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Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?

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DO ALTERNATIVE DISPUTE RESOLUTION PROCEDURES DISADVANTAGE WOMEN AND MINORITIES?

Charles B. Craver*

ABSTRACT

When different legal controversies arise, parties frequently employ alternative dispute resolution procedures to resolve them. Yet some members of ethnic minority groups and women may seek judicial proceedings out of a concern that their ethnicity or gender may undermine their ability to achieve beneficial bargaining outcomes through ADR. This article addresses the real and perceived challenges of ethnic minorities and women in ADR. It draws upon decades of research into dispute resolution bargaining processes to illustrate that most traits associated with ethnicity and gender are irrelevant today with respect to ADR. When persons are taught even minimally about the bargaining process and how it operates, such information greatly enhances their likelihood of interacting effectively. Well-prepared minorities and women should thus be able to seek advantageous terms for themselves in ADR, even when dealing with white-male counterparts. Conversely, there is no guarantee that members of ethnic groups or women would achieve more advantageous outcomes in judicial proceedings. Even the formal rules of judicial proceedings may be influenced by subconscious stereotypes that still influence the ways that judges, jurors, and arbitrators assess litigant situations. Therefore, this article posits that adjudication is not clearly preferable to ADR procedures for minority group members and women.

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* Freda Alverson Professor of Law, George Washington University. J.D., 1971, University of Michigan; Master of Industrial & Labor Relations, 1968, Cornell University School of Industrial & Labor Relations; B.S., 1967, Cornell University. I would like to dedicate this article to Professor Richard Delgado, a former colleague, whose extraordinary scholarship has been of great benefit to so many academics, law students, and practicing attorneys.

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I. INTRODUCTION

IN the late 1970s and early 1980s, individuals began to encourage the creation of alternative dispute resolution (ADR) procedures to resolve legal controversies.¹ I found this development quite interesting since I had already obtained a Master's Degree in Collective Bargaining and Labor Law. I had also been teaching a course on collective bargaining and labor arbitration and became a coauthor of the third edition of the *Collective Bargaining and Labor Arbitration* book.² In my studies, my teaching, and my work on this book, we explored the use of negotiation, mediation, and arbitration to resolve employment disputes. We read *A Behavioral Theory of Labor Negotiations*,³ which described how labor and management representatives should employ integrative bargaining techniques to effectively and efficiently resolve controversies. This seemingly innovative approach to negotiating was developed in the early part of the last century by a business consultant named Mary Parker Follett.⁴

To enable them to generate mutually efficient bargaining agreements, labor and management representatives must go behind their stated positions and explore each side's underlying interests. Which terms do union leaders desire that are not significant to employers (e.g., a union security clause), and which items do management officials value that are not that important to bargaining unit members (e.g., a no-strike provision)? By ensuring that these terms end up on the appropriate side of the bargaining table, labor and management negotiators can generate the largest joint surplus and ensure the attainment of optimal accords.⁵ With respect to the terms valued by both sides (e.g., wages and fringe benefits)—the so-called “distributive” items—bargainers are likely to employ more competitive tactics to enable them to claim a greater share of the surplus for their own side.⁶

1. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Derek C. Bok, *A Flawed System*, HARV. MAG., May–June 1983, at 38.

2. DONALD P. ROTHSCHILD, LEROY S. MERRIFIELD & CHARLES B. CRAVER, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* (3rd ed. 1988).

3. RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965).

4. See generally JOAN C. TONN, MARY P. FOLLETT: *CREATING DEMOCRACY, TRANSFORMING MANAGEMENT* 266–71 (2003).

5. See WALTON & MCKERSIE, *supra* note 3, at 52–53.

6. See *id.* at 11–125.

In the collective bargaining course, we not only explored the way in which persons negotiate but also the way mediation can be used to help parties achieve accords. We considered what the labor and management representatives should be doing and what neutral facilitators do during joint bargaining sessions and separate caucus sessions conducted by the mediator with each party alone. Almost all collective bargaining agreements contain grievance arbitration procedures that the parties use to resolve contractual issues that arise during the life of existing agreements. During the early stages of these procedures, employer and employee representatives meet and endeavor to resolve these contractual disputes through conventional negotiation. In the relatively few instances in which they are unable to achieve mutual resolutions, union officials can request arbitration. The parties select a certified neutral who is empowered to conduct formal hearings that will culminate in binding determinations.

We also considered the use of interest arbitration procedures to resolve controversies over future bargaining agreements parties have been unable to achieve on their own. Although some private sector bargaining agreements provide for such interest arbitration procedures, most do not, and disputing parties have traditionally resorted to work stoppages to help them achieve their desired results. A number of public sector labor statutes that prohibit work stoppages by government employees provide for resort to interest arbitration procedures when collective bargaining efforts do not achieve mutual accords.

When *Getting to Yes*⁷ was first published in 1981, it was considered a highly innovative approach to negotiating, which emphasized the benefits to be derived from integrative bargaining designed to maximize the joint returns achieved by parties. I was surprised to discover how many of the concepts described by Fisher and Ury pertaining to generic negotiating had earlier been articulated by Walton and McKersie with respect to collective bargaining interactions. This made me appreciate the fact that the new ADR movement was really an extension of what labor and management representatives had been doing for many decades. They resolved most disputes through traditional bargaining. When they were unable to achieve accords on their own, they enlisted mediator assistance to facilitate their discussions, and when they were still unable to reach agreements, they frequently resorted to binding arbitration.

II. POTENTIAL RISK OF PREJUDICE IN ADR PROCEDURES

When Richard Delgado coauthored his seminal article on *Fairness and Formality* in 1985,⁸ he discussed the use of negotiation, mediation, and arbitration to resolve many civil, and even criminal, matters and the concern that such dispute resolution procedures might prejudice minority

7. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981).

8. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

and female participants. He explored the perceived safeguards associated with formal and public judicial proceedings and compared them to private, informal ADR procedures. He talked about how formal rules of evidence and professional adjudicators would minimize the impact of potential biases.⁹ He expressed the view that “ADR decisionmakers or other third parties are rarely professional, and there is rarely a decision-making body similar to a jury.”¹⁰

In the next section of his article, Professor Delgado explored different theories for prejudice.¹¹ He noted that:

highly prejudiced persons tend to have an “authoritarian personality,” characterized by rigidity, conventionality, difficulty in accepting impulses they consider deviant (for example fear, weakness, aggression and sex) as part of the self, a tendency to externalize these impulses by projecting them on others, and a need for status and power in personal relationships.¹²

He further suggested that “[b]ecause ethnic minorities possess characteristics that seem different from those of the dominant group, they become ready targets for rejection and displaced hostility.”¹³ He went on to note socioeconomic differences resulting from slavery and segregation and suggested that “[s]capegoating of racial minorities is especially easy because many of them are visibly poor.”¹⁴ Professor Delgado also explored social-psychological theories of prejudice, which generally emerge in early childhood as children develop an awareness of skin color and its social significance.¹⁵

Professor Delgado then explored ways in which persons affected by prejudice resolve inner conflicts in different ways.¹⁶ They may repress their concerns, rationalize them, or compromise their true interests. These tendencies could significantly influence the way minorities and women participate in ADR procedures. When such persons become involved with formal litigation, they benefit greatly from the fact that our judicial system “has incorporated societal norms of fairness and evenhandedness into institutional expectations and rules of procedure.”¹⁷ Professor Delgado talked about the fact that minority children become aware of their societal differences early in life, especially with respect to their different skin color.¹⁸ They begin to experience different treatment, which can trigger different responses—avoidance, aggression, or acceptance. Since these factors may cause many victims of discrimination to respond with apathy or defeatism, their favored forum to redress

9. *See id.* at 1373–75.

10. *See id.* at 1374.

11. *See id.* at 1375–83.

12. *Id.* at 1376.

13. *Id.* at 1377.

14. *Id.* at 1379.

15. *See id.* at 1380–83.

16. *See id.* at 1384–85.

17. *Id.* at 1387–88.

18. *See id.* at 1390.

such wrongs has traditionally been the formal adjudicatory setting.¹⁹ On the other hand, individuals who feel they are the masters of their fate and think they can thus control their own destinies are more likely to resort to ADR type procedures to resolve difficulties they encounter.

Professor Delgado noted that the dispute resolution process favors persons from higher socioeconomic classes who believe they can exert control over their outcomes but often induces persons from lower orders “to sacrifice their grievances in the interests of peace and cooperation.”²⁰ “By creating an environment that emphasizes cooperation and imposing that on the disputants, ADR denies the existence of many conflicts and transforms others into simple misunderstandings.”²¹ He emphasized the fact that formal legal procedures begin with a presumption of inequality between disputing parties and establish formal rules to protect the interests of weaker parties, while informal dispute resolution procedures presume that participating groups are relatively equal in political power, wealth, and social status.²²

Professor Delgado explored an article by Professor Owen Fiss entitled *Against Settlement*²³ to support his opposition to the use of ADR procedures by traditionally disadvantaged group members.

An imbalance of power can distort the settlement process in a number of ways: (1) The poorer party will be less able than the wealthier party to predict the outcome of litigation and thus will be in an inferior bargaining position; (2) the poorer party may be in great need of damages and thus willing to settle for a smaller sum rather than wait for a larger recovery through litigation; and (3) the poorer party may be forced to settle simply because she cannot afford to hire counsel or finance litigation, regardless of the merits of her claim.²⁴

He also cited Fiss with respect to the view that disputants in settlement proceedings may encounter conflicts of interest with their legal representatives due to the fact that in negotiations the advocates shape the settlement terms, while in adjudications the results are determined by neutral judges and juries.²⁵ In addition, he noted the claim by Fiss that while settlements may generate peace between the immediate parties, they may fail to further the interests of similarly situated parties not directly involved in the current disputes.²⁶

Professor Delgado concluded his article by noting that “ADR increases the risk of prejudice toward vulnerable disputants . . . [while] the rules and structures of formal justice tend to suppress bias.”²⁷ He emphasized

19. *See id.* at 1390–91.

20. *See id.* at 1392.

21. *Id.* at 1393.

22. *Id.* at 1394.

23. Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

24. Delgado et al., *supra* note 8, at 1398 (footnotes omitted) (citing Fiss, *supra* note 23, at 1076).

25. *See id.* (citing Fiss, *supra* note 23, at 1080).

26. *See id.* at 1399 (citing Fiss, *supra* note 23, at 1085).

27. *See id.* at 1400.

his belief that ADR procedures are most likely “to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power.”²⁸ This is due to the fact that individuals of low status are less likely to assert their claims energetically when they negotiate with parties from higher status. In addition, these dangers may increase when neutral facilitators become involved if such mediators are members of the superior group or class. He thus suggested that ADR procedures should only be employed with respect to disputes involving parties of comparable power and stress.

III. IMPACT OF RACE AND GENDER ON NEGOTIATION RESULTS

For forty years, I have been teaching courses on legal negotiation to several thousand law students and to over 95,000 practicing attorneys in continuing legal education programs. When I first began to conduct in-house programs at major law firms, senior partners occasionally asked me whether I thought women and minority students could negotiate as effectively as white males. I was concerned about such inquiries due to the fact that I also teach employment discrimination law.²⁹ Partners harboring such perspectives might be hesitant to hire or promote women and minority members due to their thoughts that such persons might not be able to advocate for their clients as persuasively as white males. I thus decided to conduct some empirical studies to determine whether I would find any differences in the results achieved by female or minority students on my legal negotiation course exercises.

A. LEGAL NEGOTIATION COURSE METHODOLOGY

In the early 1960s, innovative law professors began to appreciate the fact that practical exercises could be employed to teach students the negotiation skills they would use throughout their careers. Professors James White,³⁰ Cornelius Peck, and Robert Fletcher³¹ developed simulation models designed to enhance the bargaining proficiency of future legal practitioners. Their students explored the negotiation process and worked on a series of exercises designed to demonstrate the different concepts being taught.

My regular three credit hour legal negotiation course is based upon the White/Peck/Fletcher models. I assign students readings in my *Effective*

28. *See id.* at 1402.

29. *See* ARTHUR B. SMITH, JR., CHARLES B. CRAVER & RONALD TURNER, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* (8th ed. 2016).

30. *See generally* James J. White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*, 19 J. LEGAL EDUC. 337 (1967); *see also* HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS A NEGOTIATOR: PROBLEMS, READINGS AND MATERIALS* (1977).

