

Plaintiff



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Why select a female mediator?

Female mediators bring diversity, which should be welcome in the ADR space

BY DEBRA BOGAARDS

As a female trial attorney for over four decades and now a mediator, arbitrator, and discovery referee, I usually walk into a mediation in stilettos without realizing I am a woman. (*Pause and raised eyebrows intended.*) In other words, I see myself as a kick-ass mediator who happens to be a woman.

Clara Foltz became the first woman to join the bar in California in 1878. Now, almost 150 years later, women outnumber men in law schools, yet this growth in legal talent doesn't fully translate into ADR panel roles. The statistics for the number of female mediators, however, are getting better. Women make up over 25% of mediators and neutrals on panels. Yet, when one enters the offices of ADR Services, Inc., there is a poster board containing two-inch square photos of the neutrals, the majority of whom are grey-haired white men. A suggestion heard at women's legal conferences to increase the selection of female mediators is to give opposing counsel three female mediator names, so that the chances of selecting a female mediator increase.

Female mediators bring diversity, which should be welcome in the ADR space. The benefits of diversity amongst mediators is important as we draw on our own life experiences to empathize with different viewpoints and to craft creative solutions. Diversification contains an ethical obligation. Standard IX of the Model Standards of Conduct for Mediators (2005) obliges mediators to bolster diversity among mediators "to promote public confidence in mediation as a process for resolving disputes."

Evidence indicates that parties to a dispute feel more comfortable within the process when they share some affinity

or commonality with those selected as a neutral. The parties will inevitably feel more comfortable sharing their concerns in a private environment, behind closed doors, with the neutral.

Women have their own natural negotiating style. In my negotiation class at U.C. Law S.F. (formerly Hastings College of the Law), the students read *Bargaining for Advantage: Negotiation Strategies for Reasonable People*, in which Wharton professor G. Richard Shell argues that although there is no ideal negotiating style, mediators can improve their effectiveness by cultivating a few core habits:

1. Thorough preparation before the mediation.
2. High expectations about what can be achieved.
3. Listening patiently to uncover critical information
4. Personal integrity, which helps build a strong reputation over time.

These habits cut across styles and situations, helping mediators become more flexible and resilient in the negotiation. As a woman, these core habits are an integral part of my practice.

Thorough preparation before the mediation

My need for thorough preparation is born out of being female (a mommela of two adult daughters and a bubbela of three small grandchildren, with another on the way – *always* multitasking and being hyper-organized), a prior trial attorney and a prior international tax specialist (for a former big 8 CPA firm) or some combination thereof.

Some mediators wing it, reviewing the mediation briefs for the first time on the morning of the mediation. Others, like me, spend hours poring over each

mediation brief and attached exhibits. Then, I draft my own chronologies or timelines, and charts to fully understand that party's view of the case. Reading the briefs is followed by individual Zoom or telephonic pre-mediation conferences with counsel. During these conferences, I may request additional written materials, such as reports, videos, screenshots of text messages or excerpted deposition transcripts. By the time the mediation rolls around, I am ready. It's go time.

The most effective participants to a mediation also spend far more time in preparation than in the mediation itself. During planning, skilled participants consider a range of options, look for common ground as well as differences, think about both short- and long-term implications, set upper and lower limits for a range of acceptable outcomes and understand what your opposing party wants by inverting. Lastly, the most effective participants hold pre-mediation conferences with their own clients to manage their expectations.

An example of my thorough preparation: In a recent merger and acquisitions mediation, I received both counsels' mediation briefs as well as 2,000 pages of documents containing technical terms, on a Saturday night, before the Tuesday all-day in-person mediation. A lot of technical documents to digest fast! The thorough preparation was key to understanding the dispute. What jumped out to me, however, was the emotional component for the plaintiff that was the catalyst to the dispute.

Or, in an upcoming personal injury case, it was imperative to review the plaintiff's comprehensive mediation brief with a who's who chart explaining plaintiff's theory of liability at least two weeks early. With six defendants, it was

essential to hold individual one-hour conferences with each counsel to plan for the mediation hearing. We discussed having coverage counsel or adjusters available to discuss their positions in a joint breakout room. We strategized about settling before the mediation with a key defendant for purposes of cementing both the percentage (or apportionment) of liability and evaluation that plaintiff's counsel proposed, rather than waiting to do so at the mediation. This early settlement set the gold standard to use at mediation. Waiting until the day of mediation to merely review the briefs would have been a huge mistake.

High expectations of what can be achieved

After reading the mediation briefs, and seeing plaintiff's settlement demand over seven figures and the defense offer at \$25,000 or below, I often think to myself that settlement will be impossible. *Impossible!* But then I read the briefs again. I talk to counsel over the phone. My view changes. I am armed with a strategy and sense that both parties really want to settle. I can facilitate a fair and reasonable settlement.

