be used to make predictions and inferences about new category members. For example, if a person has seen an orange basketball before they will place it into a certain category which has several characteristics, such as, it has a certain texture, it is round and it bounces. Later, when that person sees a black basketball, they may be able to place it in that same category based on some similar characteristics to the orange ball such as texture and shape and will from there be able to infer that it has certain characteristics as well, e.g. that it also bounces.²⁹ Psychologically speaking, people stereotype in order to predict a target person's behaviors or characteristics,³⁰ perhaps out of fear or insecurity or a need to control one's environment. Extending the basketball example from above to carnivorous jungle cats and their

²⁷ Dina L. Anselmi & Anne L. Law, *Questions of Gender: Perspectives and Paradoxes* 195 (McGraw-Hill 1997).

²⁸ Margaret L. Andersen & Howard Francis Taylor, *Sociology: Understanding a Diverse Society*, 275 (4th ed., Thomson Wadsworth 2008).

²⁹ Adam J. Oliner, *The Cognitive Roots of Stereotyping*, <http://adam.oliner.net/comp/stereotyping.html#abstract> (posted October 19, 2000).

³⁰ *Id.*

propensity for devouring humans,³¹ the benefits are obvious when a person's inferences based on categorization are used to prevent serious injury or even death.

Stereotypes based on gender are also apparent in society. From birth children are taught the values and behaviors of their gender. It is through this socialization process that they learn the rules for being male or female.³² Parents and teachers, like the rest of society, are already programmed to expect certain characteristics of little girls and little boys³³ thus, from an early age we are sent messages that boys and girls are different in ways that tend to reinforce stereotypes. For example, studies show that girl babies are cuddled more than boy babies and that babies wrapped in blue blankets are held differently than babies wrapped in pink blankets.³⁴

As boys and girls grow into adults, gender stereotypes are perpetuated and become gender "roles" or "norms." These gender roles are "socially and culturally defined prescriptions and beliefs about the behavior and emotions of men and women."³⁵ For example, we are taught that males must learn to be competitive, aggressive, powerful, unemotional and controlling. Likewise, we are taught that females must be attentive to the needs of others, emotional, passive, nonaggressive and dependent on men.³⁶ While men have traditionally been thought of as the financial providers, women are often seen as caretakers.

Society dictates these unconscious but fairly rigid role definitions of what is appropriately female or male and most of us accept them, at least to some degree, as "right."³⁷ This is problematic, however, because failure to act consistently with gender norms can have negative

³¹ *Id.*

³² Pat Boland, *Gender Stereotypes: The Links to Violence*, 3 (Pat Boland ed., WEEA Publishing Center 1995).

³³ *Id.*

³⁴ Kathy Perkins, *Gender in Mediation: Negotiation & the Gender Divide*, 2 (available at <http://kathy-perkins.com/wp-content/uploads/2010/01/GENDER-IN-MEDIATION.pdf>).

³⁵ Dina L. Anselmi & Anne L. Law, *Questions of Gender: Perspectives and Paradoxes* 195 (McGraw-Hill 1997).

³⁶ Boland, *supra* n. 32, at 3.

³⁷ *Id.*

consequences. School age girls may be punished by their female peers for not conforming; for example, for not wearing the same kinds of clothes as the popular girls. Boys on the other hand may be punished by their peers for poor performance in sports or for showing emotion.³⁸ Schools are also responsible for perpetuating gender bias especially in ways that further polarize the opposite sex by, for example, discouraging girls from participating in traditionally male-dominated sports and academic areas such as math and science or by discouraging boys from participating in traditionally female-dominated courses such as home economics.³⁹ In the classroom, females are excluded from texts and curricula and males receive more teacher time and attention. There is also evidence that males are favored in the areas of task assignment, teacher's expectation of student behavior and achievement, overall curriculum design and classroom activities.⁴⁰ These kinds of practices send very different messages to males and females about their value, their ability and their potential and lay the foundation for the development of gender roles which speak to male domination and female subordination.⁴¹

Not only are children punished when stepping outside their respective "gender roles," but adults as well can and often do suffer negative consequences as a result of their failure to act consistently with other people's biases. In the business world, "behavior that can lead a man to be seen as a straight-shooter or a no-nonsense guy can lead a woman to be seen as too pushy and aggressive."⁴² Instead of being seen as someone who is business savvy or as someone who has the attributes of a successful leader, she may be called a bitch – or worse – and find herself closed out of networks or opportunities from which she might benefit.⁴³

³⁸ *Id.* at 4.