31. *See* Cornelius J. Peck & Robert L. Fletcher, *A Course on the Subject of Negotiation*, 21 J. LEGAL EDUC. 196 (1968); *see also* CORNELIUS J. PECK, *CASES AND MATERIALS ON NEGOTIATION* (2d ed. 1980).

Legal Negotiation and Settlement book.³² The class explores the impact of different negotiator styles.³³ In the “win-win” *cooperative/problem-solving* approach, where the participants move psychologically toward each other, participants seek to maximize the joint returns and are open, trusting, and reasonable with each other. In the “win-lose” *competitive/adversarial* approach, where the individuals move psychologically away from each other, participants endeavor to maximize their own returns and are less open, less trusting, and manipulative. In the hybrid “WIN-win” *competitive/problem-solving* approach, where the negotiators seek to maximize their own returns, participants are not entirely open or cooperative and are somewhat manipulative, but endeavor to maximize the results achieved by their counterparts once they have obtained what they want for themselves.³⁴ Members of the latter group tend to achieve the best results for their clients because they recognize the critical nature of the *bargaining process*.³⁵ Studies have found that when individuals think the negotiation process has been fair and feel they have been treated respectfully, they are actually more satisfied with objectively less beneficial terms than when they feel the process has not been fair.³⁶

The class then focuses on the six stages of the bargaining process to demonstrate how structured such interactions are.³⁷ During the “Preparation Stage,” negotiators must ascertain the relevant factual, legal, economic, and cultural issues and then determine their own bottom lines, their own goals, and their planned opening positions. They must also try to place themselves in the shoes of their counterparts and estimate the goals and bottom lines of those parties. They begin their interaction with counterparts during the “Preliminary Stage,” where they seek to establish rapport with the people on the other side and create positive bargaining environments that are most likely to generate cooperative and efficient interactions.

During the “Information Stage,” which is “value creation,” the negotiators endeavor to determine the pertinent issues to be addressed and the

32. CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (8th ed. 2016) [hereinafter CRAVER, *NEGOTIATION AND SETTLEMENT*]. Over the past fifteen years, I have also taught a one credit hour legal negotiation course in which students read my book, CHARLES B. CRAVER, *SKILLS & VALUES: LEGAL NEGOTIATING* (3d ed. 2016) [hereinafter CRAVER, *SKILLS & VALUES*], and work on a number of negotiation exercises. Grades in this course are entirely pass/fail.

33. See CRAVER, *NEGOTIATION AND SETTLEMENT*, *supra* note 32, at 11–18.

34. See GERALD R. WILLIAMS & CHARLES B. CRAVER, *LEGAL NEGOTIATING* 53–54 (2007).

35. See Keith G. Allred, *Distinguishing Best and Strategic Practices: A Framework for Managing the Dilemma Between Creating and Claiming Value*, 16 *NEGOT. J.* 387, 394–95 (2000); see also Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 *CARDOZO J. CONFLICT RESOL.* 101, 107–08 (2010).

36. See generally Rebecca Hollander-Blumoff, *Just Negotiation*, 88 *WASH. U. L. REV.* 381 (2010); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 *LAW & SOC. INQUIRY* 473 (2008).

37. See CRAVER, *NEGOTIATION AND SETTLEMENT*, *supra* note 32, at 55–162.

underlying interests associated with those terms. The optimal way to obtain the relevant information is to ask many questions designed to induce counterparts to talk and reveal their interests. Once they complete the Information Stage, negotiators move into the "Distributive Stage," which is "value claiming." During this portion of the process, the participants have to divide the surplus they created during the Information Stage. This is a highly competitive part of most legal interactions. Near the end of the Distributive Stage, the negotiators begin to see the likelihood of an agreement on the horizon, and they enter the "Closing Stage." By this time, the participants have become psychologically committed to an agreement, but they must still move carefully to avoid making greater position changes than their counterparts.

Once negotiators agree upon binding terms, they frequently think their interactions are over. Individuals who make this mistake often end up with less efficient terms than they might have achieved had they moved into the "Integrative Stage," which is "value maximizing." The parties should look for items that may have ended up on the wrong side of the bargaining table due to the fact that the parties have over- and understated the value of items during the previous stages for strategic purposes. They should work to see if they might be able to exchange some terms that will simultaneously advance the interests of both sides.

During subsequent classes, we examine the different negotiating techniques individuals are likely to employ, the importance of looking for verbal leaks and nonverbal signals, factors such as telephone and e-mail interactions, and negotiation ethics. We also focus on cultural differences pertaining to such factors as nationality, ethnicity, and gender. They initially work on a series of practice exercises designed to demonstrate the concepts being covered, which will allow them to experiment regarding the way in which they interact with others. They then work on five different exercises, the results of which are rank-ordered from high to low, with the results of these exercises accounting for half of their course grade. The other half of their grade is based upon ten to fifteen page papers they write describing what they learned during the semester.

B. REAL AND PERCEIVED RACE AND GENDER ISSUES

1. *Impact of Race*

Negotiations involving participants from diverse ethnic backgrounds frequently develop differently than bargaining interactions involving persons from similar backgrounds. People tend to negotiate more cooperatively with counterparts of the same race and culture than with persons of different races and cultures.³⁸ Similarity apparently induces trust and reduces the need for each interactor to maintain a particular "face" in their counterpart's eyes. Individuals from different ethnic backgrounds

38. See JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 163 (1975).

bring certain stereotypical baggage into their new interactions.³⁹ It is amazing how many common characteristics—positive, negative, and neutral—are attributed by many people to all persons of a particular race.⁴⁰ When people who harbor such stereotypical beliefs initially encounter individuals from other races, they tend to attribute their stereotypical preconceptions to those persons, and this phenomenon may influence the preliminary portion of their interactions.

Students I have taught at different law schools over the past forty years have often allowed their stereotypical beliefs to influence their bargaining interactions. Many of my students—regardless of their ethnicity—think that white males are the most Machiavellian, competitive negotiators. They expect those men to employ adversarial and manipulative tactics to obtain optimal results for themselves. On the other hand, many expect black, Hispanic, and Asian negotiators to be more accommodating and less competitive.

