MARS & VENUS:
GENDER DIFFERENCES IN NEGOTIATION

Marta-Ann Schnabel
Patterson Resolution Group

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I. Negotiation Basics

Lawyers think of themselves as good negotiators. As advocates, they know that their job is to advance the client's position. Most lawyers cling tenaciously to their client's position. Like Sisyphus, they endlessly push that boulder up a steep hill. They sometimes even fail to notice when it rolls back down on them.

The rise of mediation, particularly over the last 20 years, marks the recognition that a system which makes space for every boulder to get to the top of the hill is plagued by expense, delay, and dissatisfaction. Lawyers have felt the rebound of client dissatisfaction: institutional clients have revolted and now often refuse to pay for the work necessary to support their intransigency; small businesses and individuals are often choosing self-representation over legal fees in this DIY world; and managing contingency fee cases often requires that the lawyer invest large sums in the face of ethical rules which hold that the client dictate the direction of the litigation.

In today's legal marketplace, the negotiator must be more than just a client "mouthpiece", more than just the gladiator on behalf of the client. The negotiator must understand the client's position, but also understand the nuances of the client's needs and best interests. The negotiator must understand the best and worst potential outcomes. The negotiator must be able to identify the economic factors impacting both sides of the conflict. Finally, and perhaps most importantly, the negotiator must understand the other party's position.

In *Getting to Yes*, Roger Fisher and William Ury outlined the four fundamental principles of *integrative negotiation*: 1.) separate the parties from the problem; 2.) focus on interests rather than positions; 3.) discover or create options which are mutually beneficial; and 4.) encourage evaluation based on objective criteria. Indeed, William Ury has made a career out of describing and expounding on this approach. Most of us are familiar enough with these four principles; few of us really have internalized

them and implemented them in our negotiation efforts.

II. Implementing the Basics

How to begin the acclimation to these negotiation principles?

First, it is important to have good communication with your client and to know what the client perceives as the preferred outcome of the negotiation. It is surprising how often lawyers do not focus on their client. Lawyers are busy professionals and often assume that they understand what the client wants or needs; they then begin to work toward the outcome that they perceive as optimal. It is not unusual, then, in the course of mediation for the Mediator to uncover more information about the client or the client's desires than the lawyer has.

In truth, many Mediators use this technique to find potential resolutions. If the lawyer independently explores this arena with the client, then the lawyer may be able to resolve the matter through direct negotiation. Perhaps more importantly, a client-savvy lawyer improves the mediation process tremendously.

As part of the good communication, lawyers must come to an understanding of what is most important to the client. This is often a process by which the client is, to some measure, "separated from" his or her problem. It also potentially introduces the client to a form of objectivity. The lawyer's role is to assist the client's perception and analysis. This process cannot begin early enough in the representation of a client, and, in fact, if the process does not begin until the eve of negotiation, the lawyer may discover that the client is unable to be separated or obtain objectivity.

Of course, there are some clients for whom separation is never going to happen. Nonetheless, identifying those issues early in the representation can still be helpful in developing negotiation strategies and moving the matter to a successful negotiated outcome. More importantly, it can avoid horrifically poor outcomes and can protect the lawyer against client claims of misconduct or malpractice.

Second, Ury advocates that the negotiator focus on "interests" rather than "positions". While this is sound advice, one must be realistic in trying to forecast "interests" for others. Atticus Finch famously

observed, "You never really understand a person until you consider things from his point of view–until you climb into his skin and walk around in it." Being too clever in anticipation of what motivates another can be as deadly as ignoring it altogether.

The third principle, creating options that are mutually beneficial, may seem like pablum to many of us. In an environment where Jerry Springer, Judge Judy, and Donald Trump's *The Apprentice* dominate, popular culture seems to revel in confrontation. There are winners and losers and very little in between.

