Alternatives
TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

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Commentary

Class Waivers & Statutory Rights in the Post-*AT&T Mobility* World: 'Like a Bridge Over Troubled Water'*

BY JAY W. WAKS AND CARLOS L. LOPEZ

A new Second Circuit decision confronts an important arbitration question again, directly: Can individual statutory rights be vindicated without the class?

In *AT&T Mobility v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740 (Scalia, J., 5-4, April 27, 2011)(available at http://www.supremecourt.gov/opinions/10pdf/09-893.pdf), the U.S. Supreme Court struck down a California state law rule—the *Discover Bank* rule—that would render most class action waivers in consumer adhesion contracts calling for individual arbitration unconscionable and unenforceable. See *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100 (Cal. S.Ct. 2005)(available at http://caselaw.findlaw.com/data2/californiastatecases/S113725.PDF).

AT&T Mobility—along with *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 599 U.S. __, 130 S. Ct. 1758 (Alito, J., 5-3, April 27, 2010)(www.supremecourt.gov/opinions/09pdf/08-1198.pdf), which held that a court may not order class arbitration unless there is a contractual basis for concluding that the parties agreed to it, constitute an emphatic recognition by the Court that class action waivers contained in arbitration agreements are enforceable because they are consistent with both the language of the Federal Arbitration Act and its underlying purpose. See Jay W. Waks & Carlos L. Lopez, "Challenging *AT&T Mobility v. Concepcion*: Employment Class Action Waivers and Federal Statutory Rights," *Dispute Reso-*

(continued on page 94)

Waks, a partner in the Complex Commercial Litigation Department of Kaye Scholer LLP, is Chair of its Employment & Labor Law Practice. He also chairs the CPR Institute's Employment Committee. Lopez is an associate in Kaye Scholer's Employment & Labor Law Practice. Both are based in New York. **The authors are grateful to Noah Peters, Litigation/Employment associate at Kaye Scholer, for his assistance. This article does not represent a legal opinion, and readers should seek specific professional advice in connection with their matters. This article continues from the authors' recent cover story, "Stolt-Nielsen, Silence and Class Arbitration: 'Same as It Ever Was*,'" 29 *Alternatives* 193 (December 2011).**

***Simon & Garfunkel, "Bridge Over Troubled Water" (1970).**

Special Issue: Women in Conflict Resolution

The American Bar Association's Section of Dispute Resolution last year formed a Women in Dispute Resolution Committee. The committee members asked conflict resolution publications, including *Alternatives*, to highlight issues involving women in the field this month, concurrent with the section's annual conference, beginning on April 18 in Washington, D.C.. This special issue begins on **Page 83** featuring three veteran mediators with three iconoclastic views:

- Victoria Pynchon on what ADR providers need to do to defeat sexist practice stereotypes;
- Vivian Berger on the importance of gender in choosing a mediator; and
- Marjorie Corman Aaron on women, men, and negotiating dynamics.

In addition, our regular Worldly Perspectives columnists, Giuseppe De Palo and Mary B. Trevor, on **Page 98** ask five women in ADR from five European countries for their perspectives on international practice, and report on their frank responses.

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CPR News

NEW FOR IN-HOUSE: NEGOTIATION TRAINING

The CPR Institute has a new addition to for its in-house training: It has teamed with MWI, a firm that offers negotiation learning programs, to launch a new offering for customized corporate training.

MWI is a Boston-based ADR provider and training firm. The firm, a nonprofit, has provided negotiation training to companies in a variety of industries, including Coca Cola Co., Analog Devices Inc., and Eastman Chemical Co., to help corporate communications and to teach executives to collaborate more effectively. See www.mwi.org for details.

The skills in focus for the new training programs are critical for preventing conflict and building productive long-term business relationships. The workshops highlight particular areas of negotiation effectiveness such as:

- Dealing with difficult people and tactics.
- Building long-term, strategic relationships.
- Influencing and persuading others.
- Managing differences in perceptions.
- Managing roles in multi-party negotiations.

The goals are to help companies build and sustain more productive and profitable strategic alliances; minimize costly friction with suppliers, resulting in lower costs; deal more effectively with difficult pricing and fee negotiations; improve communication among employees and between managers and staff to increase productivity; and improve customer retention.

The programs generally are conducted as two-day sessions, but they can be customized for the company or organization's specific objectives. The programs address organization-specific negotiation challenges by using customized role plays and real-world case scenarios.

Full details on how MWI's Negotiation Skills Learning Programs build negotiation skills are available under Events/Customized Training at www.cpradr.org.

Pricing depends upon the program requirements. CPR and MWI will provide an advance estimate. To schedule a training or for information, please contact CPR Institute Senior Vice President Helena Tavares Erickson at herickson@cpradr.org, or (212) 949-6490.

(continued on page 101)

Alternatives

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Women in ADR

Diversity is Not a Toxic Topic

BY VICTORIA PYNCHON

I didn't talk about diversity or inclusivity in the legal profession for nearly 30 years. Nor did I want to speak about women lawyers or later, female mediators.

"It's a toxic topic," I'd say to people who asked me to comment. "I don't want to be a *woman* lawyer. I just want to be a *lawyer*."

Feminists told me "a woman's voice is the only voice you have." But I didn't want to speak with its cultural stereotype.

Though "compassionate" under *some circumstances*, I am not in the business of handing out cash and prizes to every weeping sister and for every sob story that comes my way. Though attuned to the needs and desires of my fellows, I am neither weak nor compliant.

After 25 years of high-stakes commercial litigation and trial experience, I do not lack persuasive power. Nor am I unable keep two contradictory thoughts in my head at the same time—F. Scott Fitzgerald's test for "a first-rate intelligence."

I am fearless and uncompromising yet able to change my mind when circumstances call for it.

These are not characteristics typically associated with women but they are typically associated with the vast majority of those women

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The author is a mediator with ADR Services Inc., in Los Angeles, and an arbitrator with the American Arbitration Association, where she mediates and arbitrates the same type of commercial matters she litigated during a 25-year career. In 2010, Pynchon launched *She Negotiates Consulting and Training* with her business partner, Lisa Gates, an adult learning specialist and negotiation consultant. Pynchon's new book, "Success as a Mediator for Dummies," will be published this month by Wiley Press. Her previous book, *The Grownups' ABCs of Conflict Resolution* is available on Amazon in paperback and Kindle. Pynchon gives negotiation advice three times weekly at the *She Negotiates Blog* at ForbesWoman. For more information, visit http://victoriapynchon.com.

The Mediator's (Female) Gender: Irrelevant, Important, or In-Between?

BY VIVIAN BERGER

My answer to the question posed in the title is "all of the above."

Generally speaking, the best mediators have what I call the four Ps: Process skills, Preparedness, Patience, and Perseverance.

I doubt that such attributes lodge in our X or Y chromosomes. As a traditional, "Ruth Ginsburg feminist," I tend to be leery of "difference" talk. Thus, lawyers and clients should focus on picking a neutral with a proven record in these areas (perhaps placing a thumb on the scale for subject-matter expertise).

The mediator, likewise, should ordinarily feel equipped to deal with male and female players, embroiled in any type of conflict, on the same footing as a neutral of the opposite sex.

But context matters, as does the perception of the participants. Circumstances will sometimes give a slight edge to a woman or man or, on occasion, a larger or even dispositive advantage.

Mediation is not about furnishing equal opportunity to male and female mediators in every case—though plainly, at the macro level, individuals of both sexes and all backgrounds must have access to the profession.

Grounded in party autonomy and choice, dependent for success on the neutral's persuasiveness to her listeners, mediation requires as much buy-in as possible from clients and

(continued on page 88)

The author is Nash Professor of Law Emerita at Columbia Law School in New York. She is a veteran mediator. She is a former general counsel and board member of the American Civil Liberties Union, and is a regular columnist for the *National Law Journal*.

Strategy at the Negotiation Table: From Stereotypes To Subtleties

BY MARJORIE CORMAN AARON

Many, many years ago, when I was a much, much younger woman and mediating at Endispute Inc.—which evolved into international ADR provider JAMS— the attorney in one caucus room pointed his finger at me. He *ordered* me to go into the other caucus room to deliver a message on behalf of him and his client.

On my way down the hall, I seethed into the office of my boss and mentor, Eric Green. He wisely said: "You know, Marjorie. You're a mediator, not a doormat." He was right; his words permitted me to regain my bearings.

Then as now, I doubted whether anyone would have pointed at Eric or issued an order in quite the same way. Though it was quite a while ago, and I'm fuzzy on the details, I already had a fair amount of mediation experience at the time. I felt confident in the mediator's role. Was it age? Gender? Bearing? Authority? All of the above?

In mediation, we all know that attorneys negotiate for their clients with the other side and with the mediator, and the mediator negotiates with attorneys and clients on all sides.

What role, if any, does gender play?

MOVE THE OFFERS

You are participating in mediation as lead attorney for a corporate client. After consultation with your client representative, you have

(continued on page 91)

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Women In ADR—Pynchon

(continued from previous page)
of my generation who went to law school in the 1970s.

As far as I am aware, being a woman in a law firm never affected my clientele, my opportunities or my income—at least since the mid-1980s when some of my law firm's clients were vociferous in their opposition to having a woman on their litigation team.

I was rudely awakened from my gender-slumber the moment I stepped into ADR in 2004.

ADR: OLD, WHITE & MALE

The first thing anyone notices when they drop out of the legal profession and into the "neutral" business is the time warp. It's not exactly an old folk's home or assisted living facility, but it is populated primarily with the people who were already practicing law when I entered the profession in 1980.

Those people were in their 30s then. Now they're mostly over 60. They're white. And they are male. Don't get me wrong. These are *my guys*. The ones with whom I hung out, tried cases, kicked up a ruckus and hatched hundreds of schemes and plans.

It is not I who stereotype them. It is they—and many women who might hire me—who stereotype me today.

I've been to dozens of women's conferences in recent years. The few men in attendance are generally nervous and jumpy, no matter how much you try to put them at ease. They're clearly not used to being the minority. They take offense if you mention their gender—"Are you going to throw us out of the room?"—and they gather together in same-gender clumps in the back by the coffee pots..

If you are a white male neutral and/or a white male lawyer, manager or executive, I'd like you to imagine yourself in this primarily female environment for the remainder of the article. Throw in a hefty helping of minority women as well—Latinas, African Americans, Muslims, and the like.

It's good for all of us to know what marginalization feels like, but it's particularly helpful for mediators and arbitrators to walk in the shoes of their women and minority clients.

The feeling, should you have trouble identifying it, is slightly disconcerted, hyper-aware, easily startled, somewhat diminished in stature . . . and a little bit defensive.

WHY YOU DON'T HIRE WOMEN

The first time I bothered to ask random attorneys—usually those practicing in my husband's AmLaw 100 firm—whether they hired women neutrals, I was surprised to hear that they had never hired a woman neutral to mediate a commercial dispute. I was even more surprised to learn why.

- "I don't think my client will listen to a woman."
- "I need someone to lean on the other side and I don't think most women can do that effectively."
- "I hire a woman mediator when I need someone with compassion."
- "I hire a woman mediator when gender is an issue—if opposing counsel is a woman or my own client is a woman."

When thinking about hiring a mediator, people—not just men, but people—ask themselves whether the men suggested for the job have the right background, education, experience and word-of-mouth "praise" to understand and handle the dispute's legal and factual issues. They also ask about his reputation for "closing." They don't assume "men can't close" when 50% of the male mediators they hire fail to do so. But it only requires one or two experiences with a mediocre woman mediator to write off the entire gender.

When talking about women mediators, lawyers of both genders act as if women, unlike men, have a single set of generic characteristics that make them a good or bad "fit" for the task at hand.

Once, mediating a construction dispute between a downtown L.A. nightclub and a contractor, the contracting side clued me in to the club patrons' sexual preference. They were *lesbians, wink wink*. It was assumed I'd understand that the club proprietors also were gay women and that a jury would not be sympathetic to them.

Their settlement, it was further assumed, would have to reflect their lack of "appeal."

"Ohhhhh," I said. "*Les-bee-ans*. Didn't know."

"Why," the contractor's attorney asked, "do you think we hired you?"

I found this comment offensive on so many levels—Did they think I was gay or did they simply presume gay women wouldn't be persuaded by a man?—it was a struggle to maintain my neutrality. As long as I was wearing my mediator hat, however, I was able to just let it go. Once the mediation was successfully concluded, the contractors' attorneys told me how pleased they were with my work, and how likely they were to hire me or another, generic, "woman" for "similar cases."

"If you're ever looking for a mediator with 25 years of complex commercial litigation experience," I said, "along with first-rate facilitation and negotiation skills, and enough experience as an arbitrator to impress their clients in an evaluative mode, I am a good choice for you."