Despite the unreliability of many stereotypical beliefs, several empirical studies have found a few relevant differences between black and white interactants. Blacks tend to be high in terms of Interpersonal Orientation (IO).⁴¹ High IO individuals are more sensitive and responsive to the interpersonal aspects of their relationships with others.⁴² This tendency should make blacks more effective negotiators. During verbal encounters, blacks tend to speak more forcefully and with greater verbal aggressiveness than whites.⁴³ In competitive settings, this trait might enhance the bargaining effectiveness of individuals with these traits, while in cooperative settings it might undermine their ability to achieve mutual accords. When they interact with others, blacks tend to make less eye contact while listening to others than do whites,⁴⁴ which might undermine their ability to establish beneficial rapport with others and to read non-verbal signals.

Another factor which might influence minority bargainers concerns what is characterized as “stereotype threat.”⁴⁵ When individuals from different minority groups are told that persons from their background do not generally perform as well as whites with respect to particular tasks, they tend to do less well, even though members of their groups who are not given such biased information do as well as their white counterparts.

39. See Kenneth L. Shropshire, *Sports Agents, Role Models and Race-Consciousness*, 6 MARO. SPORTS L.J. 267, 277 (1996); James G. Sammataro, Comment, *Business and Brotherhood, Can They Coincide? A Search into Why Black Athletes Do Not Hire Black Agents*, 42 HOW. L.J. 535, 555 (1999).

40. See ANDREA L. RICH, *INTERRACIAL COMMUNICATION* 51–62 (1974).

41. See RUBIN & BROWN, *supra* note 38, at 164.

42. See *id.* at 158.

43. See Martin N. Davidson & Leonard Greenhalgh, *The Role of Emotion in Negotiation: The Impact of Anger and Race*, in 7 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 3, 22 (R. Bies, R.J. Lewicki & B.H. Sheppard eds., 1999).

44. See ROBERT G. HARPER, ARTHUR N. WIENS & JOSEPH D. MATARAZZO, *NONVERBAL COMMUNICATION: THE STATE OF THE ART* 188 (1978).

45. See generally STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION (Michael Inzlicht & Toni Schmader eds., 2012).

If minority participants were led to believe that they would not achieve negotiation results as beneficial as their white cohorts, they might be negatively influenced by this factor and not do as well on bargaining exercises.

Following the publication of an article by James Sammataro indicating a reluctance of black athletes to hire black agents, I performed a study of the results achieved by black and white students on negotiation exercises in my class and found no statistically significant differences with respect to the average results achieved or the standard deviations involved.⁴⁶ These results would strongly suggest that formal training eliminates negotiation result differences based upon the race of the participants.

2. *Impact of Gender*

Just as racial stereotypes can influence the way in which some persons interact with people of different races, gender-based stereotypes can have a similar impact. Men—and even many women—often expect women to behave like “ladies.” Aggressiveness that would be considered assertive advocacy if employed by men may be characterized negatively when employed by women.⁴⁷ Male negotiators who would normally counter aggressive tactics by other men with similar responses might find it difficult to do so when dealing with females. Men who behave this way could provide female counterparts with an inherent bargaining advantage. Male negotiators occasionally endeavor to obtain a psychological advantage against competitive female bargainers by casting aspersions on their femininity. Female negotiators should not permit counterparts to employ this approach since they have the right to employ any style they think appropriate, regardless of any gender-based stereotypes they may contradict.

Empirical studies have found that male and female subjects do not behave identically in overtly competitive situations. Females tend to be initially more trusting and trustworthy than their male cohorts, but they are less willing than males to forgive violations of their trust.⁴⁸ Individuals interacting with female cohorts who behave in seemingly open and cooperative ways may be able to establish trusting and cooperative relationships with those persons, so long as they do not commit transgressions. Males, on the other hand, are less likely to focus on such relationship issues, and they are more likely to establish elevated goals to enable them to obtain more beneficial results when they interact with female

46. See Charles B. Craver, *Race and Negotiation Performance*, DISP. RESOL. MAG., Fall 2001 at 22, 25–26.

47. See LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT 256–58 (2008) [hereinafter BABCOCK & LASCHEVER, ASK FOR IT].

48. See LEE E. MILLER & JESSICA MILLER, A WOMAN'S GUIDE TO SUCCESSFUL NEGOTIATING: HOW TO CONVINCE, COLLABORATE, & CREATE YOUR WAY TO AGREEMENT 42–45 (2002); RUBIN & BROWN, *supra* note 38, at 171–73.

counterparts.⁴⁹

One negotiation observer has suggested that “women are more likely [than men] to avoid competitive situations, less likely to acknowledge competitive wishes, and not likely to do as well in competition.”⁵⁰ Many women are apprehensive with respect to the negative consequences they associate with competitive achievement, fearing that competitive success will alienate them from others.⁵¹ Males tend to exude greater confidence than females in performance-oriented situations.⁵² Even when minimally prepared, males think they can “wing it” and get through such situations successfully, while thoroughly prepared females tend to feel unprepared.⁵³ This factor may explain why men like to negotiate more than women⁵⁴ and why they tend to seek more advantageous results than their female cohorts.⁵⁵ Males tend to feel more comfortable in risk-taking situations than women.⁵⁶ When males bargain, they are inclined to use more forceful language and exhibit more dominant nonverbal signals than females.⁵⁷

Women tend to seek and achieve less beneficial results than men when they negotiate for themselves, but they usually set higher goals and obtain more advantageous results when they bargain on behalf of others.⁵⁸ During personal interactions, men are more likely to employ “highly intensive language” to persuade others, while women are more likely to employ less intensive language.⁵⁹ On the other hand, women tend to be more sensitive than men to verbal leaks and nonverbal signals.⁶⁰ Nonetheless, when individuals receive specific training, male–female communi-

49. See Laura Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, in *NEGOTIATION THEORY AND RESEARCH* 203, 205 (Leigh L. Thompson ed., 2006).

50. Irene P. Stiver, *Work Inhibitions in Women: Clinical Considerations* 7 (Wellesley Ctrs. for Women, Wellesley College, 1983); see LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 102–03 (2003) [hereinafter *BABCOCK & LASCHEVER, WOMEN DON'T ASK*].