³⁹ *Id.*

⁴⁰ *Id.* at 5.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Taken to the extreme, both children and adults alike have been the target of violence as a result of not conforming to society's views on what is considered "normal" or acceptable behavior for each gender. As reported in *The Advocate* on April 8, 2008:

In Oxnard, California on February 12, 2008, 15 year-old Lawrence King was sitting in a computer lab at his junior high school when 14-year-old Brandon McInerney shot him twice in the head as their fellow students watched in horror. "Even before his death, Larry King was notorious," according to press reports. "He was the sassy gay kid who bragged about his flashy attire and laughed off bullying, which for him included everything from name-calling to wet paper towels hurled in his direction."⁴⁴

USA Today reported a similar story on January 6, 2009 about an openly gay 28-year-old woman who was attacked and gang raped by four men, including two juveniles, on a street outside her parked car on December 13, 2008. The woman was taken to a second location where she was assaulted again while the offenders continued making slurs about her sexual orientation.⁴⁵

Indeed stereotypes and more specifically gender stereotypes are operating in full force in every area of society and in all types of social interactions. The mediation arena is no exception. While little information exists on how the gender of a mediator impacts a mediation, the studies that have been done in this area clearly indicate that gender role stereotyping and the perceptions of the disputants based on their gender biases has a much greater impact on the mediation than the mediator's *actual* gender. However, before we delve into how gender role stereotyping, i.e. perceived differences, plays out in mediation it is important to first discuss those *actual* differences between men and women and, in particular, male and female mediators that impact the process and outcome of mediation.

⁴⁴ Neil Broverman, *Mixed Messages*, *The Advocate* (April 8, 2008).

⁴⁵ *2 Men, Teen Charged in Gang Rape of Lesbian*, USA Today (January 6, 2009).

III. MARS AND VENUS . . . IN MEDIATION

A. “REAL” VERSUS PERCEIVED DIFFERENCES. WHAT MATTERS MOST?

Regardless of whether the perceived differences between men and women are accurately reflected through gender stereotypes, one thing is certain; actual or “real” differences do exist between the sexes. So much so that the havoc those differences wreak in male/female interactions has for years been fodder for comedians throughout the world. Best-selling author John Gray is also a testament to the male/female dilemma having sold more than 50 million books in more than 50 languages throughout the world⁴⁶ from his *Men are From Mars, Women are From Venus* series which discusses how men and women can co-exist on earth despite coming from different “planets.”

Indeed, from biology to behavior and beyond the differences between men and women are seemingly endless. But which “real” differences matter most in the mediation arena? By “real” differences I am referring to those behaviors that have been identified through sociological studies performed by experts well-versed in gender-related matters; studies whose results dictated that there was a strong tendency for either males or females to consistently behave in a certain way that was different than their opposite sex counterparts.

1. MEN AND WOMEN IN LEADERSHIP ROLES

One area where men and women consistently behave differently is in leadership roles. Given what we know about the nature of mediation and a mediator’s role it may come as a surprise to many that leadership qualities would be important to mediation but in fact they are. Although the mediator is a neutral party whose objective is to *facilitate* rather than *dictate* the

⁴⁶ Mars Venus Come Together, <http://www.marsvenus.com/john-gray-bio> (last accessed March 8, 2011).

mediation process, as a facilitator the mediator is in effect, a guide. As a guide, the mediator is one who “leads or directs another’s way.”⁴⁷ Nothing could be truer than for the area of family mediation where the mediator must lead highly emotional people through the mediation process in order to assist them in creating a resolution to issues such as child custody and visitation and division of marital property.