"But please," I concluded, "don't ever hire me simply because I'm a woman. I am likely to disappoint your expectations of how a 'woman' might handle your mediation. Gender, like race, is the *least reason* you should ever give for hiring a neutral."

If you doubt that we are are all somewhat blinded to individual talents, skills, strengths, idiosyncrasies, and characteristics by race and

Out of Your Element

The challenge: Pretend you are someone else when reading this article.

The goal: Figure out why women and minorities don't get most commercial conflict resolution neutrals' jobs.

The recommendations: Among them, providers need to stop trumpeting diverse panels and work it much, much harder.

gender, the experience of professional musicians proves the point.

World-renowned orchestras vehemently denied that gender played any role whatsoever in their hiring decisions. The decision to hire a musician, they protested, was based entirely upon gender-neutral decisions about the quality of the work. Musical excellence cannot be objectified. It is necessarily subjective. Therefore, women had no way of proving that their underrepresentation had anything to do with their sex.

Maybe women were just not as good as the men. Or they hadn't had the time to practice as often as their male peers given their presumed child-bearing and -raising activities. Or perhaps they were more distracted by their family obligations than men were and that accounted for their purportedly deficient performance.

But when women finally convinced orchestra hiring committees to conduct blind auditions, the results were dramatic. Blind auditions increased the probability that a woman would advance from preliminary rounds by 50 percent and the likelihood that they would be ultimately selected increased several fold. (See "Blind orchestra auditions better for women, study finds," Princeton University website (2000) (available at www.princeton.edu/main/news/archive/A94/90/73G00/).)

Gender played a role after all. Changing hiring practices resulted in more equitable hiring decisions and improved orchestra performance at the same time. When you unconsciously exclude half the human race, you're bound to miss a few geniuses and hire a few clunkers.

'MARGINALIZED MAJORITY'

If you are not a minority in U.S. culture or a marginalized majority—women—you do not have to think about your place in the society. You *are* the society. You are not a "male" lawyer or a "white" doctor. You're simply a doctor.

You do not believe that people hire you because of your gender or your race because you've rarely been *deselected* for those reasons.

Talk of white, male privilege in America makes people uncomfortable, even angry. It surely makes me uncomfortable. I want to believe I live in a pure meritocracy where gender, race, sexual orientation, disability and the like are no more consequential to my ability to earn a living than the color of my eyes or the freckles on my skin.

That's because our national ideal is equality, meritocracy, and inclusion. We want to believe we live and work in a system that is not rigged either in our favor or against our interests. We want to rise or fall on our own merit. We don't want to believe we were born on third base or will forever be consigned to the dugout.

So let me just state this: Bias is not my fault and it's not your fault. It's the way we've been acculturated. And as soon as we bring our implicit biases about "others" to consciousness, we immediately start to work on changing them because we're all fair-minded people.

The Daily Beast addressed the perils of "benevolent" stereotyping in an article titled *The Stereotype Trap.* According to the social scientists whose research was cited there, "the favorable traits stereotypically associated with women often serve to perpetuate their lower status." They explained,

> When people see women as warm and caring but less competent than men, they may give women positive evaluations but still feel that women need men to protect and take care of them. Thus, women's subservience is justified. Men are not exempt from this type of ambivalent sexism; the stereotypic characteristics of men can also be analyzed into hostile and benevolent components that are analogous to those that apply to women, but women's hostile attitudes toward men do not erase men's dominance. This type of benevolent prejudice may rationalize racism as well as sexism, casting the dominant group as benevolent protectors rather than oppressors.

(The *Daily Beast* article can be found at www.thedailybeast.com/newsweek/2000/11/05/the-stereotype-trap.html.)

When I say, "Please don't hire me because I'm a woman," these are the stereotypes to which I refer. Rarely do litigators engaged in a bet-the-company, high-stakes piece of commercial litigation believe they need a warm and caring mediator to help them negotiate a settlement that satisfies all of the parties' interests well enough to terminate litigation.

My husband and several other men I know asked me why I didn't want to be hired based upon my gender. I tried the "Would you like to be hired because you're Jewish?" angle, and that didn't help.

So I called lawyer, author and diversity consultant Verna Myers, who heads her eponymous Baltimore consulting firm, for some help. She explains that applying stereotypes to women and minority professionals limits their clients' understanding of what they bring to the task at hand, what they can contribute, and how they can contribute it.

Stereotypes, says Myers, create a box for women and minorities based upon their perceptions of who you are or who you *should* be. Those perceptions will limit women's and minorities' ability to show up for you with all of the knowledge, education, experience and sophistication they bring to the job.

"If you have a way of thinking about women," she says, "then women can't break out of your descriptor. And if they do—by being aggressive, for instance—they're often penalized for doing so."

According to Myers, both negative and positive stereotypes put the stereotyped individual into a double bind. "If she acts differently than the way you expect a 'woman' to behave, she'll upset the people who have circumscribed her role. She's in the double bind because if she acts [or] behaves as a generic, stereotypical 'woman,' she may have trouble doing the job you've hired her to do."

As Gloria Steinem once said, all women are female impersonators. If you get that, then you understand the problem of stereotypes.

TED TALK

There are many reasons why Majora Carter's TED talk, *Greening the Ghetto* is so popular.

This extraordinary young woman tells a classic American story about a poor kid making good and doing so in and for her own community. (See Carter's speech at www.ted.com/talks/majora_carter_s_tale_of_urban_renewal.html.) And her accomplishments are extraordinary. She's young and she is black and she has "embraced her inner capitalist" by making "greening the ghetto" a profit-making enterprise.

Her pertinence to women in ADR can be found in this observation from her TED appearance.

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Women In ADR—Pynchon

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> When I spoke to [Former Vice President Al] Gore before breakfast, I asked him how environmental justice activists were going to be included in his new marketing strategy. His response was a grant program. I don't think he understood that I wasn't asking for funding. I was making him an offer. . . . Don't get me wrong, we need money. But grassroots groups are needed at the table during the decision-making process. . . . I have come from so far to meet you like this. Please don't waste me.

Women and minority mediators have much the same to say. *Please don't waste us,* even if using us requires you and the ADR panels from which you choose neutrals to reassess your own implicit biases, a confrontation with our deepest held secrets that requires all of us to suffer just a little diminishment of our existing self-image.

Considerably understating the matter, Lakshmi Ramarajan, an assistant professor of business behavior at Harvard Business School says that "talking about and studying diversity . . . raises a fair amount of anxiety for people."

A lot of times the context of the conversation is around diversity as a problem—isolation, prejudice, conflict—that seems to be so closely associated with working across group lines and group differences. And that makes a lot of people wary.

In a recent working paper, *A Positive Approach to Studying Diversity in Organizations* (available at www.hbs.edu/research/pdf/11-024.pdf), Ramarajan and fellow HBS professor David Thomas "argue that focusing on the benefits of a diverse organization will lead to workplace policies that embrace diversity, instead of grudgingly accepting it or pussyfooting around it." Carmen Nobel, "Taking the Fear Out of Diversity Policies," Working Knowledge website, Harvard Business School (Jan. 31, 2011)(available at http://hbswk.hbs.edu/item/6545.html).

Diversity training, like sexual harassment training and most other corporate "do good" programs generally are not well received by the people down whose throats they are forced. Too often, those training sessions make as many false assumptions about white men as they do about women, ethnic minorities, African-Americans and the LGBT community.

No one addressed this problem better before or since than President Obama did while running for the nation's highest office. As he said in Philadelphia on a fine spring morning in 2008,

> Most working- and middle-class white Americans don't feel that they have been particularly privileged by their race. Their experience is the immigrant experience—as far as they're concerned, no one's handed them anything, they've built it from scratch. They've worked hard all their lives, many times only to see their jobs shipped overseas or their pension dumped after a lifetime of labor.
>
> They are anxious about their futures, and feel their dreams slipping away; in an era of stagnant wages and global competition, opportunity comes to be seen as a zero-sum game, in which your dreams come at my expense.
>
> So when they are told to bus their children to a school across town; when they hear that an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed; when they're told that their fears about crime in urban neighborhoods are somehow prejudiced, resentment builds over time.

This is true for all of us. Who among us has not experienced prejudice, from the petty tyrannies middle-school boys impose upon one another based on size and strength; to the cutting words teen girls so quickly learn to use as rapiers to pierce another's sensitive heart, sap her confidence and leave her demoralized and confused; to the sororities and fraternities who apply all measures of metrics to the detriment of those who are blackballed; to the cruel jokes about gender, race, religion, nationality and disability?

Who among us has not, at one time or another, used these invidious and pernicious stereotypes about our fellows to shore up our own sense of importance in a world that tells us every working day that we are not good enough, smart enough, canny enough, wise enough, fair-minded and compassionate enough to proudly take our place in the life of the culture—let alone to serve as a role model of upward mobility and achievement in the face of the thousands of obstacles that daily threaten to defeat each and every one of us?

SCRATCHING THE SURFACE

You may think I've gone too far afield from a topic as seemingly inconsequential as bias in ADR. I think I'm just scratching the surface. While recognizing the existence of bias in the professional choices we make is an important first step, it cannot solve the problems that beset us.

Here, for example, are the many reasons excellent mediators are routinely excluded from ADR assignments in the field of litigated commercial cases:

- He's too young.
- She wasn't a judge.
- He doesn't have the necessary subject-matter expertise.
- Men aren't right for this assignment because we need someone able to reach the female plaintiff.

Author Victoria Pynchon, with Gloria Steinem at far right.

- I understand he's a very skilled mediator, but my client wouldn't feel comfortable with an African-American mediating this case, particularly because the opposition is from Mississippi.
- She went to a second-tier law school and practiced at a small firm; we need someone whose Ivy League credentials will impress our clients with the wisdom of a collaborative business-oriented resolution.
- My client is in the construction industry and he won't respect a gay male mediator; I'm not prejudiced but my client probably is and I can't risk hiring someone who's gay just to show how PC I am.
- Women can't close a deal.
- I don't believe a woman can exert the kind of pressure on the other side that's necessary for them to see reason.

Some of these rationales for mediator choice are based on experience, expertise and the like. Others are based on presumed characteristics shared by all the members of a particular group—women, for instance, gay men or African-Americans.

It's not so much that we do a disservice to others when we choose individual mediators based on the presumed attributes of their race or gender—it's that we deprive ourselves of the opportunity to find the best individual for the job.

SEVEN WAYS TO MOVE FORWARD

When I asked consultant Verna Myers for her help communicating women's distress at being hired because they are women, I also asked her for ways in which we can resist our biases, and thereby seek and find the best individual for any job.

Here are seven quick tips she provided:

1. Find places to go where you are the minority—observe what you learn about yourself and others.
2. Accept that you have biases, then test and correct for them.
3. Put yourself in someone else's shoes—and apologize if you step on their toes.
4. Expand your Dance Card—reach out to those who are different from you and include them in your network.
5. Learn more about and enjoy the power of different ideas, cultures, histories and forms of beauty.
6. Invest in the success of someone from a historically marginalized group—use your in-group advantage to create opportunity for others.
7. Do you see bias occurring in a personal, work or communal environment? Decide to interrupt it, in a classy and peaceful way.

Of all these suggestions, I believe that the sixth is the key to resolving the gender gap in the law, in politics, in business and, of course, in ADR. Put your own skin into the game of a woman neutral who has done a good job for you, remembering that you hire and re-hire men who are simply good but often refuse to re-hire women unless they're unbelievably great.

PROVIDER RESPONSIBILITY

I have heard executives and ADR panel owners—the entire provider industry—repeatedly justify discrimination against their women and minority neutrals by saying "The market has spoken," and "We have to give them what they want—old, white-male mediators and arbitrators," preferably retired judges.

"Our diversity efforts have failed," I've heard them say, "and we must move on."

But the market was also speaking way back in the late 1970s when I and most other women neutrals went to law school and commenced practice. The market wanted white men too, even though 33% of all law school students were then women.

Had our law firms listened to their "market" back then, we would have faced the same discrimination faced by Sandra Day O'Connor, our first woman U.S. Supreme Court justice, when she graduated from law school. The only job she could get was a legal secretarial position.

Women lawyers were integrated quickly into law firm practice because there was simply no avoiding us. And that's the only way we'll be integrated into ADR commercial dispute practice anytime soon.

ADR panels must flood their lists with women and minorities. But simply having marginalized neutrals on a panel's roster is not enough. Any roster can be *diverse*. What it needs to be is *inclusive*.