51. See *BABCOCK & LASCHEVER, ASK FOR IT*, *supra* note 47, at 32.

52. See Muriel Niederle & Lise Vesterlund, *Gender Differences in Competition*, 24 *NEGOT. J.* 447, 450–56 (2008).

53. See GAIL EVANS, *PLAY LIKE A MAN, WIN LIKE A WOMAN: WHAT MEN KNOW ABOUT SUCCESS THAT WOMEN NEED TO LEARN* 84–85, 90–91 (2000); Peggy McIntosh, *Feeling Like a Fraud* 1, 2 (Wellesley Ctrs. for Women, Wellesley College, 1985).

54. See Deborah A. Small, Michele Gelfand, Linda Babcock & Hilary Gettman, *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 *J. PERSONALITY & SOC. PSYCHOL.* 600 (2007).

55. See *BABCOCK & LASCHEVER, ASK FOR IT*, *supra* note 47, at 146–47.

56. See *id.* at 32.

57. See *BABCOCK & LASCHEVER, WOMEN DON'T ASK*, *supra* note 50, at 105.

58. See Emily T. Amanatullah & Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women's Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 *J. PERSONALITY & SOC. PSYCHOL.* 256, 258 (2010).

59. See Michael Burgoon, James P. Dillard & Noel E. Ooran, *Friendly or Unfriendly Persuasion: The Effects of Violations of Expectations by Males and Females*, 10 *HUM. COMM. RES.* 283, 284, 293 (1983).

60. See ALLAN PEASE & BARBARA PEASE, *THE DEFINITIVE BOOK OF BODY LANGUAGE: THE HIDDEN MEANING BEHIND PEOPLE'S GESTURES AND EXPRESSIONS* 13–14 (2006).

cation differences tend to disappear.⁶¹

Men tend to define themselves by their individual achievements, while women tend to define themselves by their relationships and group endeavors.⁶² In competitive bargaining situations, particularly zero-sum interactions, participants possessing such male traits could reasonably be expected to outperform participants possessing stereotypically female traits.⁶³ Another factor that could influence male and female bargaining interactions concerns the fact that men and women differ with respect to what they consider to be appropriate outcomes. Women tend to value “equal” exchanges, while men tend to desire “equitable” outcomes.⁶⁴ These different predispositions might cause female bargainers to accept equal results even when they possess greater economic power than their counterparts, while male negotiators would strive for equitable exchanges that would reflect power imbalances.

When men and women interact in non-intimate settings, men tend to speak for longer periods of time and interrupt conversations more frequently than women.⁶⁵ This masculine tendency to dominate male–female interactions can provide men with an advantage during bargaining interactions by enabling them to control the discussions. Men also tend to be more direct than women. If a man is hungry, he is likely to say so directly and indicate a desire for food. On the other hand, women tend to be more indirect. If a woman is hungry, she is likely to ask the individuals around her if they are hungry, hoping they will appreciate the fact she wants something to eat.⁶⁶ This factor might similarly cause men to be perceived as more forceful than women at the bargaining table.

When men and women prevaricate, they tend to have different objectives. Males frequently lie on a self-oriented basis to enhance their own reputations (braggadocio), while females tend to engage in other-oriented lying intended to make other people feel better (“I love your new outfit”).⁶⁷ This difference would most likely cause males to feel more comfortable than their female cohorts when they engage in deceptive be-

61. See Nancy A. Burrell, William A. Donohue & Mike Allen, *Gender-Based Perceptual Biases in Mediation*, 15 COMM. RES. 447, 453 (1988).

62. See Deborah M. Kolb & Linda L. Putnam, *Negotiation Through a Gender Lens*, in THE HANDBOOK OF DISPUTE RESOLUTION 135, 137 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

63. See Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942, 946 (2001).

64. See Catherine Eckel, Angela C.M. de Oliveira & Philip J. Grossman, *Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?*, 24 NEGOT. J. 429, 441 (2008).

65. See KAY DEAUX, THE BEHAVIOR OF WOMEN AND MEN 60 (1976).

66. See DEBORAH TANNEN, THAT’S NOT WHAT I MEANT! HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS 71–73 (1986); Lynn Smith-Lovin & Dawn T. Robinson, *Gender and Conversational Dynamics*, in GENDER, INTERACTION, AND INEQUALITY 122, 124–26 (Cecilia L. Ridgeway ed., 1992).

67. See Bella M. DePaulo, Deborah A. Kashy, Susan E. Kirkendol, Melissa M. Wyer & Jennifer A. Epstein, *Lying in Everyday Life*, 70 J. PERSONALITY & SOC. PSYCHOL. 979, 986–87 (1996).

havior during negotiation encounters to advance their own interests, since such conduct would be of a self-oriented nature. Would such deceitful conduct be unethical?

When lawyers negotiate, they frequently engage in overt deception. For example, Side A may be authorized to accept any amount over \$100,000, while Side B may be authorized to pay up to \$130,000, which provides the participants with a \$30,000 settlement range. Once the small talk concludes and the participants begin to focus on the real issues, the Side A representative might say that he could not accept less than \$160,000, while the Side B representative might indicate that she cannot pay more than \$70,000. They are both pleased that they have been able to commence the substantive talks successfully, but they have both lied about their true settlement intentions. Have they committed an ethical violation? Model Rule 4.1 is a paragon of clarity. It states that “a lawyer shall not knowingly make a false statement of material fact or law to a third person.”⁶⁸ When this rule was being drafted, persons who teach negotiation emphasized the fact that during bargaining interactions almost all lawyers over- or under-state their positions for strategic purposes. They induced the American Bar Association (ABA) to add Comment 2, which states:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not to be taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category.⁶⁹

Although I agree that negotiators regularly misrepresent their underlying values and settlement intentions, since this is an inherent aspect of bargaining interactions,⁷⁰ I must confess that these are the only truly material elements of such endeavors. The factual, legal, and economic issues are all secondary. What the parties must determine is which items are valued by the other side and how much they must concede to get those counterparts to accept a deal. Nonetheless, due to the “puffing” and “embellishment” indigenous to such interactions, I do not expect counterparts to be completely open with respect to these issues.