Considering that mediation is still a relatively new concept that has only been available in family courts for the past few decades, the unfamiliarity of what mediation is and how the process can help divorcing families to carve out the next stage of their lives only adds to the anxiety that participants are already experiencing. While certain aspects of the mediation will vary due to the uniqueness of each family, the process will largely remain the same. It is a process that the mediator is familiar with and must delicately lead participants through. Indeed, the divorcing couple will be looking to the mediator as someone who will help them understand mediation, to be comfortable with being there and to lead them successfully through the process.

Social Psychology Professor Alice Eagly, Ph.D. has been studying the psychology of gender since the 1960’s and has authored and co-authored numerous books and articles on the differences between male and female behavior in social roles and social situations.⁴⁸ One of the situations Eagly writes about is how men and women behave differently in leadership roles. Female leaders, for instance, use transformational leadership techniques more frequently than male leaders.⁴⁹ Transformational leaders empower and mentor through “inspirational motivation, individual consideration, idealized influence intellectual stimulation.”⁵⁰ Male leaders,

⁴⁷ Merriam-Webster, <http://www.merriam-webster.com/dictionary/guide> (last accessed March 8, 2011).

⁴⁸ Northwestern University, Department of Psychology, http://www.wcas.northwestern.edu/psych/people/faculty/faculty_individual_pages/eagly.htm.

⁴⁹ M.G. Morrisett & Alice F. Stuhlmacher, *Males and Females as Mediators: Disputant Perceptions* 5 (DePaul University Working Paper No. 1, 2006) (Available at SSRN: <http://ssrn.com/abstract=913737>).

⁵⁰ *Id.*

on the other hand, use transactional techniques more frequently than do females. Transactional leaders “attend to standards and mistakes and encourage an exchange relationship (i.e. give and take) in interactions.”⁵¹ Extending male/female leadership styles to mediation, female mediators exhibiting transformational leadership qualities will not only be concerned with fair distribution of solution, but they will also be cognizant of the quality of the participants’ relationship throughout the mediation.⁵² By contrast, transactional male mediators are more likely to guide disputants to a solution but will fail to attend to the interpersonal aspects of the disputants’ relationship.⁵³

Perhaps of more concern than the actual behavior differences between male and female mediators as leaders are the perceptions of male and female mediators as seen through the eyes of the disputants. Behaviors and stereotypes interact in such a way that “certain behaviors by males and females in prescribed roles . . . have even stronger consequences than the behavior or stereotype alone.”⁵⁴ Other people’s biases and filters create an expectation that she or he is (or ought to be) acting consistently with gender norms.⁵⁵ Men and women who don’t comply with those gender norms can suffer.⁵⁶ For example, because the typical leader role is congruent with “masculine” behaviors, men are often rated as more effective leaders than women.⁵⁷ However, behavior that can lead a man to be seen as a straight-shooter or a no-nonsense guy can lead a woman to be seen as too pushy and aggressive.⁵⁸

⁵¹ *Id.*

⁵² David Maxwell, *Gender Differences in Mediation Style and Their Impact on Mediator Effectiveness*, 9 Conflict Resol. Q. 353-364 (1992).

⁵³ *Id.*

⁵⁴ Morrisett & Stuhlmacher, *supra* n. 49, at 8.

⁵⁵ Perkins, *supra* n. 34, at 4.

⁵⁶ *Id.*

⁵⁷ Morrisett & Stuhlmacher, *supra* n. 49, at 8.

⁵⁸ Perkins, *supra* n. 34, at 4.