As a female mediator, I bring an abundance of empathy and compassion to the room. While strong, I am also personable and approachable. Counsel may be looking for a female mediator for this exact reason. In sex abuse cases and sexual harassment in employment, counsel often choose a female mediator. Why? A female victim may feel more comfortable with a female mediator in her room. In a recent sex abuse case involving two men, both the victim and the perpetrator felt more at ease discussing private aspects of their relationship with me. The verbal sexually explicit text messages and allegations in

employment cases are enough to make even the saltiest sailor blush. Somehow, as a female mediator (and former "salty" trial attorney), I can navigate these explicit allegations with ease. Additionally, I have handled many sexual abuse cases where a hug with the victim after the successful mediation has been very gratifying for both the victim and me. Maybe that's the protective mama bear in me.

In a products-liability case, plaintiff's counsel presented a \$10 million demand for the first time the night before the mediation. And that was only because I shared with him that I won't conduct mediation without a settlement demand. The defendant hired local counsel and brought national counsel who informed me that they try every single case. At first, this case seemed like it would be *impossible* to settle. But then I put all counsel aside and focused on the young man who was injured by the gas line and his sweet wife. That focus gave me high expectations of what could be achieved during the mediation. It worked! We reached a settlement, albeit late in the evening.

Patient listening to uncover critical information

Mediation is increasingly gaining significance as a less expensive and often more satisfactory alternative to litigation. I believe 98.4% of all cases can settle at mediation rather than go to trial. As a former trial attorney with just under 40 jury trials, I absolutely loved being in front of a jury. But I now realize that my clients would have much preferred to have settled at a pre-lit mediation, or at least before trial if they could have achieved a fair and reasonable settlement. The emotional roller coaster, risk, and uncertainty of trial.... not to mention the time commitment makes any rational

person prefer settlement. Trial should be left for those cases where the parties remain polarized on what is a reasonable settlement, either due to their liability positions or case value.

As the mediator, my role is to actively listen when the parties talk to me, to uncover critical information and to build rapport as well as trust. I am interested in gathering information and learning about strengths and weaknesses. What are their concerns about confidentiality? What about the other party? From this, I can generate options and look for a way to build value out of differences in interests. Maybe we can create value and then claim value through prioritizing confidentiality, policy changes and cash flow as well as the timing of payments.

Building rapport as a female mediator is easy. I have a respectful demeanor and professional manner. And I love schmoozing! I build rapport by discussing topics unrelated to the mediation like common interests (cycling, skiing, hiking), schools, hobbies, travels, etc. In a complex employment case, I was able to build rapport with an attorney who was rather unapproachable during our pre-mediation call by comparing boichick bagels to Noah's bagels. (He later sent me the NYT article declaring boichick bagels the best in California.) Also, during the mediation while continuing to build rapport, careful framing of the issues is important – avoiding inflammatory terms, ultimatums, extreme demands and offers. How the mediator frames the issue is critical: Re-frame the issue in a non-inflammatory manner, if the party uses inappropriate language, by focusing on the problem.

On rare occasion, when I am gathering information in an emotional case, like a sexual harassment employment matter

or sex abuse case, or even in a products liability or personal injury case, a party (or counsel) may become angry. Cortisol levels increase under stress and spike when angry. The anger is usually a product of their frustration with the numbers. It typically takes 20 minutes for an average adult to return to rational thought. By being alert to this, I usually have everyone take a break. Once the angry participant has gone outside for some fresh air, or grabbed a nosh, we can begin again.

Personal integrity

This trait transcends gender. As a female mediator, my personal integrity and reputation have been honed through my 45 years of law practice since law school. One case at a time. One interaction with counsel at a time. My beloved Dutch mother-in-law Louisje valued integrity above all else. If she liked someone, they

had *integrity*. That was her code for a good person. She wasn't wrong. Integrity and reputation are built through action, one mediation at a time.

I would add a few more traits that are requisite in a successful mediator: grit, determination, and perseverance. Sometimes, mediation is like chutes and ladders – zigs and zags – with various options. I chase down all options, and exhaust them to get to the finish line. If the parties are at an impasse or need a face-saving measure, I will offer a mediator's proposal. In the rare instance that the parties can't reach a settlement at the close of the mediation, I will keep their options open. Perhaps the employer needs time to come to grips with reality, or a key deposition needs to be taken, or something else. I will keep the momentum and stay with the attorneys until they are in a position to return to negotiations.

Conclusion

Thanks for reading this long megillah! Hopefully you will select a female mediator for your next mediation. And maybe even consider leaving your sweatpants and slippers at home and coming into our beautiful new offices in San Francisco for an in-person mediation. That'll be the subject of my next article: In-person mediations are making a comeback!



Debra Bogaards is a mediator with ADR Services, Inc. She has a background with 38 years in insurance defense, mostly for State Farm clients, and an overlapping 20 years as a plaintiff's personal-injury and employment lawyer.



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