ADR panels are diverse when they add women and minorities. They are *inclusive* when they make us prominent choices, that is, when they promote women. Law firms and businesses who hire neutrals also should assure themselves that their internal "go to" neutral lists include at least as many women and minorities as are present in their local communities.

There is no justification for ADR panels to be 70% to 80% white male. *None.* The American Arbitration Association's pledge to put at least 20% women and minorities on every list of neutrals recommended to its clients is insufficient. (See William K. Slate, "Diversity at the American Arbitration Association," 63 *Dispute Resolution Journal* (February 2008).) We know it's insufficient because the implementation of that policy has not moved the needle of diversity even a digit.

We women and minority mediators and arbitrators exist in sufficient numbers to easily accomplish the goal of ensuring that we are represented in something approaching our population in the community.

This is not only an issue for neutrals. It is a justice issue. As the bench has become more diverse, people, small businesses and even Fortune 500 corporations have increasingly been moved out of the public justice system and into court-mandated mediation programs, or contractually required arbitration proceedings.

Picture yourself, a white male litigant, being forced to arbitrate your case before a three-arbitrator panel composed of an African American, a Muslim and a Latino woman. Enough said.

INCREASE RETENTION

Here are just a few suggested programs to increase the retention of women and minority neutrals by clients of ADR providers:

- Include at least 50% women and minorities in percentage of their presence in the population on all ADR panels;
- Create a high-profile marketing campaign touting the accomplishments of women and minority panel members;

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Women In ADR—Pynchon

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- Include at least 50% women and minorities by percentage of their presence on the panel on any list of potential arbitrators or mediators recommended by the ADR provider;
- Providers should encourage their employees to recommend women and minorities as often as possible and to ask themselves why they tend to recommend the same white men over and over again;
- Arbitration providers should stop making it easy for panel patrons to choose only white men as arbitrators in commercial cases;
- Promote your women panelists whenever you market;
- Let ADR provider clients know that the firm is actively promoting its women and minority panel members, while at the same time reminding clients that they have their own diversity and inclusivity goals to meet.
- Reward neutral panel employees with raises, bonuses and promotions for achieving internal diversity goals.
- If you sponsor continuing education programs to advertise the availability of your neutrals to local bar associations, ensure that women and minorities are included in your presentations.

It's time that we all made a conscious effort and took deliberate steps to end bias in business and the professions. It's good for business, it's good for justice and it's good for ADR professionals.

Women In ADR—Berger

(continued from page 83)

counsel. Ideally, perhaps, the mediator's gender, like other protected characteristics, should not count any more than her glove size.

Yet because it may matter a great deal in reality, the subject demands a nuanced approach—not a flat rejection of relevance.

In that spirit, the following are tentative thoughts about ways in which male and female mediators might differ, at least at the margins, and about when and why one might prefer a female in some situations. Because the short answer to "when" is whenever a stakeholder strongly wants one, assuming that all with a vote agree, this article tries to assess the notions behind the predilection from my vantage as a female neutral.

Like so many who venture into the swamp of gender, I emerge with no firm view on whether men (mediators) are "from Mars" and women are "from Venus." While I believe "earthly" professional qualities—held in common—matter most in mediation, the question of difference remains intriguing and is, therefore, worth exploring.

WHAT'S THE DIFFERENCE?

Author Carol Gilligan distinguished between two approaches to conflict resolution: one based on an ethics of rights, more frequently embraced by men, the other based on an ethic of care, more often displayed by women. "In a Different Voice" (1982).

Karen K. Klein, chief magistrate judge of the U.S. District Court of North Dakota, observes that "mediation, at least in its facilitative form, reflects Gilligan's relational, care-oriented model." Karen K. Klein, "A Judicial Mediator's Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice," 81 *N.D. L. Rev.* 771 (2005). Klein hypothesizes that women's increasing presence in the practice of law has influenced the rise of mediation as a way of dealing with legal disputes.

Focus on The Mediator

The question: How important are the differences between the sexes?

Answer: Context and perception matter. Comprehensive assessments are needed.

An even tougher question: When do you want a woman mediator? This article provides the answer.

Admittedly lacking empirical studies supporting her view, Klein posits it cautiously. One does not have to accept her conclusion or take a stand on the vexing question of nature versus nurture in order to agree that women bring a distinctive style to resolving conflict. It would, indeed, be most surprising if they did not.

As the Sixth Amendment fair cross section jury decisions have long recognized: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both. . . ." *Ballard v. United States*, 329 U.S. 187, 193 (1946). This insight does not preclude other equally evident truths—that males and females have more similarities than singularities and that some people approach disputes in ways more characteristic of the opposite sex. (Like Klein, "I do not wish to exaggerate gender as a factor." 81 *N.D. L. Rev.* at 771.)

COMFORTABLE WITH FEELINGS

That said, how might the typical—stereotypical?—female neutral differ from her male counterpart in ways relevant to mediation? Based as much on personal experience as on theory, this author believes that a woman mediator brings to the table a greater willingness to deal directly with emotional issues, as well as express her own feelings like sympathy, empathy, and respect.

Since I have not often co-mediated, this impression admittedly relies on second-hand evidence, such as discussions with other practitioners and conduct observed outside mediation. What I know, of course, is my own behavior as a mediator. The reader can judge for himself or herself whether it reflects a "female style."

For example, in caucus I attempt to "build up" parties—usually, plaintiffs in employment disputes—whose confidence or self-esteem has been eroded by the events underlying the conflict, such as dismissal, or by my own reality-testing.

To support my point that the courts are an imperfect forum for gaining justice or vindication, I frequently say: "The worth of your case

is not the worth of *you*." In addition, in trying to move the complainant toward settlement, I may praise him for having stood up for what he believes to be his rights. I note that his complaint has drawn serious attention, as shown by the fact that the defendants' representatives have set aside their whole day to attempt to resolve it.

At times, too, I comment on matters unrelated to the controversy. Thus, to single mothers I may voice admiration at how well they have raised their children under difficult conditions. To others, depending on the circumstances, I have remarked on attributes like their work ethic, loyalty to friends, resilience in confronting disease, and diligence in seeking higher education. The comments are based on open-ended background questions I ask during a first caucus, which are designed to elicit information that grounds my subsequent observations.

As part of active listening, I often will reflect my sense of the speaker's unexpressed emotions, as well as summarize her factual account. I might remark: "Am I right that you felt disrespected when your boss reprimanded you in public?" or "I think I hear that you felt betrayed when you were sued by an employee whom you had hired and twice promoted." The responses I receive are both affirmative and emphatic; several times I have received a thank you!

Two caveats. First, not every mediation lends itself to such approaches; they may well be more suitable to the employment matters I handle than to standard commercial disputes. Second, a little goes a long way. The neutral has to avoid sounding Pollyannaish, patronizing, or insincere. I never say anything I do not mean.

My principal point here, however, is that a mediator's openness to addressing, and even turning to advantage, the parties' emotions probably bears a positive correlation with gender. Men may use the same techniques, to some extent; they likely come more naturally to women.

WILLINGNESS TO SHARE

Mediators need to elicit trust and respect from participants and generally should be able to do so irrespective of the vagaries of background or personality. But this bond is more easily created when a client feels kinship with the neutral arising from real or perceived similarities.

Thus, for example, educated women—or, more broadly, upwardly mobile, striving women—tend to gravitate easily toward me. So do many older people. Mediation is one of the few settings where gray hair may bestow an advantage on a female! Age may also neutralize any sexist tendencies to discount the competence of women professionals. Resemblances that lower barriers to communication between the neutral and parties or counsel definitely smooth the mediator's path.

Yet what if, for whatever reason, the mediator senses that she is not making the desired connection? Or if she feels a need to deepen the existing tie, perhaps in order to surface a difficult topic or to overcome a party's resistance? In these circumstances, I may share some facts about my own life to maximize the chance that the person will feel I know where he or she is coming from.

For instance, to the defendant who plainly feels that I am too ready to ask him to part with his hard-earned money, I might indicate that I grew up in a family business. To the poor immigrant, who may find it hard to imagine we have anything in common, I may mention that my parents came to this country as refugees with little in their pockets. To a grieving widow, who blamed the company's insensitivity toward her cancer-disabled husband for hastening his death, I have mentioned that I lost a spouse to the same disease. And when proud parents show me photographs of their offspring, I occasionally display my grandchildren's pictures.

Once, in a kind of reverse turn on these bonding strategies, I frankly stated to an African-American male plaintiff who appeared to be rather alienated: "I have the impression you think I can't understand your feelings that you were discriminated against, but you're too polite to say so." His silence spoke volumes.

I continued: "I know that I can never really walk in your moccasins since I'm not black." I then proceeded to mention certain events in my life that I thought had increased my capacity for empathy and said that I felt this quality could at least help bridge the racial divide. The client became less guarded; paradoxically, we connected better after I acknowledged the limits of connection.

TRADING IN 'HUMANENESS'

Are such maneuvers unduly manipulative? Unprofessional? I think not, so long as the neutral engages in them in caucus and in moderation, having made the judgment that they are appropriate to the specific case at hand, and never allows her own story to usurp the centrality of the client's. After all, part of the mediator's job description is "trading" in her humanness. It's fundamental: Self-revelation should never be ventured self indulgently, but only as a means of increasing the chance that the neutral can put a party at ease and thereby pave the way to settlement.

More important, for present purposes, does gender affect the mediator's willingness to "open up?" Again, without being able to prove it, I suspect the answer is yes.

PARTICIPANTS' MEDIATOR PERCEPTIONS

The most important difference between male and female mediators resides in the parties' hearts and minds. Perhaps because of preconceptions about the genders' relative strengths and proper roles, I think that participants of both sexes are readier to accept "touchy-feely" approaches by women mediators. Gentleness, warmth, "motherliness," and similar qualities jibe with society's traditional view of femininity. Accordingly, techniques that reflect or appeal to emotions are less likely to elicit squeamishness or embarrassment, especially from men, when employed by females.

Yet even if the mediator downplays emotions, her sex itself will likely elicit unconscious responses, positive or negative, from the participants that vary from those evoked by males. As in therapy, perception and projection greatly affect the dynamics of the enterprise—and not only regarding gender. A mediator should act on the premise: "I am what you think I am." Paul D. Butler, The Question of Race, Gender & Culture in Mediator Selection, 55 *Disp. Resol. J.* 36 (2001) (referencing George Herbert Mead's "Looking Glass Theory").

WOMAN PREFERRED?

As indicated, the main reason to favor a neutral of either sex is party predilection rather

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Women In ADR—Berger

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than supposed gender differences. A smart disputant will usually defer to an opponent's wishes to give him or her a greater investment in the process and, hence, a stronger incentive to settle.

That being stated, attorneys recommend mediators. Absent a stated client preference, what might influence counsel to favor a female mediator based on her sex?

The previous discussion suggests a potential general answer: the likelihood that a key participant will need to work through strong emotions before being ready to reach resolution. Not only the neutral's skill in dealing with both conscious and unconscious feelings but also her ability to forge meaningful bonds with people in a short time plays a critical role in these circumstances. Even a lawyer who rejects the idea that these qualities correlate with gender may tip the scales in favor of a woman if the targeted player is viewed as apt to respond better to a female mediator's "TLC."

What paradigm situations bring to the fore the issue of the mediator's gender? Predictably, one of these is a claim of sexual harassment. Some defendants may worry that in such an emotionally fraught context a female neutral might sympathize overly with the complainant. By the same token, however, one could argue that a male might lean toward the person accused.

Author Vivian Berger

But empathy does not equate to bias. A woman mediator's real or perceived depth of comprehension of feelings of sexual imposition need not blind her to problems with the plaintiff's case, legal or factual. (Good neutrals of either gender monitor themselves for partiality.) Rather, she will probably succeed better in reality-testing the client than would a male—whose efforts the putative victim might more readily dismiss on the ground that "he just doesn't get it."

The female neutral may also have more standing with defendants who truly "don't get it." For instance, in the case of a low-level worker who engaged in sex with a supervisor under threat of dismissal if she failed to submit, I made headway with the defense by voicing strong doubt that jury outrage would be tempered by anger at her for having surreptitiously taped an admission by him. The company's white-shoe lawyer had argued that a jury would judge the victim adversely for failing, in essence, to adhere to Marquess of Queensberry rules.

Although any mediator would have seriously challenged this notion, I believe the defendant's representative was more willing to accept a woman's view of the matter.

Equally, in instances of less egregious or more credibly contested charges, I have pointed out to plaintiffs that older female jurors especially can be quite judgmental of women—citing my late mother's reaction to "date rape" scenarios: "Why didn't she just slap his face?"

