

## **Exposing the Fallacy of Women Being Disadvantaged in Mediation**

Some attorneys have accepted the conclusion that women are disadvantaged in mediation because of their predisposition toward preservation of relationships. And it has been suggested that women may actually benefit more in litigation, which allows parties in conflict to tell their stories more fully than in mediation.

Based on my twenty-nine years of experience representing parties in litigation and my more recent training and practice in the Understanding-based Model of mediation, I agree litigation is sometimes necessary, but I could not disagree more strongly that litigation is usually a preferable method for dispute resolution, either for women or men, or that in litigation women can be more aggressive or are more likely to have their needs met.

Indeed, in this mediation model, all participants, including women who are caught in power imbalances, not only have the opportunity, but the responsibility, to fully articulate their needs and to allow the other parties to do likewise. The mediation process itself is designed to create a safe environment where the mediator's function is to support and validate each of the parties in this effort. In contrast to the winner-take-all mentality of litigation, the purpose of mediation is to craft a solution that meets all the important needs of both parties without having to "compromise" by sacrificing one party for the benefit of the other.

In this approach to mediation, even those who are concerned with the preservation of relationships do not have to choose between their own needs and those of others.

### **Litigation Process**

In litigation, parties rarely have the opportunity for meaningful self-expression. Certainly, the litigation system does not support parties in expressing what they think about the dispute or how it affects them. The inquiry is limited to facts that are technically relevant to the legal issue presented, and not which facts are relevant to how the dispute can be understood and resolved.

The process itself relegates the parties to the background and places the lawyers and the judge in the forefront, speaking in a code language that they tell their clients is the legal argument. Clients are told to be quiet and not to offer information. In this environment, neither women nor men engaged in a conflict have the opportunity to become part of the process, except as an accessory to their counsel.

Too often, no one speaks of solutions in litigation, as the focus becomes wanting to win, whatever that ends up meaning.

One of the misconceptions about litigation is that it is a more aggressive or assertive process than mediation, with the latter representing a process for those who are weaker and more inclined toward conciliation. Actually, many individuals prefer litigation precisely because they can turn the entire matter over to their lawyers, thus avoiding the conflict itself.

Litigation affords the parties the feeling that they are sticking up for themselves, but in reality, they are avoiding the conflict, turning it over to others to address, and then living with whatever result that yields.

Mediation, in contrast, is a process where the parties are the primary participants and are center stage. Even with counsel present, in the Understanding-based Model of mediation, it is the parties who speak directly and in depth with the mediator about all aspects of the dispute and their needs. And it is the parties who are ultimately responsible for the informed decision-making that leads to a solution.

With the assistance of the mediator, who works to understand each of the parties as fully as possible and to confirm that understanding with each, the parties have a legitimate platform to articulate all the issues relevant to them. The mediator treats both parties as having valid perceptions and needs, and does not have to choose who is right and who is wrong.

This may be the first time that a party in conflict, man or woman, feels that his or her perspective has been heard and understood. This is extremely empowering.

A woman in this approach does not have to fear that she has to give up her own point of view, her own reality, or sense of her own needs in order to listen to and fully accept and understand those of the other participants, even if they appear to be inconsistent with her own views. As stated earlier, the objective is to determine if a solution can be created to meet all her important needs without having to sacrifice the important needs of others, as well.

### **No Tea Party**

Mediation may require the participants to “work together,” but it is no tea party.

It can be highly emotional and charged, precisely because in this model of mediation the parties are all present in the same place. When one party talks to the mediator, the other party may hear things she or he strongly disagrees with.

In the preliminary stages of this model the parties prepare for this and agree, as an essential condition of the mediation, that they will not abandon what is important to them simply to accommodate the other party.

Women, who are often described as better communicators than men, may actually find the process of articulating their needs more natural than men. Rather than using his or her position as the mediator to manipulate parties into giving up what is important to them to “settle” the dispute, as can occur in some other approaches to mediation, in the Understanding-based Model, the mediator is there to help the parties get underneath the problem and surface all considerations for the purpose of seeing how a global solution can be crafted.

In the Understanding-based Model, the predisposition of some people toward the preservation of relationships\* does not necessarily represent a weakness but may turn out to be an asset.

## **Constructive Approach**

Mediation provides an environment where conflicts can be addressed in a constructive, rather than destructive, manner. If the matter under consideration involves an ongoing business relationship—that of a musician and a record company, for example—assessing whether a constructive solution can be reached that works for both sides and thereby preserves the relationship is a positive and not a negative.

But that does not translate into mediation being a superficial process that allows a party to overlook her own interests. In addition, the Understanding-based Model gives each party a chance to test and assess what is important to all sides. This includes addressing whether even the parties' own beliefs about what they think they need make sense to them after a full discussion of why they believe they need whatever they have stated as their positions.

A woman may come into the process believing that preservation of the relationship is important, yet she may discover through the discussion that she overvalued that goal. If preservation of a relationship is one of the objectives and, under scrutiny, that makes sense, then a woman's motivation toward crafting a solution that meets her own needs, as well as what is important to the "other side," and that allows for the possibility of a continued relationship does not reflect a disadvantage or a weakness, but a strength of mediation.

Finally, the mediator's purpose is to assist the parties in obtaining the best possible understanding of all the dimensions of the conflict and in developing options for a resolution that would meet more of their needs than would be available in court. The mediator is not a judge and does not evaluate their positions. The mediator attempts to assist the parties in understanding themselves and each other and to help break down destructive communication patterns that interfere with positive progress toward resolution.

It is true that mediation is not appropriate for every dispute, and in some circumstances, at least one of the parties' interests will likely be better served by litigation or arbitration. No process is perfect. And as human beings, we are all imperfect. But in light of this, the Understanding-based Model of mediation is an excellent vehicle for conflict resolution for both men and women.

\*While statistically it may be true that women are more likely than men to give up their own needs to satisfy others, that is only one of a multitude of factors that play a part in the mediation dynamic. In her article "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce," Diane Newmann puts this issue in perspective as she discusses the numerous other aspects to the male/female power imbalance in that context and how the mediation process is structured to assess and address them.

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