When one considers these gender-based differences, should they expect male and female negotiators to achieve statistically different results? Professor Kay Deaux noted many years ago that behavioral predictions based upon such stereotypical beliefs are likely to be of highly questionable validity in most situations.⁷¹ There are relatively few characteristics in which men and women consistently differ. Men and women both seem to

68. MODEL RULES OF PROF'L CONDUCT R. 4.1 (AM. BAR ASS'N 2016).

69. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (AM. BAR ASS'N 2016).

70. See generally Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299 (2010).

71. See DEAUX, *supra* note 65, at 144.

be capable of being aggressive and helpful and, alternatively, cooperative and competitive.

Over the past two decades, I performed several empirical studies comparing the results achieved by male and female students on my graded course exercises. I consistently found no statistically significant differences with respect to the average results achieved or the standard deviations involved.⁷² These studies would suggest that despite some behavioral differences between men and women, those differences do not significantly affect the bargaining outcomes they achieve.

During the fall semester of 2015, I decided to perform a slightly different statistical assessment. I initially examined the student results on the first practice exercise to see if there might be any gender-based difference, and I found that the average male placement results were higher than average female placement results, with a level of statistical significance at the 0.0276 level.⁷³ This was consistent with the differences found by Professors Korobkin and Doherty in a study they had conducted among first year law students working on a single bargaining exercise.⁷⁴ I thought that with careful training gender-based differences would disappear, as they had in my prior studies. I was thus surprised when I compared the male and female results on the graded exercises conducted during the second half of the semester. The male placement means were 78.559 while the female placement means were 61.643, with these differences statistically significant at the 0.002 level.⁷⁵

In the final class of the semester, I disclosed these findings and asked the students what might have contributed to these different results. A number of students suggested that some males and a few females had behaved in an aggressive and even adversarial manner to advance their interests, causing more female counterparts to give in than male counterparts. Some female students also indicated that their fear of nonsettlements caused them to give in near the end of their interactions to avoid the consequences associated with such “failures.”

During the fall 2016 semester, I focused on the concerns the students had addressed at the end of the 2015 term. We explored ways in which students could effectively counter aggressive and adversarial tactics.⁷⁶ I emphasized the fact that when nonsettlements resulted, *both sides* obtained low exercise scores. I indicated that when counterparts threaten

72. See Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 341 (1999); Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DISP. RESOL. 1, 12–16 (1990); Charles B. Craver, *The Impact of Gender on Negotiation Performance*, 14 CARDOZO J. CONFLICT RESOL. 339, 354–56 (2013).

73. See Charles B. Craver, *Formal Training Does Not Always Eliminate Gender-Based Negotiation Differences*, 18 CARDOZO J. CONFLICT RESOL. 1, 15 (2016).

74. See Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?* 11 AM. L. & ECON. REV. 162, 189–92 (2009).

75. See Craver, *supra* note 73, at 17.

76. See generally WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991).

nonsettlements, all students—especially females—should ask themselves whether they truly believe their counterparts would be satisfied with such results. They should thus suggest that they will not give in to such threats.

At the conclusion of the 2016 term, I compared the average placement scores achieved by the forty-seven male and female students on the graded exercises. The male mean was 68.4 and the female mean was 66.96, with a p-value of 0.8087, indicating a complete absence of statistical significance. In future years, I will again emphasize the ways in which students can effectively deal with aggressive tactics and the fact that no rational students want to end up with nonsettlements. I am confident that this approach will continue to eliminate any gender-based differences.

IV. IMPLICATIONS FOR ADR PROCEEDINGS

A. POSSIBLE IMPACT ON BARGAINING INTERACTIONS

When individuals work to establish new professional relationships or change existing relationships, they should negotiate. They should similarly negotiate when difficulties arise. These may be between managers and subordinates at work or between business partners, friends or neighbors, or even immediate family members. Persons who feel uncomfortable negotiating will place themselves at a distinct disadvantage, because they will either have to accept what their counterparts are proposing or walk away. If minority members or women were to place themselves in these positions by declining to interact, they would be unlikely to obtain arrangements as beneficial as those obtained by white male cohorts willing to bargain.

When I make presentations on negotiating to female groups, I tell them they should contemplate “out-of-body experiences” when they have to negotiate agreements for themselves. Many women are uncomfortable negotiating with others, and when they bargain for themselves they tend to set lower goals than their male cohorts. I strongly encourage them to assume that a close friend has asked them to represent her and work to obtain beneficial outcomes for that person. They should act as if a friend with their resume has asked them for such assistance and work to achieve the objectives they would try to obtain for that individual. If they behave in this manner, they can significantly diminish the likelihood they will accept terms less beneficial than they should be able to obtain.

When persons are taught even minimally about the bargaining process and how it operates, this should greatly enhance the likelihood they will interact in this manner and do so effectively. If women or minorities are having problems with their spouses, children, or other family members, they should endeavor to deal directly with those individuals. If they are unable to resolve such matters in this manner, they may contemplate marital dissolutions. By this time, they usually seek legal assistance.

People involved with neighborhood controversies or difficulties with municipal regulators must initially communicate directly with the rele-

vant persons to see if they can agree upon mutually acceptable arrangements. In the vast majority of cases, they are able to do so, and they are pleased to have done so amicably. When such interactions do not work out, they often seek legal assistance.

When individuals apply for jobs, they may suspect they are not being considered seriously due to their race or gender. They may even suspect such discriminatory treatment from their current employers. They may be denied promotions, given smaller pay increases, or subjected to racial or sexual harassment not controlled properly by their employers. In such circumstances, they might contact the employer's equal employment opportunity officials, a state fair employment practice agency, or the Equal Employment Opportunity Commission.

Individuals encountering such difficulties are extremely likely to resolve them through informal or formal interactions with the pertinent parties. They will get together and express their concerns and work to achieve mutually acceptable resolutions. In most cases, they will do so successfully.

Despite the concern of Professor Fiss that these matters may concern issues of significant interest to other people or groups, they generally do not. They usually pertain to isolated matters that do not have such external ramifications. As a result, their amicable resolution of such matters through relatively confidential bargaining interactions does not undermine the rights of others. In the unusual situations where group interests are involved, they may seek the assistance of such entities as the National Association for the Advancement of Colored People (NAACP), Mexican American Legal Defense and Educational Fund (MALDEF), or a women's rights group.