By parity of reasoning, a female neutral may have an advantage mediating claims of sex discrimination in general and, by extension, any dispute in which a woman attributes her injury to male oppression. (Divorce and similar family matters often fall under this heading; yet where both husband and wife harbor feelings of gender mistrust, using male and female co-mediators may be advisable.)

For example, I mediate allegations of minor disciplinary violations brought by clients against their attorneys. A majority of the former are women; the latter, in every case, have been men. Most complaints involve misunderstandings rather than actual misconduct. But these often arise from lawyers' perceived "talking down" to clients, impatience, and failure to answer questions. A number of complainants plainly believe that they would have gotten better treatment had they been male. Whether or not this perception is accurate—I tend to think many respondents either are blameless or are equal-opportunity boors —I surmise that the women feel more fully "heard" by a female neutral.

More broadly, any breakdown in communications between male counsel and a female client may call for the use of a woman mediator to help resolve the dispute for which representation was sought. It may be hard for the lawyer to tell whether the problems in the relationship stem at all from gender dynamics. In such a situation, however, and surely when gender-based tension is plain, the attorney should assume that a woman will have an edge in dealing with the wary party.

The mediator may assist the pair to bridge the gap dividing them, thereby improving the odds of settling the underlying matter by increasing the client's willingness to heed the attorney's advice. Or counsel may take a back seat to the mediator, at times to the point of encouraging her to caucus privately with the client. I have done so a number of times (always receiving the lawyer's permission), even in cases without attorney-client friction, when I sensed that the mediation would benefit from a "just-between-us-girls" conversation.

Obeying that instinct has several times prevented impasse or knitted up an unraveling deal. A one-on-one talk gives a vulnerable party a tangible sign of respect and attention, which she may crave.

* * *

There surely are additional contexts in which the sex of the mediator may meaningfully affect the settlement process. If nothing else, the overall diversity, or lack thereof, of the expected participants might reasonably influence the choice of a neutral. For example, in a case with a number of key players all or most of whom are male, it would likely make good sense to balance the group by hiring a female mediator.

But I have not offered these thoughts as hard conclusions about the relevance of the mediator's gender, or as a catalog of the settings where it might prove to be important. My own ideas on the subject are still uncrystallized. I view them more as the opening of a conversation—with myself as much as with others. I hope that the conversation continues.

Women In ADR—Aaron

(continued from page 83)

decided to make a next move in the negotiation phase, to $125,000, conditioned upon an enforceable agreement not to solicit named customers, with a liquidated damages provision.

The mediator expresses disappointment, responding that your move "will get us nowhere. . . . Couldn't you up it to $150,000 and drop the non-solicit for customers the plaintiff brought in?"

You're frustrated. Why is the mediator pushing you before even taking your proposal to the other side? You know the mediator only wants a deal, no matter who it favors. Why does the mediator seem to think you and your client are the easy mark for pressure? You might eventually get to those terms, or you might not, but certainly not yet.

First, let's agree that mediators seek to move the offers and demands of all attorneys and clients in the direction of settlement. If a proposal seems likely to derail the process—specifically, the other side will walk out or progress will be grindingly slow—mediators negotiate before carrying the proposal to the other room.

But are mediators equal opportunity negotiators? Do we seek movement from women attorneys and clients more than men?

I don't know of a study on that precise point. But some research has found that negotiators use more aggressive opening offers in simulated business transactions with women than with men. And, mediators will admit that we generally refrain from pushing when we sense that one side is immovable. Put differently, we take movement where we find it.

In these two examples, the attorney and the mediator wish the other would just listen and accept the authority with which we speak: respect the fact that our negotiation moves or process advice are based upon considered professional observation and experience.

When the attorney puts forward her client's next move in the bargaining phase, she would rather the mediator *not* try to make it higher. When the mediator sets the boundaries of her mediator's proposal, she'd rather the attorney not argue for different numbers.

How might gender matter within this rather familiar process of positioning, spinning, pushing, resisting, persuading, leveling, testing? Whether as attorney or mediator, our perceived power and authority affect others' willingness to listen and be convinced, or to test and to seek accommodation in their direction.

Some limited research has suggested that male mediators are perceived as more in control, and thus more positively, than female mediators—even when, in one experiment, transcript analysis suggested the female mediators had more control. Nancy A. Burrell, William A. Donohue and Mike Allen, "Gender-Based Perceptual Biases in Mediation," Vol. 15, No. 4 *Communication Research* 447-469 (August 1988); Melissa Morrissett and Alice F. Stuhlmacher, "Males and Females as Mediators: Disputant Perceptions," International Association for Conflict Management Meetings Paper (2006)(available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913737).

'Authoritative & Confident'

The subject: Gender and negotiation.

Stating 'the unspeakable': Authority goes with size. Men have an advantage.

The application: The author, a national expert in negotiation, provides tips that put negotiators in control, regardless of sex.

Allow me to state the unspeakable: We unconsciously associate power and authority with larger size, greater strength, deeper voice, confidence, and age. See Timothy Judge and Daniel Cable, "The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model," Vol. 89, No. 3 *J. of Applied Psych.* 428-441 (2004)(available at http://faculty.washington.edu/mdj3/MGMT580/Readings/Week%201/Judge.pdf).

And men are typically larger and stronger, have lower voices, and more often employ communication patterns associated with confidence. (For better or for worse, both genders start young and get older.) Of course, unconscious associations can be broken. We all know short, slight men and women and those with high-pitched voices who command unwavering attention and respect. Yet, on first impression and in critical moments, the unconscious can affect interactions.

Research indicates that "in the aggregate and on the average" men and women fall into socially gendered communication patterns that are read as reflecting different levels of power and authority. See, e.g., Judith A. Hall, Nonverbal Sex Differences: Communication, Accuracy and Expressive Style 15-17 (1990); Lynn Smith-Lovin & Dawn T. Robinson, "Gender and Conversational Dynamic," in "Gender, Interaction, and Inequality," Cecelia L. Ridgeway, ed. (1992). Add the historical fact that most U.S. professional and political leaders have been male until lately, and it may be particularly important for women and all young attorneys and mediators to be aware of how communication choices can affect their perceived power and authority.

NODDING AND SMILING

Women tend to nod their heads and smile more often than men do when speaking or listening.

Head nodding and smiling are understood as communicating warmth and friendliness. The listener who nods and smiles offers encouragement to the speaker. This can be helpful for a mediator or an attorney seeking to build trust and rapport with clients. Indeed, a recent study suggests that female attorneys judged to be highly competent are described as having strong assertive and likeable characteristics.

Head nodding and smiling, however, also are characteristic of those with less power, of subordinates within a relationship. In a demonstration at the American Bar Association Section of Dispute Resolution conference several years ago, many volunteers were asked to go on stage, pair up and speak to each other.

But one in each pair was instructed to nod while talking and the other to keep his or her head still. The audience was asked which member of each pair was the more powerful: it was *not* the head-nodder.

When a speaker nods and smiles, she may be perceived as seeking approval and thus less powerful and less confident. Male or female mediators and attorneys are wise to control head movement when speaking—when they want their words to carry weight and authority.

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Women In ADR—Aaron

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If the advice applies to men and women, then why reference it in an article about gender differences? If we recognize that men are likely to be larger and have deeper, stronger voices—all subliminally read as markers of power—perhaps the male speaker who nods his head need not worry, though younger men may wish to pay heed.

Women who wish to project a forceful and confident presence might be mindful and literally keep a steady head when speaking. Accompany your words with slower and well-controlled motions; smile less often and only deliberately.

CHOICES: VOICE, TIMING, AND GESTURE

What else can an attorney do to discourage the mediator from weakening her client's proposal before conveying it to the folks in the other caucus room? What can the mediator do to lend weight to her prediction that failure to include a certain term will generate suspicion and animus from the other side?

Looking to communication science, as well as repeated observations of student lawyer interactions, I recommend attentiveness to voice, timing, and gesture. When nervous or less confident, people tend to speak more quickly, and in a higher pitch. Robert Barton and Rocco Dal Vera, Voice: Onstage and Off, 18 (Routledge 2nd ed. 2011). Your listener—in this case, the mediator—may not be conscious of this, but picks up on the cues.

So, my advice for women and men who wish to be perceived as authoritative and confident: deliberately slow your natural rate of speech and speak at the lower end of your natural vocal range.

Speed and pitch go together. Generally, when people speak slowly, their voices lower. And, when you have made an important point, one your audience would be wise to consider well and accept, PAUSE. Really: FULL STOP.

Emphasize the solidity of your proposal with a gesture that places it on the table. That makes it more real, and less subject to alternation or vagary with a hand wave. Be prepared to let the proposal sit out there, as you sit tall and sit back.

Of course, a mediator can also use the power of pause, voice, and gesture to give weight to her opinion that "putting this term in the proposal will undo the progress we've made and is likely to end the mediation."

Say it slowly, firmly, gravely, and then stop. No pleading vocal or facial expressions. Wait. Let the attorney and client see, hear, and come to terms with the force of your message.

Delivery does matter and it can be difficult to master in critical moments. Beyond words, delivery communicates your intention, power, and authority.

THE MESSAGE MATTERS, TOO

Do some substantive stereotypes still haunt us, or affect the negotiation interaction?

Of course the answer is yes. Even if the mediator is the same age as the XYZ Corp.'s general counsel, the GC might wonder just how much experience the mediator has. The GC might assume that the woman mediator will be fine for an employment case where emotions run high, but wonder if she has really handled many construction cases or high-stakes securities matters. Will she be able to handle math, spreadsheets, and technical data?

If you are the mediator and you'd like to be retained, or you want to command the general counsel's attention from the first moment of the opening session, do not shy away from war stories or lingo. Weave in a comment about a software programming case. What sounds to you like self-aggrandizement is important information to him: He hadn't imagined that you were the one who settled that enormous construction development debacle in the northern corner of the state.

When mediating construction cases, I find it helpful to reference "the skin of the building" or other like lingo within the first few paragraphs of my opening. It's not for the lawyers who recommended me, it's for their construction company clients who might otherwise doubt the female mediator's familiarity with the way these projects work.

The same advice holds for the attorney: don't let a mediator or opposing side in an accounting case think they can gloss over the math. Demonstrate your command of data and how it was derived. They will think twice before running roughshod over the numbers and your analysis when formulating an offer.

DEEPER QUESTIONS

The critical reader with good gender humor might observe that this article has thus far focused on "style and accessories": voice, movement, and conspicuous addition of lingo or war stories. When asking what role does gender play, why not look to deeper questions?

I suggest that the time is ripe to raise awareness among mediators and attorneys of the impact of more surface and more subtle choices in communication—style and accessories—because many of the deeper questions about gender differences in mediation and negotiation have been asked and substantially answered. Yes, there's still room for more research, but credit is due for what has been done to date.

There now exists an impressive body of research on the question of gender differences in negotiation, as well as social and professional consequences for women who negotiate assertively or aggressively. Some of the most insightful and prolific researchers and authors on these topics include: Linda C. Babcock of Carnegie Mellon University's H. John Heinz III School of Public Policy and Management; Hannah Riley Bowles at Harvard University's John F. Kennedy School of Government; Charles Craver

Author Marjorie Corman Aaron

at George Washington University Law School; Deborah Kolb at the Simmons College School of Management; Kathleen L. McGinn at Harvard Business School; Carrie J. Menkel-Meadow, A.B. Chettle Jr. Professor of Dispute Resolution and Civil Procedure, Georgetown University Law Center; Linda Putnam at the University of California at Santa Barbara; Andrea Kupfer Schneider at Marquette University Law School, and Catherine H. Tinsley at the McDonough School of Business at Georgetown University, and the Georgetown University Women's Leadership Initiative. See below and the accompanying box for examples of some of their seminal works.

FROM THE RESEARCH ...