Often, however, parties and their lawyers know the relative merits of their positions; the trick in negotiation is to find a solution that scales positively within the context of the "relative merits" perceived by each party. For example, lawyers who regularly defend personal injury cases know that they will ultimately "lose" at trial– that, in fact, the plaintiff is going to recover something. No one likes to lose, but if losing is what happens every time, then one becomes immune to that potential outcome. If the negotiation position is: "You won't lose if you settle rather than try," it may have little effect. On the other hand, a negotiation position that suggests that trying the case may result in a negative precedent that will impact future matters may well succeed.

Finally, encouraging evaluation based on objective criteria may be the most difficult of these principles. Many negotiators take offense at the suggestion that they cannot be objective, and many clients do not understand why they ought to be objective. Re-framing this principle may be helpful. The suggestion that others have solved a similar problem in a particular way is sometimes easier to hear than the more pejorative "be objective". This also encourages the use of neutral language in communication between the parties (as well as internal communications about the other party).

III. Does Gender Make a Difference?

A 2001 study undertaken by Kray, Thompson & Galinsky amongst MBA students (published as "Battle of the Sexes: Gender Stereotype Activation in Negotiations" in *The Journal of Personality and Social Psychology*) found that an overwhelming majority believed that men are "self-assured, assertive,

and able to stand firm against compromise" whereas they believed that women are "emotional, relationship-oriented and co-operative." While the study is now 15 years old, it is safe to say that the perception lingers.

Perception and reality, however, are often very distant. For example, a 2004 review of empirical studies of gender differences in negotiation by Rekha Reddy of Princeton University, noted that the academic studies on this issue have yielded "little or no evidence of statistically significant differences between the negotiating styles of men and women." Moreover, Ury's *integrative negotiation* approach seems universally to be hailed as one that converts skills perceived to be more "natural" to women to advantage. And yet, there is continued focus on women's deficits as negotiators.

Of late, both the Harvard and the Wharton Business Schools have initiated programs directed at improving women's negotiation skills. Having asked to be on their mailing lists, I can report without hesitation that vast numbers of hours (and many, many pages) are being dedicated to looking at this issue. This may be a "chicken or egg" conundrum. Note that the Kray and Thompson study published in *Research in Organizational Behavior* and entitled "Gender Stereotypes and Negotiation Performance" includes this insightful passage:

> Because many stereotypically masculine traits are valued at the bargaining table, we argue that negotiators hold implicit theories about what it takes to succeed that places female negotiators at a dissadvantage....Regardless of whether a given individual negotiator endorses this point of view, just being aware that this connection exists can influence bargaining behavior because the activation of stereotypes is virtually impossible to overcome.

Regardless, Harvard and Wharton both accept as a truism that women negotiate poorly on their own behalf but are often effective and zealous advocates on behalf of others. This seems to explain the ongoing disparity between male and female salaries even in the white collar world and supports the Sheryl Sandburg hypothesis that women simply don't ask for enough money or success.

Typically women are not bullies, although I confess that as I grow older, the prima donna in me has emerged. And I am perhaps even more delighted to note that a number of younger woman litigators whom I know do seem to be bullish, but not bullies. And the disappearance of the old references to *female*

dogs seems a positive vernacular trend. At the end of the day, however, the William Ury disciples certainly recognize that those who are the most aggressive do not necessarily accomplish the best negotiated results.

Becoming a good negotiator, like everything else, takes practice. It requires a combination of self-insight and self-discipline. Good communication is key, as is patience and an understanding of the client's needs and goals. There is absolutely no reason why men cannot develop this skill set as well as women!

If this topic is of interest to you, here are some suggested resources:

*Program on Negotiation at Harvard Law School: *pon.Harvard.edu*
*Strauss Institute for Dispute Resolution: *law.pepperdine.edu/strauss*
*Princeton Leadership for Change: *princetonlfc.edu*
**Women Don't Ask: Negotiation and the Gender Divide*, Babcock & Laschever (Princeton Press)
*Haas School of Business, University of California Berkley: *Haas.Berkley.edu*