Most attorneys who deal with family matters, property rights, employment issues, and similar arrangements are used to resolving the underlying issues through bargaining interactions. Most are taken care of without the need to initiate formal legal proceedings. They contact the relevant persons on the other side and endeavor to work with them to generate acceptable results. Even where formal proceedings are commenced, very few ever go to trial. The overwhelming majority of such legal matters are settled through inter-party negotiations. This saves disputing parties significant monetary amounts and enables them to avoid the psychological traumas so frequently associated with formal litigation. It may also enable them to address emotional issues that courts cannot usually resolve. For example, someone may want to obtain a sincere apology from the person responsible for their plight.

It is generally irrelevant whether the clients are minority or nonminority group members or are male or female. Their legal representatives will diligently seek to advance their interests, as they are ethically obliged to do under Model Rule 1.3. It is also irrelevant in most situations whether their attorneys are minority or nonminority persons, or are men or women, due to the fact that most lawyers have a fairly good idea how

to negotiate—even if they have had minimal formal training in this area. They have generally been conducting such interactions on a regular basis and have learned how to do so effectively.

B. POSSIBLE IMPACT ON MEDIATOR ASSISTED INTERACTIONS

When inter-party negotiations are unable to generate mutually acceptable results, conflicting parties often seek the assistance of neutral facilitators. Such mediators work with the interested individuals to help them with their negotiations. The styles employed by mediators can be important due to the fact that different approaches might adversely affect the parties involved because of their ethnicity or gender.

Effective mediators generally possess a number of common characteristics.⁷⁷ They tend to be objective persons who are aware of their own potential biases. They have excellent communication skills and are empathetic listeners and assertive speakers. They are active listeners who are adept readers of nonverbal signals. They generally have good interpersonal skills that enable them to interact well with persons from diverse backgrounds. They understand the negotiation process and the way in which they can enhance bargaining interactions. Since they lack the authority to impose actual terms on bargaining parties, they must rely on their powers of persuasion and their reputations for impartiality and fairness to help parties achieve mutual accords.

Mediators tend to primarily employ one of three different styles.⁷⁸ Most are *facilitative* intervenors who work to reopen blocked communication channels and encourage direct inter-party negotiations. Some employ an *evaluative* style and focus primarily on the substantive terms being discussed. They often suggest the terms they think the parties should agree upon. “An innovative group of mediators are [t]ransformative.”⁷⁹ They endeavor to empower weak participants and generate mutual respect that will enhance the ability of disputing parties to resolve their difficulties.

Facilitative mediators work to regenerate party-to-party discussions to enable the bargaining participants to structure their own deals.⁸⁰ They think that temporary impasses are caused by communication breakdowns and/or unrealistic expectations. They strive to reopen communication channels and induce the negotiators to re-evaluate the reasonableness of their respective positions. They ask many questions designed to prompt the participants to reconsider their positions and to encourage the parties to explore new areas. They prefer to conduct joint sessions during which

77. See JAMES C. FREUND, *ANATOMY OF A MEDIATION: A DEALMAKER'S DISTINCTIVE APPROACH TO RESOLVING DOLLAR DISPUTES AND OTHER COMMERCIAL CONFLICTS* 57–65 (2012).

78. See DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 63–92 (2d ed. 2012).

79. CRAVER, *SKILLS & VALUE*, *supra* note 32.

80. See MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, *EXAMPLES & EXPLANATIONS: DISPUTE RESOLUTION* 85–86 (2d ed. 2011).

the parties engage in face-to-face bargaining. They rarely resort to separate caucus sessions with each side, except when they encounter serious difficulties during which the disputing parties are unable to talk directly with one another in a conciliatory manner.⁸¹ They also consider separate caucus sessions when they think that one side is behaving in an adversarial manner designed to intimidate their counterparts. This enables them to minimize the possibility that one party can employ intimidating techniques to take advantage of timid counterparts.

Communication between facilitative mediators and negotiating parties is designed to re-establish meaningful and constructive inter-party discussions. They ask questions to induce participants to reassess their own positions and to think more openly about the positions being articulated by their counterparts. They almost never offer their own evaluations directly, but they accomplish this result through the questioning process. Facilitative mediators are especially appreciated by proficient negotiators who desire minimal bargaining assistance and wish to control their own outcomes.

Evaluative mediators are frequently used to assist relatively inexperienced negotiators who have difficulty achieving their own agreements.⁸² These mediators usually deal with individuals who either do not know how to initiate meaningful bargaining interactions or are unable to explore the relevant issues in a manner likely to generate mutual accords. As a result, they feel the need to control the situations they encounter. Evaluative mediators can also help even skilled negotiators overcome seemingly irreconcilable issues blocking ongoing interactions.⁸³

Evaluative mediators like to use separate caucus sessions during which they explore the underlying interests of each party outside the presence of the persons on the other side. This approach minimizes the possibility that adversarial parties can directly intimidate weaker counterparts. Evaluative mediators initially ask many questions designed to let them know what each side needs to achieve. Once they feel they have a sound understanding of the relevant terms, they formulate packages they believe will optimally serve the interests of everyone. They then employ a direct approach to let each side appreciate the terms they believe everyone should accept. When participants object to suggestions being made, these neutrals try to convince those persons that the proposed accord would be the best they could hope to achieve.

Negotiators who are uncertain regarding the appropriate way for them to achieve mutually acceptable agreements and who desire substantive guidance from experienced neutrals may appreciate the assistance provided by evaluative mediators. They should carefully select substantive experts who are likely to understand their particular interests and work with them to generate terms that best satisfy the objectives of both sides.

81. See DEBORAH M. KOLB, *THE MEDIATORS* 46-47 (1983).

82. See MOFFITT & SCHNEIDER, *supra* note 80, at 86-87.

83. See generally FREUND, *supra* note 77.

Since these neutral facilitators generally conduct separate caucus sessions, it is difficult for competitive negotiators to employ adversarial tactics designed to intimidate their counterparts.

In their thoughtful 1994 book, Robert Baruch Bush and Joseph Folger explored a novel approach to mediation.⁸⁴ They rejected the traditional facilitative and evaluative mediation styles in favor of a more relationship-oriented approach designed to transform disputing parties into relatively self-sufficient problem solvers. They believe that many persons have difficulty negotiating with others because they feel they have no meaningful power to influence the bargaining outcomes. Individuals may also find it difficult to appreciate the underlying interests of the persons with whom they are dealing.