At great risk of the sin of reductionism to absurd levels, here are some salient points from this research for female and male mediators and attorneys:

- There are no significant differences in male and female attorneys' effectiveness in competitive negotiations on behalf of their clients. See Charles Craver, "Why Negotiation Assumptions about Women May Be Wrong," 20 *Alternatives* 45 (March 2002). Indeed, some research suggests that female negotiators are apt to be more energized and more assertive when negotiating on behalf of others. Dina W. Pradel, Hannah Riley Bowles, and Kathleen L. McGinn, "When Does Gender Matter in Negotiation?" *Negotiation* (November 2005)(available at http://www.people.hbs.edu/kmcginn/PDFs/Publishedarticles/2005%20-%20When%20Does%20Gender%20Matter%20in%20Negotiation.pdf). Some research suggests that female negotiators are more likely to find integrative solutions.
- Gender differences that may exist when women and men negotiate on their own behalf are affected by the social circumstances and the ambiguity and range of possible results. Hannah Riley Bowles, Linda Babcock, and Kathleen L. McGinn, "Constraints and Triggers: Situational Mechanics of Gender in Negotiation," 89: 6 *Journal of Personality and Social Psychology* 951-965 (2005)(see accompanying box).
- Opposing negotiators may begin with a more aggressive opening proposal and be less flexible in the negotiations when they believe they are negotiating against a woman. Hannah Riley and Kathleen McGinn, "When Does Gender Matter in Negotiation?" John F. Kennedy School of Government, Harvard University. Faculty Research Working Paper Series (September 2002)(available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cts=1331571295088&ved=0CD4QFjAD&url=http%3A%2F%2Fweb.hks.harvard.edu%2Fpublications%2FgetFile.aspx%3FId%3D51&ei=wiheT6XyK-bd0QGsoKiqDw&usg=AFQjCNEW8YSrd5FdiBp4D2G3zbG-cpr8OA)(citing Riley, H.C, "Expectations and Gender in Negotiation" (Harvard Business School 2000), and Sarah J. Solnick, "Gender Differences in the Ultimatum Game," 39:2 *Economic Inquiry* 189-200 (April 2001)). Women who negotiate assertively on their own behalf—requesting a higher salary—tend to be perceived as less likeable and are less likely to be hired than males who negotiated equally assertively. Their asking for more is described as generating social backlash. One of the reasons women may, in the aggregate and on the average, be less aggressive/assertive when negotiating on their own behalf is that they fear social backlash, with good reason. Hannah Riley Bowles, Linda Babcock & Lei Lai, "Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask," 103 *Organizational Behavior and Human Decision Processes* 84 (2007) (see accompanying box).
- There is no social backlash against women lawyers who negotiate assertively on behalf of their clients. Women viewed as highly effective are described as having both assertive and likeable characteristics. Interestingly, male lawyers viewed as effective were described as having assertive characteristics. Likeability didn't seem to matter. Andrea Kupfer Schneider, Catherine H.

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Field Leaders

Here is a sampling of articles from some of the leading researchers on gender and negotiations that are mentioned in the accompanying article: Andrea Kupfer Schneider, Catherine H. Tinsley, Sandra Cheldelin, and Emily T. Amanatullah, "Likeability v. Competence The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers," 17 *Duke Journal of Gender Law & Policy* 363-384 (2010)(available at www.law.duke.edu/shell/cite.pl?17+Duke+J.+Gender+L.+&+Pol%27y+363+pdf); Hannah Riley Bowles, Linda Babcock, and Kathleen L. McGinn, "Constraints and Triggers: Situational Mechanics of Gender in Negotiation," 89:6 *Journal of Personality and Social Psychology* 951-965 (2005)(available at www.google.com/url?sa=t&rct=j&q=hannah%20riley%20bowles%2C%20linda%20babcock%2C%20and%20kathleen%20l.%20mcginn%2C%20%E2%80%9Cconstraints%20and%20triggers%3A%20situational%20mechanics%20of%20gender%20in%20negotiation%2C%E2%80%9D&source=web&cd=2&ved=0CC0QFjAB&url=http%3A%2F%2Fweb.hks.harvard.edu%2Fpublications%2FgetFile.aspx%3FId%3D190&ei=rF1ST5XEJMKC0QHivc37DQ&usg=AFQjCNHZwMveLE7K7IZwPJ2xTgdBeaAIVw&cad=rja); Deborah Kolb and Kathleen L. McGinn, "Beyond Gender and Negotiation to Gendered Negotiations," 2:1 *Negotiation and Conflict Management Research* 1-16 (2009)(available at www.people.hbs.edu/kmcginn/PDFs/Publishedarticles/2009-Beyond%20Gender%20and%20Negotiation%20to%20Gendered%20Negotiations.pdf); Catherine H. Tinsley, Sandra Cheldelin, Andrea Kupfer Schneider & Emily Amanatullah, "Women at the Bargaining Table: Pitfalls and Prospects," 25 *Negotiation Journal* 233 (2009) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397699##); Hannah Riley Bowles, Linda Babcock & Lei Lai, "Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask," 103 *Organizational Behavior and Human Decision Processes* 84 (2007)(available www.cfa.harvard.edu/cfawis/bowles.pdf); and Deborah M. Kolb and Linda Putnam, "Gender is More Than Who We Are," in Andrea Kupfer Schneider & Christopher Honeyman eds., Negotiators Fieldbook, 315 (2006).

—Marjorie Corman Aaron

Women In ADR—Aaron

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Tinsley, Sandra Cheldelin, and Emily T. Amanatullah, "Likeability v. Competence The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers," Vol. 17 *Duke Journal of Gender Law & Policy* 363-384 (2010)(see box on Page 93).

- One recent study by Stephen Goldberg and Margaret Shaw of ratings of mediator effectiveness based upon performance in high-stakes legal disputes showed no gender differences in attorneys' perceptions. Stephen B. Goldberg and Margaret L. Shaw, "Further Investigation into Secrets of Successful and Unsuccessful Mediators," 26 *Alternatives* 149 (September 2008).
- Georgetown Law Prof. Carrie Menkel-Meadow's extensive conflict resolution work has included a strong focus on negotiation, gender, and ethics. See, e.g., "Teaching about Gender and Negotiation: Sex, Truths, and Videotape," *Negotiation Journal* 357 (2000), and "Portia Redux: Another Look at Gender, Feminism, and Legal Ethics," in Susan D. Carle, ed., "Lawyers' Ethics and the Pursuit of Social Justice, A Critical Reader" (NYU Press 2005).
- For a comprehensive overview of the many factors involving negotiation in alternative dispute resolution, the authoritative casebook is "Dispute Resolution: Beyond the Adversarial Model," by Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider, and Jean R. Sternlight (Aspen Publishers 2004).

Out of the more traditional realm of negotiation scholarship, additional research suggests that:

- In the aggregate and on the average, women tend to be better at perceiving social and emotional cues, detecting deception, and at accurately judging intelligence of others. See Nora H. Murphy, Judith A. Hall, and C. Randall Colvin "Accurate Intelligence Assessments in Social Interactions: Mediators and Gender Effects," 71 *Journal of Personality* 3 (June 2003); on detecting deception, see Steve McCornack and Malcolm Parks, Vol. 7 *Journal of Social and Personal Relationships*, 107-118 (1990).
- Women attorneys may be less likely than other attorneys to significantly overvalue or undervalue their cases. Attorneys are not generally accurate at predicting case outcome. But attorneys who have completed at least 30 hours of mediation training tend to be somewhat more accurate predictors. Randall L. Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (New York: Springer 2010), built upon original research described in Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane,"Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5:3 *Journal of Empirical Legal Studies* 551–591 (2008)(available at http://www.blakemcshane.com/Papers/jels_settlement.pdf).

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The good news, then, is that objective measures confirm that women advocates and neutrals are at least as competent as their male counterparts in often difficult negotiations that occur within the mediation process—and "in the aggregate and on the average" we might have an edge in aspects of social and emotional intelligence.

As the numbers of experienced and distinguished legal professionals grow, women have places of power at the mediation table. Still, some more subtle frictions can be felt, tugging backward, causing frustration as women aim to be seen and heard as powerfully as merited by expertise, experience, and professional roles. Some of that friction and its frustration may be overcome by strategic choices in communication style substance, particularly in the beginning and at critical moments within the process.

Commentary

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lution Journal (February-April 2012); Jay W. Waks & Carlos L. Lopez, "*Stolt-Nielsen*, Silence and Class Arbitration: 'Same as It Ever Was*,'" 29 *Alternatives* 193 (December 2011).

Nevertheless, as to federal claims, some courts have resisted enforcement of class action waivers where bringing individual claims is so costly, according to these courts, that they effectively preclude the possibility of individual arbitration and, in turn, the possibility of vindicating federal statutory rights.

These courts maintain that *AT&T Mobility* would govern only where state law rights conflict with the FAA. But where federal law rights are at issue, an older "federal substantive law of arbitrability" governs. Moreover, their rationale parallels California's *Discover Bank* rule, which was held to be preempted by the FAA in *AT&T Mobility*.

Although the Supreme Court's strong support of individual arbitration is crystal clear, its recent cases have not resolved a debate still simmering in the lower courts over the relationship between alleged high arbitration costs and the vindication of federal statutory rights.

AMEX CASE, DÉJÀ VU

In a single case concerning the enforceability of a class action waiver, the Second U.S. Circuit Court of Appeals distinguished first *Stolt-Nielsen,* and later *AT&T Mobility,* on its path toward finding that a waiver would interfere with vindication of rights under federal statutes.

In re American Express Merchants' Litigation, 554 F.3d 300 (2d Cir. 2009) (*Amex I*), vacated by 130 S. Ct. 2401 (2010), on remand 634 F.3d 187 (2011) (*Amex II*), modified by 667 F.3d 204 (Feb. 1, 2012) (*Amex III*)(available at http://www.ca2.uscourts.gov/decisions/isysquery/5e7d8fc4-1b03-4d99-bbc9-6546ca5e3d89/5/doc/06-1871_2_opn.pdf#xml), a suit under the Sherman and Clayton Antitrust Acts, initially was decided by the Second Circuit in 2009, and has since been revisited twice by that court after a stopover in the Supreme Court.

In *Amex I*, the court held that a class action waiver in a Card Acceptance Agreement between merchants and American Express was unenforceable because the waiver "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." 554 F.3d at 320.

In light of *Stolt-Nielsen*, the Supreme Court granted *certiorari*, vacated *Amex I*, and ordered reconsideration. In *Amex II*, the Second Circuit concluded that *Stolt-Nielsen* did not require departure from its original analysis because the *Amex I* issue—whether "a contractual clause barring class arbitration is *per se* enforceable . . . when it would effectively strip plaintiffs [each with relatively small claims] of their ability to prosecute alleged antitrust violations"—was different than *Stolt-Nielsen*'s issue of the contractual basis for the class arbitration waiver. *Amex II*, 634 F.3d at 193-94 (emphasis is in the original).

Shortly after *Amex II*, the Supreme Court decided *AT&T Mobility*. The *Amex II* court sua sponte reconsidered its decision in light of the Supreme Court's latest word on class action waivers.

In *Amex III*, the Second Circuit again did not depart from its substantive conclusion in *Amex I*. It held that neither *Stolt-Nielsen* nor *AT&T Mobility* addressed the issue of the enforceability of class action waivers that would effectively prevent vindication of federal statutory rights. 667 F.3d at 213-214. That issue, according to the Second Circuit, is governed by the federal substantive law of arbitrability.

THE HEART OF SUBSTANTIVE ARBITRABILITY LAW

In 1985, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court held that the federal antitrust claims at issue could be arbitrated under the FAA "*so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum*." Id. at 637 (emphasis added).

Mitsubishi Motors was followed six years later by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in which the Court upheld an adhesion contract, forcing the plaintiff to arbitrate his Age Discrimination in Employment Act claim.

The *Gilmer* Court recognized that by agreeing to arbitrate a statutory claim, a party does not forfeit any substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than judicial forum. *Gilmer*, 500 U.S. at 26.

These cases constitute the heart of the substantive federal law of arbitrability.

Lower federal courts have understood *Mitsubishi Motors* and *Gilmer* to rest on the supposition that the arbitral forum adequately protects litigants' ability to resolve their statutory claims. "This supposition[] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights." *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999).

So what happens if a potential claim is so expensive to prosecute that it cannot feasibly be brought on an individual basis and only a class action would do, yet class actions are barred by the parties' arbitration agreement?

Vindicating Rights

The issue: Class action waivers—where it appears classes are needed.

The law: The Supreme Court says arbitration is a satisfactory forum, and class waivers are enforceable.

So what isn't settled? Costs. If they are too high, well, the latest decision in a long-running Second Circuit matter saw the class arbitration waiver invalidated, despite the top court's recent decisions.

PROHIBITIVE COSTS?

The Supreme Court acknowledged in dicta in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000), that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."

As the *Green Tree* Court cautioned, however, when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 91-92.

In the face of an otherwise enforceable class action waiver, this issue of prohibitive costs can arise when the small individual claim would be too expensive to bring in court or in arbitration unless it were presented as an aggregate action.

This, in fact, is exactly what happened in *Amex I*, where the demonstrated cost of an expert antitrust study would eclipse any potential recovery in individual arbitration and would not be feasible for an individual plaintiff to pursue. See *Amex III*, 667 F.3d at 212.

Although Supreme Court decisions have recognized the benefits of aggregate actions, the Court has not passed on whether a class action waiver would be unenforceable if the plaintiffs were to demonstrate that the practical effect of the waiver would be to disable them from bringing their claim. See, e.g., *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

PARSING *AT&T MOBILITY*

Despite the fact that it dealt with state law claims instead of federal law claims, *AT&T Mobility* may be the case that comes closest to touching this issue.