Likewise, female mediators may encounter conflict between their gender role and that of the mediator role. Female mediators who utilize the same “controlling and power-demanding” mediation techniques as their male counterparts may be perceived more negatively than males using these techniques because the expectations of the disputants are violated.⁵⁹ As a result, female mediators risk being viewed as less competent than males using similar behaviors.⁶⁰

Arguably then, a female mediator employing a transformational leadership style with its focus on preserving relationships may not fare as well as the male mediator employing the more objective transactional style of leadership with its focus on reaching a mediated agreement. In the eyes of some mediation participants, a female mediator’s relational style which is incongruent with the typical “masculine” view of leadership may not be seen as evidence of competence or a demonstration of authority by the female mediator but rather just something that women “do.”⁶¹

Practically speaking, a participant who is not interested in emotions or feelings but in a very streamlined process whereby an agreement would be the ultimate outcome, may view a transformational mediator as one who is more concerned with performing therapy rather than resolving the issues at hand. The female mediator runs the risk of a participant walking away from the process who may be opposed to the “therapy-like” setting or who views the mediator as one who is ineffective in helping the parties to reach a mediated agreement.

By contrast, a transactional mediator who is focused on the outcome and who overlooks the relational aspects of the situation may draw harsh criticism from a participant who is harboring deep seated emotions and strong feelings. The participant is likely to feel that they are

⁵⁹ Nancy A. Burrell, William A. Donohue & Mike Allen, *Gender-based Perceptual Biases in Mediation*, 15 *Commun. Res.* 447-469 (1989).

⁶⁰ Morrisett & Stuhlmacher, *supra* n. 49, at 8.

⁶¹ Perkins, *supra* n. 34, at 4.

not being heard if their feelings are not being validated or even acknowledged. This could translate into the participant feeling as though they have no voice and that an agreement reached under these circumstances would not be a fair one since it does not take into account their feelings about the situation. The result could be a disputant who shuts down and refuses to participate, or worse, participates, but agrees to things they do not really want.

2. MEN AND WOMEN RESOLVING CONFLICT

Research on gender differences also reveals that males and females behave differently when dealing with conflict. According to psychologist and New York University Law Professor Carol Gilligan who has written about her clinical observations, males are typically more objective when dealing with conflict while females are more focused on relationships. The male “abstracts the moral [or legal] problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute. The male perspective looks at conflict resolution by applying rights in a hierarchy and by abstracting the issues.”⁶² Consequently, male mediators will be “more likely to behave consistently with a settlement frame, the primary focus of which is to get the parties to reach an agreement.”⁶³

Conversely, for females,

“the world is a world of relationships and psychological truths where an awareness of the connection between people gives rise to a recognition of responsibility for one another, a perspective of the need for response. The disputants are not seen as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend . . . Consequently her solution to the dilemma lies in activating the network [of interpersonal relationships] by communicating, securing . . . inclusion . . . by strengthening rather than severing connections.”

⁶² Nancy G. Maxwell, *The Feminist Dilemma in Mediation*, 4 (1) Int. Rev. Com. 67 (1992).

⁶³ Charkoudian & Wayne, *supra* n. 1, at 27-27.

Female mediators are therefore more likely to behave consistently with an “enhanced communication” frame, viewing the aim of mediation as facilitating the parties’ communication and helping them to develop improved understanding of their situation.⁶⁴

As negotiations unfold between the participants, the potential exists for participants to question the mediator’s neutrality as the different ways in which men and women mediators approach conflict merge with the different negotiating styles of each sex. Loyola Law School Professor Eve Hill identifies two main types of negotiating styles: the “competitive approach” and the “cooperative approach.”⁶⁵ In the competitive approach, which is more positional-based, the objective is to try to maximize one’s gain at the expense of the other party.⁶⁶ A competitive negotiator usually makes very high demands at the outset and few and small concessions throughout the negotiations.⁶⁷ They will usually negotiate in debate format, using arguments and justifying positions rather than seeking new information and creating different options. Competitive negotiators are motivated by the desire to win, to “outmaneuver their opponents.”⁶⁸ They never show their hand and they create tension, hoping to pressure their “opponents” into an agreement. Competitive negotiators often utilize tactics such as commitments, threats, extreme positions and offers, lying, exaggeration, ridicule, accusations and the like to accomplish this goal.⁶⁹

Cooperative negotiators, by contrast, seek cooperation from the other side in order to work toward a common goal.⁷⁰ They are especially concerned with discovering the other person’s needs because they believe that the solution to the conflict lies in meeting those needs.

⁶⁴ *Id.* at 26.