Transformative mediators strive to empower weak-feeling parties by demonstrating the rights and external options available to those persons through settlement and nonsettlement alternatives. They also help the participants understand the positions being taken by their counterparts and recognize—even if they do not accept—the validity of those positions. They believe that empowered individuals who are aware of their nonsettlement alternatives and appreciate the perspectives of their counterparts can optimally work to achieve mutually beneficial solutions. This approach is especially beneficial where family disputes are involved and one or both parties feel emotionally or economically impotent. It can also be effective where employment controversies arise and the affected workers feel they possess no bargaining power vis-à-vis their employers.

Unlike facilitative and evaluative mediators who are particularly interested in achieving resolutions of the underlying disputes, transformative conciliators are primarily interested in future party relationships. They may be pleased when their efforts generate current agreements, but they prefer to help disputants understand how they can effectively resolve their own future controversies. To accomplish this objective, transformative intervenors focus on two basic issues: party *empowerment* and inter-party *recognition*.⁸⁵

Many women and minority group members feel a lack of bargaining power when they interact with others due to the discriminatory practices that have historically affected their groups. As a result, they understandably fear that mediators may undervalue their interests and favor the positions being articulated by white males, especially those from upper socioeconomic groups. For people experiencing such concerns, transformative mediation can be especially helpful. They need the assistance of someone who will help them understand two critical factors. First, they do not have to reach agreements. If the positions being set forth by their

84. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (1994); *see also* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2005) (responding to assessments of their first edition).

85. *See* BUSH & FOLGER (1994), *supra* note 84, at 20–21.

counterparts are particularly disadvantageous, they may be better off seeking judicial assistance through the litigation process—or by terminating current relationships with the parties on the other side. Second, they can also benefit from an appreciation of their counterparts' underlying interests.

When transformative mediators are not available, it can be helpful to look for facilitative mediators who will try to get the parties working together to resolve their differences. When skilled facilitative neutrals recognize that one or both sides feel impotent, they generally endeavor to show them that they do have realistic options they could choose instead of caving into unreasonable counterpart demands. Such neutrals are also good at controlling the bargaining environment to prevent adversarial persons from rudely and aggressively intimidating parties short on self-confidence. This can be particularly critical where someone feels such impotence due to their race or sex.

Parties who understandably fear that dispute resolution procedures would be likely to disadvantage them because of their race or sex may feel uncomfortable dealing with evaluative mediators. If they lack the inner confidence of their white male counterparts, they might think such mediators will try to impose terms favoring the persons on the other side. Proficient neutrals should appreciate such concerns, work hard to assist such persons to understand their true bargaining power, and assist them with the articulation of appropriate positions their counterparts must consider.

The biggest thing women and ethnic minorities must appreciate is the fact that they do not have to give in to the demands of others. They must carefully consider their nonsettlement options and understand that bad deals are worse than no deals when they would be better off going to court or doing business with someone else. They must also strive to place themselves in the shoes of the persons on the other side to appreciate the degree to which those parties need what they can provide. If such persons really need to generate mutual accords to further their own interests, they would be unlikely to let the current discussions culminate in nonsettlements. As soon as they appreciate that the individuals on this side would be willing to accept their nonsettlement alternatives, those counterparts would be likely to become more open to fair terms.

Recent studies have found no significant differences with respect to the results achieved by female and minority claimants compared with white males with respect to mediated matters.⁸⁶ These findings are important, especially with respect to persons with limited financial means. If such individuals are unable to resolve their controversies through negotiation and mediation, they may lack the financial resources needed to proceed

86. See Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *LAW & SOC'Y REV.* 767, 777 (1996); Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 *CAP. U. L. REV.* 819, 829 (2011).

to litigation.⁸⁷

C. POSSIBLE IMPACT ON JUDICIAL OR ARBITRAL PROCEEDINGS

On those relatively rare occasions when disputing parties are unable to achieve agreements through the bargaining process, even with mediator assistance, they can frequently resort to formal adjudicatory proceedings. In some instances, their contractual relationships may require them to submit their disputes to arbitration; if not, they can generally go to court. Although many people think that formal procedural rules can help to diminish the impact of possible prejudice against women and minority persons, it is not always clear that this assumption is correct. Although it is true that the overt forms of discrimination that affected many women and ethnic minorities in the past have significantly decreased as we have moved into the modern world and understand how improper such considerations are, it is important to understand how even subconscious biases may come into play.⁸⁸

Judges, arbitrators, and jurors often possess stereotypical beliefs they are not even aware of. They may have implicit beliefs regarding women and different ethnic groups that might influence how they evaluate positions being articulated by members of different groups. When they endeavor to evaluate the merits of positions put forth before them, they may subconsciously give greater respect to members of one group vis-à-vis members of other groups. It should thus be clear that no matter how much formal adjudicatory rules attempt to minimize the impact of such biases, they cannot eliminate them entirely. This is a major reason women and minority group members should not automatically dismiss reliance on the negotiation process and the assistance of neutral facilitators to resolve their controversies. During these procedures, they have the ability to directly influence both the processes involved and the results, if any, achieved. They can work hard to diminish the possible impact of subtle biases that might undermine their persuasiveness and endeavor to control the final outcomes that may be achieved.

V. CONCLUSION

When different legal controversies arise, parties frequently employ alternative dispute resolution procedures to resolve them. They initially try to negotiate with the other persons involved. If they encounter bargaining difficulties, they may request mediator assistance. Members of ethnic minority groups and women may be concerned that their ethnicity or gender may undermine their ability to achieve beneficial results through the bargaining process, even with mediator assistance. Although there continue

87. See Press, *supra* note 86, at 838.

88. See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

to be some different traits associated with ethnicity and gender, most are irrelevant today with respect to ADR proceedings. Well prepared minorities and women should be able to seek good terms for themselves, even when dealing with white male counterparts. Even though judicial proceedings may have formal rules designed to minimize potential racial or gender biases, subconscious stereotypes may still influence the ways judges, jurors, and arbitrators assess litigant situations. It should thus be clear that adjudication is not clearly preferable to ADR procedures for minority group members and women.