Justice Stephen G. Breyer's dissent in *AT&T Mobility* argued that class proceedings were necessary to prosecute small-dollar claims that might otherwise slip through the legal system. 131 S.Ct. at 1760-1761. The majority rejected this view: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753.

But even *AT&T Mobility* did not squarely present the issue because, as the Court concluded, the arbitration procedures in that case were "sufficient to provide incentive for the individual prosecution of meritorious claims." Id. (Citing the district court's conclusion that the Concepcions were better off under their arbitration agreement with AT&T than they would have been as class action participants).

As noted, however, the issue was addressed squarely in *Amex I*. The *Amex I* court held that, under *Green Tree*, plaintiffs had to demonstrate that the cost of individually arbitrating their disputes would be prohibitively expensive, effectively depriving them of the statutory protections of the antitrust laws. *Amex I*, 554 F.3d

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Commentary

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at 315-16. The plaintiffs carried their burden by submitting an affidavit from an economist who opined that an expert economic study, an important component of proving an antitrust violation, likely would cost somewhere between $300,000 and $2 million. Each individual plaintiff would need such a study, yet the average individual plaintiff could only hope to recover maximum damages of less than $5,300. The court found that this compellingly demonstrated that arbitrating disputes individually would be prohibitively expensive. The court reiterated this finding in *Amex II* and *Amex III*.

Relying on *Amex II* and *III*, district court judges in the Second Circuit, post-*AT&T Mobility*, continue to argue whether class action waivers are voidable if plaintiffs can demonstrate that individual arbitration is prohibitively costly. See e.g., *Sutherland v. Ernst & Young LLP*, __ F.Supp.2d __, 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012), appeal docketed, No. 12-304 (2d. Cir. Jan. 24, 2012); *LaVoice v. UBS Fin. Srvs. Inc.*, __ F.Supp.2d __, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *Raniere v. Citigroup Inc.*, 2011 WL 5881926 (S.D.N.Y. Nov. 22, 2011), appeal docketed, No. 11-5213 (2d Cir. Dec. 19, 2011).

The Second Circuit, however, is the only circuit to have addressed this issue after *AT&T Mobility*, although other circuits previously had permitted plaintiffs to challenge class action waivers as being cost prohibitive. For example, in *In re Cotton Yarn Antitrust Litig.*, the Fourth Circuit said "if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement." 505 F.3d 274, 285 (4th Cir. 2007).

Other pre-*AT&T Mobility* cases to apply the vindication principle in regard to arbitration costs include: *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006) (concluding that limitations in arbitration agreement on treble damages, attorney's fees and costs, and aggregate procedures "would prevent the vindication of statutory rights" and thus could not be enforced in an antitrust action against cable company under state and federal law); *Morrison v. Circuit City Stores*, 317 F.3d 646, 663 (6th Cir. 2003)(en banc) (holding, in consolidated Title VII actions alleging employment discrimination, "that potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (finding, in putative class action under federal Truth in Lending Act, that "the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs. . . ."); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223-1224 (11th Cir. 2007) (following *Kristian* in holding arbitration agreements unenforceable in a putative class action under federal Cable Communications Policy Act).

Unlike *Amex I-III*, however, plaintiffs elsewhere have failed to prove that a contractual bar to class actions in arbitration actually prevented vindication of statutory rights. According to the post-*AT&T Mobility Amex III* court, this fact "speak[s] to the quality of the evidence presented, not the viability of the legal theory," and "[t]he fact that plaintiffs so often fail in their attempts to overturn such waivers demonstrates that the evidentiary record necessary to avoid a class-action arbitration waiver is not easily assembled, and that the courts are capable of the scrutiny such arguments require." *Amex III*, 667 F.3d at 217.

THE COUNTERPOINT TO *AMEX III*

The counterpoint to the *Amex* view, of course, is that to the extent that *Green Tree*'s vindication of rights doctrine survives *AT&T Mobility* at all, it does so in a very limited way.

According to *Kaltwasser v. AT&T Mobility*, a California federal district court case explicitly rejecting *Amex II*, "*Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed[s] potential individual damages." 812 F. Supp. 2d 1042, 1050 (N.D. Cal. Sept. 20, 2011). *Kaltwasser* involved California state law claims of unfair competition and false advertising.

The court was skeptical that the vindication-of-rights doctrine was applicable to claims arising under state law. The court also concluded "even assuming that *Green Tree* applies to state law claims, the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with [*AT&T Mobility*]." Id. at 1048.

Moreover, that court would limit *Green Tree* to an analysis of arbitration costs alone: "If *Green Tree* has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims." Id. at 1050. See also *Hendricks v. AT&T Mobility LLC*, 2011 WL 5104421 at *4-*5 (N.D. Cal. Oct. 26, 2011) (C. Breyer, J.) (agreeing with *Kaltwasser* that *AT&T Mobility* foreclosed the argument that a class action waiver should be voided because the cost of pursuing a case on an individual basis would be prohibitive).

Both *Kaltwasser* and *Hendricks* involved state law claims, and their rejection of an *Amex*-style prohibitive costs analysis in the wake of *AT&T Mobility* was not, strictly speaking, necessary to their holdings.

'LARGE ARBITRATION COSTS' AND VINDICATION OF RIGHTS

Thus far, the Supreme Court consistently has upheld individual arbitration agreements against claims that enforcement would unfairly strip plaintiffs of important rights. In addition to *Stolt-Nielsen* and *AT&T Mobility*, the Court's January decision in *CompuCredit Corp. v. Greenwood* upheld—against a class action attack under the federal Credit Repair Organizations Act—a credit card adhesion contract's requirement of individual arbitration. 565 U.S. __, 132 S.Ct. 665 (Scalia, J., 8-1, Jan. 10, 2012)(available at www.supremecourt.gov/opinions/11pdf/10-948.pdf).

As the *CompuCredit* Court reiterated, the FAA establishes a "liberal federal policy favoring arbitration agreements" that applies "even when the claims at issue are federal statutory claims. . . ." Id. at 669 (internal quotation marks omitted). In addition, the Court rejected the notion that statutory references to "action," "class action," and "court" amount to a Congressional command that would preclude enforcement of individual arbitration agreements. Id. at 670-672.

None of these Supreme Court cases, however, squarely presented the issue of a class action waiver that would frustrate the plaintiffs' ability to vindicate their legal rights due to

prohibitive costs associated with individual arbitration. *AT&T Mobility* itself formally rested on federal supremacy grounds—i.e., "*States* cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons" (emphasis added)—and prohibitive costs were not a concern.

Thus, the Court's increasingly pro-individual arbitration stance has done little to resolve the debate over *Green Tree*'s "large arbitration costs" that might frustrate statutory rights.

LOOMING QUESTIONS

In the wake of the post-*AT&T Mobility* decisions, three questions still loom: (1) concerning federal statutory claims, to what extent is *Green Tree*'s focus on "large arbitration costs" still valid? (2) concerning state law claims, does *AT&T Mobility* foreclose the possibility of a class action waiver being held unenforceable if the plaintiff demonstrates that enforcement of the waiver in favor of an individual arbitration would effectively preclude that individual or another class member from vindicating *state* law rights? and (3) which of the competing analyses, *Amex III* or *Kaltwasser*'s *dicta*, should prevail in adjudicating *federal* claims in the face of contractual class action waivers and individual arbitration provisions?

As to the second and third questions, prior to *AT&T Mobility*, the Court of Appeals for the District of Columbia, in an opinion by then-Circuit Judge John G. Roberts Jr., now Chief Justice of the U.S. Supreme Court, presumed that the *Mitsubishi Motors* vindication principle, restated in *Gilmer*, applied to local as well as federal claims. See *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (available at http://scholar.google.com/scholar_case?case=5406334310637403924&q=Booker+v.+Robert+Half+Int%E2%80%99l+Inc.,+413+F.3d+77,&hl=en&as_sdt=2,33&as_vis=1)(racial discrimination suit filed against employer under District of Columbia law; in analyzing the enforceability of the parties' arbitration agreement, the court stated: "Statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute.").

The Eleventh Circuit also has noted the question "of whether *AT&T Mobility* leaves open the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action." In that same case, the Eleventh Circuit noted that uncertainty exists over whether "the *Mitsubishi* vindication principle applies to state as well as federal statutory causes of action. . . ." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011)(available at www.leagle.com/xmlResult.aspx?xmldoc=In%20FCO%2020110811080.xml&docbase=CSLWAR3-2007-CURR). See also *Coneff v. AT&T Corp.*, __F.3d __, 2012 WL 887598 (9th Cir. March 16, 2012)(available at www.ca9.uscourts.gov/datastore/opinions/2012/03/16/09-35563.pdf)(citing *Cruz* and finding that the vindication of rights principle would not save a Washington state unconscionability rule from a conflict with the FAA under *AT&T Mobility*).

AMEX'S FLSA APPLICATION

As to the third question alone, in *LaVoice v. UBS Fin. Srvs.*, decided after *Amex II* but before *Amex III,* a New York federal court conducted an *Amex II* analysis of the plaintiff's claim that an aggregate action waiver in the parties' arbitration agreement would disable him from vindicating his substantive rights under the Fair Labor Standards Act, or FLSA, because it would be economically infeasible for him to bring his claim on an individual basis. 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012).

The court concluded that "the practical effect of enforcement of the waiver . . . would not preclude LaVoice from exercising his rights. . . ." Id. at *7 (internal quotation marks omitted). In reaching this conclusion, the court reviewed the plaintiff's assertion of damages, attorneys' fees, expert fees, disinclination to pursue the claims individually, and likelihood of success at arbitration.

The court noted that LaVoice's estimated damages exceeded $127,000, as compared to roughly $5,000 in *Amex II* damages. Moreover, the arbitration agreement in *LaVoice* permitted the plaintiff to recover attorneys fees, and attorney fee-shifting is mandatory under the FLSA. Finally, the *LaVoice* court found plaintiff's expert fees argument to be speculative; and the disinclination and success points, not relevant. Id. at *8.

LOOKING AHEAD: IS CLARIFICATION COMING?

Continuing disagreements over these three questions should be expected. In the meantime, *Amex III* is the only post-*AT&T Mobility* federal appellate court decision to void a class action waiver solely because the plaintiffs successfully demonstrated that enforcement of the waiver would make it prohibitively expensive for them to vindicate their federal statutory rights.

In February, however, American Express filed a petition in *Amex* for rehearing *en banc* before the Second Circuit. See Docket, No. 06-1871-CV (2d Cir. Feb. 14, 2012). If the petition is granted, "*Amex IV*" would have the full Second Circuit deciding whether *AT&T Mobility* forecloses the prohibitive cost analysis of *Amex III*.

If not, it may be up to the Supreme Court to weigh in again.

* * *

Supreme Court clarification may be required on another aspect of *Amex III*.

In *Amex III*, the Second Circuit stated, with respect to the Supreme Court's 2010 *Stolt-Nielsen* decision, that, absent the parties' agreement, "*Stolt–Nielsen* plainly precludes any court from compelling the parties to submit to class-wide arbitration where the arbitration clause is silent as to class-wide arbitration."

Because the *Amex III* court concluded "that the arbitration provision at issue here does not allow for class arbitration, under *Stolt–Nielsen* and by its terms" but that an aggregate action was warranted, the court refused to enforce the arbitration clause and permitted plaintiffs to pursue a judicial class action. 667 F.3d at 219.

This Second Circuit treatment in *Amex III* contrasts with its prior view of *Stolt-Nielsen*. In *Jock v. Sterling Jewelers*, 646 F.3d 113 (2d Cir. 2011), the Second Circuit reversed U.S. District Judge Jed Rakoff's decision to vacate an arbitration award on the ground that the arbitrator exceeded her authority in ordering class arbitration. The Second Circuit found that, although the arbitration agreement was silent as to class proceedings, the arbitrator properly exercised her authority in reading the agreement to permit class arbitration.

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Commentary

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The *Jock* court distinguished *Stolt-Nielsen* in that the parties there had stipulated that they had not reached an agreement on class arbitration, where the parties in *Jock* had submitted that question to the arbitrator. 646 F.3d at 124. Circuit Judge Ralph K. Winter Jr. dissented in *Jock*, arguing that the panel majority's narrow reading of *Stolt-Nielsen* as turning on "an idiosyncratic stipulation of the parties" rendered *Stolt-Nielsen* "an insignificant precedent in this circuit." 646 F.3d at 129 n. 2 (Winter, J., dissenting). Jay W. Waks & Carlos L. Lopez, 29 *Alternatives* 193, supra.