⁶⁵ Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 Ohio St. J. on Disp. Resol. 337, 344 (1989-1990).

⁶⁶ Maxwell, *supra* n. 62, at 71.

⁶⁷ *Id.* at 70.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 71.

Cooperative negotiators try to deal with emotions as a way to gain a better grasp of the other person's needs and will make efforts to understand the other person's perceptions to avoid misunderstandings.⁷¹

The intersection of competitive and cooperative negotiators with either a male or a female mediator has the potential to destroy the participants' perception of the mediator as a neutral party. As Carol Gilligan's theorizes, "the ideal of competition between poles fits into the male perspective of weighing abstract rights, which is the negotiating posture of the competitive negotiator."⁷² A competitive negotiator, therefore, could possibly misconstrue an objective male mediator's conflict resolution style of "applying rights in a hierarchy" and "abstracting issues" as similar to or aligned with the negotiator's positional-based ideals.

Similarly, the cooperative negotiator could view the more relational based conflict style of a female mediator as being "in his or her corner." Because the cooperative negotiator looks at the parties' needs and tries to maintain their relationship, this approach is more likely the model of conflict resolution that women would use.⁷³ As Eve Hill describes, "the female perspective prefers reconciliation of different positions, rather than a choice between them. The female perspective prefers to look between and behind the positions in searching for a solution."⁷⁴

Of course, it is also likely that the participants' view of the mediator as neutral would be distorted if the competitive negotiator perceived the mediator as being biased in favor of the other participant if the other participant was of the same gender as the mediator.

depending on the sex of the mediator and the negotiating style of that participant. For example, if the husband in this scenario was a competitive negotiator and his wife was a cooperative

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Hill, *supra* n. 65, at 342.

negotiator and they were mediating their child custody and visitation issues in front of a female mediator, the potential does exist for the husband to perceive the female mediator as being on his wife's "side" thereby threatening to impede the mediation process and a favorable outcome for both the participants and the mediator. No matter what the combination of negotiating styles and male/female mediators, one thing is certain, the perception of the mediator as neutral third-party is at risk under these circumstances.

3. COMMUNICATING WITH DISPUTANTS

John Gray, an internationally recognized expert in the fields of communication and relationships⁷⁵ can attest to the difficulty that men and women face due to their different communication styles. Not only has Mr. Gray authored 16 best-selling books, but every year he travels the world speaking in lecture halls, seminars, on radio and on television assisting men and women in understanding, respecting, and appreciating their differences.⁷⁶ Male and female mediators are no exception.

Not only to male and female mediators differ on their role as communicators, however, they also differ in their views on their roles as mediators. This has important implications for the mediation because how mediators view their role as mediators seems at least to some degree to determine the method of communication the mediator uses. Female mediators are more likely to see their role in mediation as facilitating either communication alone or both communication *and* the mediation process.⁷⁷ They tend to focus on understanding the parties, their differences, and

⁷⁵ AskMarsVenus.com, <http://www.askmarsvenus.com/dr-john-gray.php> (last accessed April 17, 2011).

⁷⁶ *Id.*

⁷⁷ Charkoudian & Wayne, *supra* n. 1, at 26.

their emotions.⁷⁸ Male mediators, on the other hand, see their role as facilitating only the process of mediation, and tend to focus on solving the problem and reaching an agreement.⁷⁹

The different ways in which male and female mediators view their respective roles in the mediation impacts the manner in which they communicate. Although male and female mediators use about the same number of “formulations” – communications that paraphrase, summarize, and reframe – they communicate for different purposes and use their formulations differently. Female mediators use more formulations for clarification, to ensure accurate understanding of participants’ statements, and to identify areas of agreement and disagreement. Male mediators, however, use formulations that help them to control the mediation process and are more likely than females to use tactics to alter the parties’ positions or expectations and to make suggestions.⁸⁰

Perceptual differences in communication between male and female mediators seem to be more advantageous for male mediators. A study on perceptions of male and female speech found that men’s speech is perceived differently than women’s speech.⁸¹ Specifically, male speech was identified as more dominating, aggressive, militant, and humorous than female speech.⁸² Thus, men who are perceived as having a more dominating speech style may also be perceived as the more effective mediator.

