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PERSPECTIVE

Why mediation, and maybe your case, needs women

By Eydith Kaufman

In the past month, we've read about high-level negotiations to free hostages held by both sides in the Middle East hostilities. Teams of negotiators have been working behind the scenes to structure hostage exchanges, but little has been reported about the make-up of the negotiation teams.

It's a safe bet, however, that most of the members are men. According to Georgetown Institute for Women, Peace and Security, in 2018 women made up just two percent of mediators in major peace processes. A United Nations press release from October 2023 reports that women represented "only about 16 per cent of total participants" in peace processes and "were almost completely absent" from many of the processes and talks on situations on the Security Council's agenda.

An American Bar Association article published this month also points to the peace negotiation stories to conclude that women are seriously underrepresented in alternative dispute resolution. Noting that women possess qualities that make them uniquely capable of achieving successful outcomes, the author concludes that these same skills can be taught to all mediators - male and female - to help improve the mediation process for everyone.

Mediation of legal disputes is, of course, a far cry from negotiating the release of hostages in a field of war. But, just as in peace process negotiations, there should be more women involved in mediation of legal disputes, especially in areas where they may be overlooked.



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Women practice in every area of law; they hold degrees in medicine, engineering, and countless other disciplines that used to be thought of as traditionally "male." They know the law and understand the issues in these fields as well as their male counterparts, but they may be overlooked as potential mediators because parties and counsel make assumptions, as opposed to looking at the mediator's unique qualifications and experience.

For example, when parties are involved in family law or gender discrimination disputes, they tend to look for female mediators, despite the fact that there are many amazingly empathetic male mediators. Similarly, parties involved in construction defect or business con-

tract litigation tend to look for male mediators, even though a significant number of female mediators are well qualified in construction defect and business matters.

This is not to say that there are no differences between male and female mediators. A landmark study of women mediators in Northern Ireland identified a host of "soft" skills that women bring to mediation. Women, according to the study, are more sensitive to gender inequalities because of their own experiences. They focus more on the relational nature of conflicts and less on power and hierarchy issues. Instead of looking only at facts and law, women mediators tend to put things in context, seeing both the bigger picture and the emotional details of a case.

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Describing these as “soft” skills might suggest that women mediators are less forceful, more conciliatory, and more emotional than their male colleagues, but being sensitive to gender inequalities does not make women weaker or less forceful. Just because they focus on building bridges between parties to try and break impasses does not mean that female mediators are acting in a conciliatory manner. And just because they focus less on power and more on the bigger picture does not make them more emotional.

In fact, these so-called “soft” skills enable both male and female mediators to better relate to the parties in contentious legal disputes, helping them to feel heard, appreciated and

understood. Women mediators are, for good reason, perceived as more empathetic and willing to listen to both sides. But those same traits can be learned and used by their male colleagues. Ultimately, this will help reduce competitiveness and build the trust parties and counsel need in order to work towards resolution of the dispute.

My own journey to mediation was influenced at least in part by a series of gender-based insults, both subtle and not so subtle, that occurred on more than one occasion during hotly contested litigation. Those experiences led me to realize how the competitive nature of litigation can cause some attorneys to lose sight of what is best for their clients and even for themselves.

Mediation offers a surprisingly effective alternative. By listening carefully and actively to both sides and helping parties see the big picture - including possible solutions and alternatives - a skillful mediator can actually help parties reach a mutually agreeable resolution, sparing them additional stress, expense, and risk.

Practicing litigators often have a strategy, or reasons beyond the area of law at issue, that will dictate their choice of mediator for a particular case. And there are times when one gender will be more appropriate for the parties or the particular fact pattern of the case. But by no means should parties fail to consider the value of working with a female mediator, no matter what area of law is involved.

Women mediators, like their male colleagues, are critical members of the dispute resolution community and should be valued and assessed on their unique strengths and abilities. Given the breadth and depth of women’s knowledge in all areas of law, parties and their counsel should never make gender-based judgments regarding a particular mediator’s qualifications to hear a legal dispute.

Instead, attorneys and parties should look at the full picture, including the individual neutral, and consider whether using a female mediator would be beneficial, not just to support diversity in mediation but actually to resolve their case, irrespective of the applicable area of law.