Last December, Sterling Jewelers sought certiorari in the Supreme Court, arguing that the *Jock* panel had eviscerated *Stolt-Nielsen*. The *Jock* plaintiffs opposed, arguing that there was no circuit split on *Stolt-Nielsen's scope*; the Second Circuit had correctly applied *Stolt-Nielsen* in *Jock*; and the issue in *Jock* primarily involved the arbitrator's power, not the proper reading of the arbitration agreement.

Neither side cited the implications of *Amex III's* emphatic language, which was decided while the certiorari petition was being briefed. Although the Supreme Court denied review last month (565 U.S. ___ (March 19, 2012) (available at www.supremecourt.gov/orders/courtorders/031912zor.pdf), the issue of *Stolt-Nielsen*'s scope remains far from settled.

Worldly Perspectives

International Distinctions: How European Women See Their Mediation Practices

BY GIUSEPPE DE PALO AND MARY B. TREVOR

In the spirit of this issue's examination of women in alternative dispute resolution, we sought out leading female cross-border mediators from Bulgaria, Germany, Italy, the Netherlands, and Poland. We inquired about possible gender differences in the practice of ADR to discern if and how such differences are common across an international spectrum. Each of the neutrals was provided with a set of questions and asked to respond based on her experience and the trends in her country.

We received pragmatic and forthright responses. They demonstrate that although professional mediators, regardless of gender, generally are capable of handling all types of mediation challenges, gender distinctions nevertheless exist. Some people consider these distinctions to be genetic while others believe they are a result of social conditioning and cultural expectations.

Several U.S. studies suggest that female mediators may tend to be more transformational and focused on relationships, while male mediators may tend to be more transactional and focused on reaching an outcome. See, e.g., Melissa Morrissett and Alice F. Stuhlmacher, "Males and Females as Mediators: Disputant Perceptions," International Association for Conflict Management Meetings Paper (2006)(available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913737).

Furthermore, when they do use controlling interventions, female mediators might be perceived more negatively than their male counterparts because this behavior can be inconsistent with the parties' expectations.

Because not all mediations are solely cross-border in nature, the answers to our questions brought in observations based on both domestic and cross-border mediation experiences.

* * *

How does being a woman affect your mediation practice? Please share one experience in which your gender made a difference in a difficult mediation.

Sevdalina Aleksandrova, Bulgaria, vice president of the Professional Association of Mediators, Bulgaria's major mediation provider and training organization**:**

My perceptions about mediators are not very influenced by gender. I evaluate mediators based on personality, professional skills, and general communication skills. While I have had cases where male parties in a mediation used a slightly condescending tone toward my position of authority, I usually do not experience special or different treatment directly related to my gender from mediation participants. I strive to be neutral in my mediations by recognizing and exercising control over my natural reactions as a woman, such as resentment in cases of physical and psychological violence by a male party.

Ewa Gmurzynska, **Poland,** director of the Center for American Law Studies of Warsaw University and Staff Attorney at the Center for Governmental Responsibility:

In the very specialized field of commercial disputes, gender is secondary to qualifications such as training, experience, professionalism, and education. These qualifications are the attributes that give the parties assurance of knowledge, professionalism, and high ethical standards. Prejudice against female mediators is almost nonexistent in

De Palo is cofounder and president of the ADR Center, the largest private ADR services provider in continental Europe and a member of JAMS International. He is based in Milan. He also is the first International Professor of ADR Law & Practice at Hamline University School of Law in St. Paul, Minn. Trevor is an associate professor of law and director of the legal research and writing department at Hamline. This month's column was prepared with the assistance of Flavia Orecchini, Karolina Galecki, and Lauren Keller of the ADR Center International Projects Unit.

Poland because of the wide representation of women in legal settings.

Gender did appear to play a role in a family law mediation I was once involved in. Such mediations are usually co-mediated by a man and a woman to maintain neutrality. However, I had to conduct that particular mediation solo due to an illness. It took extra effort to build trust with the male party as he was very distraught that all of the individuals involved were women, from his wife and daughter, to both of the judges presiding over his divorce case, to the mediator.

Cinzia Brunelli, Italy, civil law notary and a JAMS International panelist active in ADR since 2000:

I believe that being a female civil law notary has been an advantage in mediation. In order to delve more deeply into the dispute, characteristics usually attributed to women such as patience, perseverance, and empathy are essential.

I recall, in particular, an estate distribution case I mediated between a decedent's son and the decedent's second wife, whose relationship was very problematic. After a series of meetings during which I could not elicit any openness from the parties, I decided to try something very unusual. I inquired into the widow's religion and asked her to consider how it affected her opinion of what her late husband might have suggested about settling this dispute with his own son. My use of patience and my woman's intuition to connect with the widow on a spiritual level resulted in her cooperating about reaching an agreement.

Manon Schonewille, the Netherlands, president of ACB Foundation; partner at Toolkit Co., a training and consulting firm in Haren, the Netherlands; lecturer on business mediation at Utrecht University; JAMS International panelist, and International Mediation Institute certified mediator at Amsterdam's Result ADR Center for Businesses:

It is very important to take into account that the "job" of a mediator, which involves playing a neutral and impartial role in the interaction between two or more parties, is different in many respects from other work situations. Nevertheless, there are three aspects of mediation where gender can potentially play a role:

a) During appointment by the parties, who may consider gender along with other characteristics such as culture, language, professional background, and mediation style;

b) During mediation interactions, which, if conducted in a professional, neutral, and impartial manner, should not reveal a gender, race, culture, or generational difference; and

c) During co-mediations with a colleague, where some gender impact during the interaction, comparable to a regular working relationship, may occur.

I have noticed that mediation parties, especially female parties, sometimes use asides—mentioning something and then dismissing it as not connected to the issues at stake—when the remark actually has revealed the true interests. Men may regard this as being "wordy" but as a woman, I recognize that it is beneficial to explore these asides. In general, although gender pitfalls can play a role in the mediation process, often they can be avoided if identified and neutralized or turned into something positive.

* * *

What are the main female characteristics that can be useful in a mediation? Can being a woman present an advantage in cross-border mediations that imply cultural differences?

Sabine Konig, Germany, judge and member of the mediation model project at the Hamburg District Court, as well as a JAMS International panelist:

The ability to listen, empathy, cultural competence, and respect are more important than gender.

Aleksandrova: I have seen women mediators listen more carefully, deal with emotions much better, and show empathy, acknowledgement, and respect to the parties in a way that I have not seen male mediators show. I have found that being a woman mediator is an advantage in every case where a high level of sensibility to peoples' needs and concerns is sorely required, as well as where empathy and delicacy would be very important.

In conflicts associated with intercultural issues and differences, it is very important to be able to discuss such issues in a delicate way because people may be very vulnerable and react strongly, and even get offended, when it comes to aspects of their culture such as customs, beliefs, religion, and values.

Gmurzynska: Emotional intelligence, empathy, and sensitiveness are beneficial, but in certain cases, such as commercial ones, assertiveness, logic, and realistic evaluation of the case are needed just as much as those "softer" approaches. Mediating when cultural differences exist requires not only knowledge of the differences between cultures, beliefs, and styles of negotiation that are characteristic of a particular group or country, but also emotional intelligence, which may help a mediator notice and understand nuances particularly important in cross-cultural disputes. The "softer" approach to conflict resolution is consistent with the idea of mediation and assures a procedure that is quite different than court proceedings. Conducting the procedure in a more amicable way is also consistent with the parties' expectations. Women mediators (with the proper education, knowledge of legal issues, and experience) may offer the parties the more amicable (softer) approach to dispute resolution, as well as a certain amount of knowledge, assertiveness, and sensitiveness.

Schonewille: Being generally more relationship oriented, women can potentially deal better with cultural differences or at least be sensitive to them. There are some differences in the way men and women interact professionally, but it also greatly depends on the individual.

Further, gender differences tend to have less influence in well-defined situations with clear rules. Research indicates that empathetic pre-mediation caucuses can be very beneficial if the mediator manages to stay out of the substantive issues and just focuses on building a relationship with the parties. See Roderick I. Swaab and Jeanne M. Brett, "Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution," International Association for Conflict Management Meetings Paper (2007)(available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080622). However, female mediators run the risk of staying in the empathy/relationship-focused mode and by doing so, may miss occasions where it is necessary to use controlling or directive mediation techniques.

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Worldly Perspectives

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What do you think are differences between female and male mediators and their mediation style and how can they affect a mediation?

Konig: These differences specifically affect cultures which are male dominated. I do not believe there is a gender-specific mediation style. Instead, style depends on the personal preferences of being more passive or active as a mediator.

Aleksandrova: I have had cases where parties calmed down as a result of the mediator showing a higher level of empathy and appreciation for their efforts. I think such expressions are crucial for mediation because parties often feel frustrated and misunderstood by the other party. If a third neutral party acknowledges their efforts, this action would meet their need to be understood and would serve to some extent as a substitute for the understanding and acknowledgment they expect from the other party.

I once mediated a case involving partition of joint property between an uncle and niece. At a turning point in the mediation, I was able to show the uncle deep respect and appreciation for his really extensive and decisive efforts. As a result of the listening and acknowledgment he received, he became calmer and started discussing options with the mediator.

Although having a sense of parties' needs and showing deep understanding and recognition was an expression of my female characteristics, a male mediator who has developed a sense and skills for empathy would also be successful in a similar situation.

Men often communicate in a more straightforward way and tend to ignore emotions. Male mediators do not tend to feel attacks, misunderstandings, and challenges from parties as deeply as women do and are able to deal with such developments without losing their inner balance. In addition to that, men often are better able to see "the big picture" and do not "dig" into details.

However, male mediators tend to "push" parties to resolution more than women, and as they are usually result oriented, often guide parties to a pragmatic resolution on the most important "material" and "property" issues– a resolution that can be seen, touched, and measured-and tend to leave "non-property," "intangible" issues unresolved because they are not measurable.

Nevertheless, I consider men and women mediators equally able to deal with all issues in an effective and professional manner leading to resolutions satisfactory for both parties.

The Differences

The setting: European-based international ADR practices.

The views: These women neutrals say the skills between the sexes are equal, but . . .

The feelings: . . . don't hesitate to cite empathy, repeatedly, when asked about the distinction between male and female mediators.

Schonewille: In my experience, communication in mediation is more affected by the parties' background, gender, culture, and generation than the mediator's gender.

Mediators need a balanced and neutral mix of male and female characteristics. However, in general, female mediators are better in important communication skills like listening, reading non-verbal cues, empathizing, and acknowledging feelings. Men are said to be more direct and dominant, competitive, adversarial, and analytical. Women typically are thought to be more cooperative, nurturing, emotional, and oriented on connecting with others.

Nevertheless, these differences in mediation style may be more perception than reality, and the situation strongly depends on the individuals involved. For example, more of a difference in mediation style can exist between a Dutch female mediator and a U.S. female mediator than between a Dutch male mediator and a Dutch female mediator.

Brunelli: Women are more emphatic and more able to listen without judging, which is sometimes enough to make the parties feel that a solution is more likely. This can be very important in mediations involving emotions and feelings. However, when the dispute is over a practical and economic issue, being a man is a plus.

* * *

Do you perceive a gender imbalance in mediation practice in your country and what do you think could be done to bring more women into the mediation profession?

Konig: There are more women in family law and in many trainings in Germany. There is not enough interest in mediation training from men, even in larger organizations. There are enough women in mediation, but not in the business world. The human relations sector continues to be more attractive to women.

Aleksandrova: There is an imbalance in gender in Bulgaria because there are about eight female mediators for every male mediator. This trend is to some extent related to the fact that mediation is still not a high income-generating profession, and men are more focused on profitable activities because they are expected to ensure sufficient income to support their families. Women are well represented in the field of mediation because they are very motivated to help others resolve their differences.

Gmurzynska: In general, there are more women than men mediators in Poland. Women traditionally dominate family and labor cases while men are more often represented in commercial cases. The Faculty of Law and Administration at the University of Warsaw conducts an annual mediation LL.M Program designed for lawyers. Since its inception in 2008, every year it has welcomed about 45 students, of whom about 30 are women.

I suggest offering interesting mediation programs, not necessarily connected to family law or gender issues, at low cost and targeted toward women. A majority of women understand that learning soft skills and effective communication may not only be valuable in their professional work but also in their family life.

Brunelli: The number of male mediators in Italy is higher, but the last couple of years have seen an increase in female mediators to steady the imbalance. This is perhaps due to

the fact that the job of mediator is more suited to a woman's lifestyle and her multiple commitments, such as her family.