B. PUTTING IT ALL TOGETHER

Although mediation research has exploded in the past decade, the empirical base concerning perceptions of male and female mediators is still limited.⁸³ Several fairly recent

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Morrissett & Stuhlmacher, *supra* n. 49, at 7.

⁸² *Id.*

⁸³ Morrissett & Stuhlmacher, *supra* n. 49, at 16.

studies do exist, however, which seem to support the conclusion that the mediator's gender, as seen through the eyes of the disputant, impacts overall participant satisfaction with the mediation process and the mediator.

In a recent study on participants' perceptions relating to the mediator's fairness participants who attended a mediation with no same-gender mediator present saw the mediator as listening judgmentally and as taking sides in the mediation.⁸⁴ In addition, when the participant was outnumbered in the mediation session because the mediator's gender matched only that of the opponent, these perceived bias effects worsened.⁸⁵ This research supports the conclusion that the mediation experience is harmed when participants face mediators who do not share their gender because in mediations in which participants are of a differing gender than that of the mediator, participants are likely to view the mediation as unfair. The view of the mediation and by extension the mediator as unfair would undoubtedly destroy the participants' perceptions of the mediator as a neutral third-party further compromising the integrity of the mediation and increasing the likelihood that an agreement between the parties would not be reached.

Another fairly recent study on disputants' perceptions relating to mediator satisfaction revealed that gender was "strongly tied to disputant perceptions of that mediator."⁸⁶ In fact, male mediators were consistently perceived more positively than their female counterparts were.⁸⁷ There is no clear indication from the research that exists thus far why that is the case. One theory is that the objective often more controlling behaviors and communication styles of men

⁸⁴ Charkoudian & Wayne, *supra* n. 1, at 44.

⁸⁵ *Id.*

⁸⁶ Morrissett & Stuhlmacher, *supra* n. 49, at 14.

⁸⁷ *Id.*

are perceived as more effective for resolving conflict situations. Of course, this theory remains untested to date.

Another theory, which appears to be rooted somewhat in gender stereotyping, centers on a concept known as “benevolent sexism” which refers to attitudes and beliefs about women that the perceiver subjectively considers positive.⁸⁸ For example, several studies yield evidence that a “chivalry” norm exists whereby a greater value is placed on outcomes provided for women than men which ultimately results in society giving more help to a women than a man.⁸⁹ Indeed there is evidence that within patriarchal societies, in which the societal structure develops to ensure male dominance over the female, protective attitudes toward women flourish.⁹⁰ Thus, by experiencing the chivalry norm throughout their lives, women may come to have certain expectations of how men might behave in certain situations.

A recent study extending the chivalry norm to mediation hypothesized that women who had experienced the chivalry norm would reason that a male mediator’s beliefs that women ought to be protected would cause him to favor her cause in the negotiation making the women more receptive to a male, rather than a female, mediator.⁹¹ The results of the study did indeed reveal a strong and positive correlation between benevolent sexism and receptivity to a male mediator.⁹² By contrast, the correlation between the benevolent sexism and receptivity to a female mediator was near zero which seems to indicate that “the extent to which women themselves endorse benevolently sexist attitudes, the more receptive they will be to a male mediator.”⁹³ Conversely, as women endorsed hostile sexist attitudes, they are less receptive to a

⁸⁸ Aaron S. Wallen & Peter J. Carnevale, *Receptivity to Mediation: The Role of “Benevolent” Sexism 2* (New York University, Working Paper No. 1, 2004).

⁸⁹ *Id.* at 6.

⁹⁰ Marcia Guttentag & Paul Secord, *Too Many Women? The Sex Ratio Question*, (Sage Publications 1983).

⁹¹ Wallen & Carnevale, *supra* n. 88, at 8.

⁹² *Id.* at 11.