Schonewille: Mediation is typically a line of business that attracts many female practitioners in the Netherlands, with about 57% of mediators being female. Stratus Research, based on mediators registered with the Netherlands Mediation Institute (April 2010). However, commercial or cross-border panels feature more male mediators: about two-thirds of mediators at the Dutch business mediation provider Results ADR Center for Businesses are male. Nearly 50% of the conflict resolution expert panel, who provide commercial conflict analysis and pre-court assessments, is male. There is a need for good mediators, no matter the gender or other characteristics, and there is a need for more commercial parties to understand the benefits of mediation and to choose mediation instead of litigation or arbitration.

* * *

Authors' conclusion: To be a mediator, regardless of gender, is to be a professional. As acknowledged by our female mediators, gender differences, both real and perceived, may play a role in a given mediation. Sometimes they may make a certain situation more or less difficult to deal with.

But in the end, the professional mediator, of whatever gender, recognizes, acknowledges, and deals with these differences, because the larger goal is to effectively facilitate the interaction between the parties and explore possibilities for settlement or other positive outcomes.

* * *

Coming in May in Worldly Perspectives*: the Czech Republic.*

(For bulk reprints of this article, please call (201) 748-8789.)

CPR News

(continued from page 82)

BANKING COMMITTEE REVIEWS NEW ARBITRATION TOOLS, AND MOVES TO ADD MORE PANELISTS

CPR's Banking and Financial Services Committee has been active in 2012's first half, setting up reviews for prospective CPR Panel members, and examining new trends in arbitration and bankruptcy ADR.

The committee—co-chaired by Pamela Corrie, general counsel and chief risk counsel at General Electric Capital Corp., in Norwalk, Conn., and José Antonio Morán, a partner in Baker & McKenzie's Chicago office—will next meet on May 31 at the New York City offices of Reed Smith LLP. An agenda was not yet available at press time; for more information, visit www.cpradr.org.

At its most recent meeting in February, the committee members examined the application of recent CPR Arbitration Committee products to their work. Led by CPR Arbitration Committee chair Lawrence W. Newman, of counsel in the New York office of Baker & McKenzie, the attendees discussed:

- The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (available at: http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Protocol%20on%20Disclosure%20of%20Documents%20and%20Witnesses.pdf) &
- The CPR Protocol on Determination of Damages in Arbitration (available at: http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/CPR%20Protocol%20on%20Determination%20of%20Damages%20in%20Arbitration%20fnl.pdf), and
- The CPR Guidelines on Early Determination of Issues in Arbitration (available at: http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Guidelines%20on%20Early%20Disposition%20of%20Issues%20In%20Arbitration.pdf).

At the February meeting, Banking and Financial Services Committee member Edna Sussman, a New York neutral, reported on the Jan. 16 opening conference of P.R.I.M.E. Finance, an ADR organization based in the Hague. The idea behind the new organization, Sussman told the group, is that there is a need for an expert body of neutrals to arbitrate and mediate complex cross-border financial transactions. (For more information, see www.primefinancedisputes.org/index.php/about-us.)

Next, New York-based U.S. District Court Bankruptcy Judge Allan L. Gropper talked to the group about arbitration and mediation in cross-border bankruptcy cases.

In addition, CPR Institute Senior Vice President Helena Tavares Erickson put out a call for volunteers to create a "neutrals review" subcommittee. The subcommittee will review applications of neutrals who want to be added to CPR's Banking and Financial Services Panel—one of the organization's Panels of Distinguished Neutrals (see http://cpradr.org/FileaCase.aspx)—to ensure that they have the appropriate background to serve on the panel.

If you are interested in participating in next month's meeting or the committee's other activities, contact CPR Institute Special Counsel and committee liaison, Olivier Andre, at oandre@cpradr.org, or 212-949-6490.

MORE AWARDS: CPR'S TOP 2011 ARTICLES

Last month, this CPR News column provided highlights and excerpts for an initial batch of the CPR Institute's 29th Annual Awards.

This month, the coverage continues of the January awards program, which recognizes achievement in business conflict resolution. Below are highlights from professional and student articles award winners, as well as the "short article" award.

The CPR Awards were presented at a dinner hosted by Weil, Gotshal & Manges at the firm's New York offices on Jan. 11, just

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CPR News

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before 2012 CPR Annual Meeting.

Last month, *Alternatives* detailed four awards—for outstanding contribution to ADR diversity; for outstanding practical achievement; for best 2011 ADR book, and for outstanding electronic media. For full details and background on these four awards, see "Annual Awards presented for a Court Research Paper, Pioneering European Mediation Work, and to a Diversity Leader," 30 *Alternatives* 66 2012). For a full listing of the judges and criteria, see the Awards tab at www.cpradr.org.

The 2011 annual awards were sponsored by Upchurch Watson White & Max, a national ADR provider and consulting firm that has four southeast offices, three in Florida and one in Birmingham, Ala. (See uww-adr.com.) The student awards were sponsored Kilpatrick Townsend & Stockton, an Atlanta-based firm with 21 offices worldwide. (See www.kilpatrickstockton.com.)

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The 2012 awards competition is now open, with an Oct. 26 deadline. A full list of this year's categories, as well as full details for making nominations, can be found on the CPR Institute's website, here: http://cpradr.org/Awards.aspx. For more information, E-mail info@cpradr.org.

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The professional articles award went to Roselle L. Wissler, research director at the Lodestar Dispute Resolution Program at Arizona State University's Sandra Day O'Connor College of Law in Tempe, Ariz. She studied attorneys' comparative views of court-connected settlement programs, which concluded that mediation with court-staff mediators, rather than volunteer neutrals, got the most positive responses, and the least negative ratings.

Wissler examined how lawyers feel about nontrial settlement processes set up in courts. She notes at the outset of her piece that ADR has become commonplace in courts since Rule 16 of the Federal Rules of Civil Procedure was amended nearly 30 years ago to include settlement discussions in pretrial conferences, and with the encouragement and later mandatory installation of federal court programs in the 1990s.

In "Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences," 26:2-3 *Ohio State J. on Dispute Res.* 271 (2011)(available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740033), Wissler analyzes attorneys' responses to inquiries about the effectiveness of the principal courtroom ADR methods. The processes studied include settlement conferences with judges assigned to the case; settlement conferences with judges not assigned to the case; court-connected mediation with staff mediators, and court-connected mediation with volunteer mediators.

Paid staff court mediators led the pack. In looking at assessment categories including the ability to be candid; scheduling availability; bringing clients into the process; credibility, and providing good service, staff mediators rated higher than the other court ADR and judge-directed settlement categories. They trailed only private mediators—who lagged behind court-employed mediators on the credibility rating.

"[L]awyers viewed mediation with staff mediators more favorably on a majority of dimensions and gave staff mediation by far the highest proportion of first-place overall preference rankings and the fewest last-place rankings," wrote Wissler.

"That was a major surprise to me," said award judge Irene Warshauer, a New York solo lawyer-neutral, in presenting the award to Wissler at the January dinner.

Wissler has written on empirical studies of conflict resolution processes for two decades. One of her most often-cited studies about court-annexed mediation is "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," 17 *Ohio State J. on Dispute Res.* 641 (2002). Her biography and bibliography can be seen here: www.law.asu.edu/files/faculty/cvs/rosellelouisewissler.pdf.

* * *

Stacie Strong's "Collective Arbitration under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?" 29 *ASA Bulletin* 145 (2011)(available at http://ec.europa.eu/competition/consultations/2011_collective_redress/strong_annex1_en.pdf), received a CPR award for outstanding original short article.

The article discusses class proceedings in Europe, a relatively new phenomenon. It focuses on the parallel development, since 2009, of "collective arbitration" in Germany. The rules put forth by the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit or DIS) are compared to the American Arbitration Association's class arbitration procedures.

Strong, an associate professor at the University of Missouri-Columbia's School of Law and a senior fellow at the school's Center for the Study of Dispute Resolution, concludes that the new German rules "show great promise as a means of resolving collective disputes in both the domestic and cross-border context." She adds that the DIS processes—which use an "opt-in" procedure that contrasts with U.S. "opt-out" methods and have other contractual provisions that would help in international enforcement—"bear watching by both the German and the international arbitral community."

This is Strong's second CPR article award in three years. She received a professional articles award in 2009. See S.I. Strong, The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity? 30 *Michigan J. of Intl. Law* 1017 (2009)(available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1359353).

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CPR News

Both articles recognized for the 2011 Outstanding Original Student Article award were published in the *Ohio State Journal on Dispute Resolution*, like Rosanne Wissler's professional article.

First, Michael Diamond asks Congress to set up a mediation program that would help with siting problems accompanying electric power transmission lines in "Energized' Negotiations: Mediating Disputes Over the Siting of Interstate Electronic Transmission Lines," 26 *Ohio St. J. on Dispute Res.* 1 (2011).

Diamond, who graduated from Ohio State's Moritz School of Law last year, presents the background for his mediation proposal in the first four parts of his article. Then he explains that a combination of factors has coalesced to create problems requiring public participation for a resolution—and that resolution should come via mediation.

The factors include increasing demand for electricity; legislation that gives the Federal Energy Regulatory Commission the power to push states to grant permits to power companies for transmission lines construction, and even step in and grant licenses where states fail to act in the face of resistance over transmission lines siting; and *Kelo v. City of New London*, 545 U.S. 469 (2005), the controversial case that increased governments' use of eminent domain to take private property for public purposes.

Kelo sparked numerous state law changes, some of which have come into play where governmental authorities act on behalf of power companies. Author Diamond points out that current Congressional proposals seek to expand FERC's involvement in siting, which could invoke *Kelo*-related protests from affected property owners.

Those landowners, Diamond argues, need a bigger voice in the siting processes. He advises that the proposed mediation program "would be able to accommodate any pending broader revisions of the current protocol for siting interstate transmission lines. Mediation has been highly successful when applied to land use disputes, so much so that one study reported 86% of those participating in mediated land use dispute resolution processes reacting to it favorably, with 85% believing that the mediator played a critical role in contributing to the process's success. In addition to increasing participants' satisfaction, mediated land use agreements are also likely to be more efficient than traditional alternatives. For instance, the study also found that 91% of participants, including government officials, reported that the process cost less, and 81% stated that the process took less time than more adversarial, conventional alternatives." (Citations omitted.)

Diamond writes that the mediation public participation proposal—in which FERC would provide a forum for landowners and power companies to work out their problems—would improve decision making, and help legitimize increased expanded federal jurisdiction over siting.

Diamond provides detail on how he suggests the process would work, including emphasizing regional supervision of the FERC processes to prevent state board provincialism.

New York-based U.S. Bankruptcy Court Judge Elizabeth Stong, who presented the student article awards, told the awards dinner audience that the article is a "pretty precise topic, [describing] a bigger problem than I knew it was, and a pretty neat solution."

* * *

The second student award went to Nate Mealy for his work, "Mediation's Potential Role in International Cultural Property Disputes" 26 *Ohio St. J. on Dispute Res.* 1, 169 (2011). The article takes on the problem of looting of historic sites under war conditions, or where thieves access historic sites and steal relics and antiquities.

Looting literally destroys history, the article says. "First, looting denies many countries the ability to control and appreciate their histories and identities to the fullest possible extent because it strips countries of historical objects which they claim inform the pasts of their lands," writes Mealy. "Second, looting decreases archaeology's ability to investigate the past at its most undisturbed and, therefore, informative state," he adds.

Despite a 1970 convention signed by 120 nations addressing illegal transfers of cultural properties by the United Nation's Educational, Cultural and Scientific Organization, Mealy writes that source nations are still having problems recovering their lost artifacts for a variety of reasons, including evidence issues. "This is the current status of the cultural property world," the article notes. "It is an uphill, litigation-based battle in which source nations have few rights and little chance of success."

Once again, the author—also a 2011 Moritz graduate who, Judge Stong told the awards dinner audience, has entered the U.S. Army officer corps—recommends a mediation cure. After describing how nations trade in antiquities, the categories of stakeholders and the disputes, and his mediation plan, Mealy summarizes his solution in his conclusion:

> . . . [M]uch more is at stake than source or market nation pride. At stake is knowledge itself. Unless disputant-stakeholders engage in a system which creatively encourages the equitable spread of cultural property—one which acknowledges the interests of all stakeholders—it is likely that the world will someday face a complete freeze on the exchange of newly discovered archaeological, artistic, and historically significant objects which inform who we are as a human race. At the end of the day, it is this tragedy, more than any other, that mediation helps overcome. This, regardless of its voluntary nature, is why disputant-stakeholders must embrace mediation.

Referring to both Nate Mealy's article and Michael Diamond's article, Judge Stong said that the solutions provided show that "good writing about hard subjects really matters."