⁹³ *Id.* at 11-12.

female mediator. This result is generally consistent with a preference for a male, rather than a female mediator, as a function of expectation of treatment by that mediator.”⁹⁴

The degree to which participants’ preferences for a male rather than a female mediator is due to the controlling behaviors and communication styles more often employed by males, gender stereotyping, or a combination of the two has, to date, not been quantified in any of the available research from existing studies. Nevertheless, ample effects have been found concerning the perceptions of male and female mediators that have the potential to negatively impact or even derail the mediation process altogether. As individuals involved in dispute resolution, a mediator’s goal should be to keep gender issues from becoming a barrier to resolution.⁹⁵ Given that the disputants’ perceptions are, for the most part, completely out of the control of the mediator, “Is there *anything* that the mediator can do to minimize or neutralize those effects?”

IV. WHAT IS A MEDIATOR TO DO?

Certainly the awareness of the mediator of the existence and impact of gender biases in mediation is essential. One must be able to recognize gender biases at work in order to be able to address any resultant negative impact. Of course as a mediator being cognizant of your own biases and preconceptions and how they play into the dynamics of the mediation is also important. A female mediator who finds herself bristling at an over-competitive, aggressive male advocate needs to strategically develop a response rather than writing him off as obstructive. Likewise, a male mediator whose instinct is that the female party representative does not have sufficient clout to make a settlement decision should check the facts first.⁹⁶

⁹⁴ *Id.* at 12.

⁹⁵ Perkins, *supra* n. 34, at 7.

⁹⁶ *Id.*

Mediators may also be able to minimize the effects of gender bias in mediation by better defining the process. Studies show that gender tends to have more of an effect in high ambiguity negotiations; for example those that are open ended or have few rules, than in low ambiguity negotiations where the process is strictly defined and understood.⁹⁷ Better articulating and defining the process may help “neutralize gender differences and level the playing field.”⁹⁸ Of course, the concern here is that the mediator is careful not to define the process in such a way as to remove ownership of the process from the participants or in a way that is so strict as to alter the authentic nature of mediation.

Identifying gender triggers is another way mediators can work to neutralize gender bias. For example, because men tend to negotiate better in a highly competitive negotiation, men may be encouraged to maximize outcomes by ramping up their competitive drive. Women, on the other hand, tend to do better when negotiating for others and thus may be inspired by reminders that they are representing not just themselves but their children as well. Armed with this knowledge, mediators can then recognize situations that have the potential to trigger subtle or blatant gender stereotypes or role expectations within a certain negotiation context and work to counter those triggers or use them to benefit negotiation performance.⁹⁹

Establishing credibility will also go a long way toward decreasing effects of gender biases. This may be especially true for female mediators. Just as women are perceived as less competent than men in the courtroom,¹⁰⁰ so too may this be true in the mediation arena perhaps due in part to a female mediator who begins a mediation with a relationship-building rather than an objective, settlement-focused style. Female mediators can demonstrate competence through

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 7-8.

¹⁰⁰ *Id.* at 925.

body language and an employment of both relationship building and objective mediation styles strategically placed throughout the mediation. In addition, taking the time to summarize a complex issue accurately and succinctly will also build confidence in the mediator's competence.

Lastly, mediators should make concerted efforts in the face of gender biases to maintain "obvious neutrality." By making equal eye contact with both participants and given the participants equal reframing time, the mediator is demonstrating the balance between the parties and by implication the neutrality of the mediator. Finally, it is important that the mediator always communicates throughout the mediation without appearing to be judgmental. Appearing to be judgmental could perpetuate or reinforce existing gender biases which may lead to a participants' refusal to proceed with the mediation.

V. CONCLUSION

Of the limited research available on how the mediator's gender affects the mediation, there does seem to be a strong indication that it is the mediator's gender as perceived through the eyes of the participants more so than the mediator's actual gender which has the most influence on the mediation process. That is not to say that mediators are powerless to minimize the effects of such an impact. Indeed moving beyond distorted and often inaccurate disputant views begins with mediator awareness and a commitment to prudently and strategically employing tactics within the confines of the professional and ethical rules governing mediators throughout the mediation that will work to minimize the effects of gender biases while facilitating an authentic mediation process.