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A few thoughts on gender in the practice of mediation

The question of whether the gender of a lawyer, party or mediator plays a role in negotiation and mediation has been the subject of a variety of studies over the past few decades. Recent related research also addresses gender differences in the brain as observed by functional magnetic resonance imaging.

Although the results are complicated, context specific and inconclusive, there are some findings that may be useful to a practitioner.

One of the most interesting discoveries relates to "stereotype threat," a phenomenon that occurs when women are reminded that effective negotiators are rational, assertive and unemotional (traits usually associated with men). Women become unconsciously distracted by the stereotype and do not perform as well.

In other words, some of their mental energy is used up by worrying about conforming to the negative stereotype and this affects such things as aspirations, opening offers and agreements. This can be overcome, however, by an explicit reminder of the stereotype. Laura Kray of the University of California at Berkeley has found that when women pay attention to the fact that good negotiators are strong, dominant, assertive and rational — and that these are male traits — they actually outperform men.

Therefore, when preparing for a mediation, it might be useful for a less experienced female lawyer to pre-empt stereotype threat by reminding herself that negotiation skills can be learned, that many women excel at negotiation and that research has shown that women may have additional strengths important in a mediation setting.

These strengths include speaking the language of problem-solv-

ing, considering nonmonetary solutions and relationships, exhibiting empathy skills and being able to manage conflict and collaboration simultaneously. It could even be helpful to remember that it was a woman, Mary Parker Follett, who first put forth the notion of integrative bargaining, now more commonly known to lawyers and mediators as principled or interest-based negotiation made famous by the book, "Getting to Yes" by Robert Fisher and William Ury.

Briefly thinking or writing just before the mediation about something a female lawyer values could also be helpful as this strategy has been found to be effective to defeat stereotype threat for young girls taking math tests.

Lawyers wishing to increase effectiveness might try taking two minutes to do "power poses" to reduce cortisol and increase testosterone as described by professor Amy Cuddy of Harvard Business School.

Power poses include standing with hands on hips like Wonder Woman or with arms and legs extended fully like an X — a victory stance employed by humans worldwide.

After watching Cuddy's fascinating TED.com talk, I had visions of the crowded elevators at the Daley Center becoming even more cramped as lawyers struck various power poses on their way up to court.

Many of these strategies relate to using your mind and body to sort of trick your brain into shifting to another state, not unlike the mood lift from putting a pencil in your teeth using your smile muscles. While it is easy to feel skeptical of these ideas, the research on the effectiveness is impressive.

It should be noted that these strategies are less relevant to experienced female attorneys, business women and other profession-

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als as the studies show that training, experience and dispute context may matter more than gender variations.

There are also interesting findings about the gender of the parties in mediation. Law professor Tammy Relis found that many female parties, particularly female plaintiffs, are looking for the direct communication opportunities available in facilitative mediation settings where parties discuss the issues in joint session. Female parties also are more likely to seek nonmonetary outcomes.

Relis also found that when choosing a mediator, people prefer gender or ethnic "matching." As will come as no surprise to many female lawyers, studies also show that women are far more assertive when negotiating on behalf of someone else, whether as lawyer, manager or parent.

Out of all this research, the most useful bit of information may come from the studies by neu-

roscientist Tania Singer, who showed that empathy-related neural responses are significantly lower in males when observing an "unfair" or "out-group" person experiencing pain.

The brain areas related to empathy are activated when pain is inflicted upon an in-group person in both men and women. However, the reward areas of the brain are activated in men when the "bad guy" gets it.

Therefore, when dealing with a male lawyer or party, a negotiator or mediator may wish to use language that addresses this male need to see people as part of the group, such as emphasizing that mediation is a way to engage in joint problem-solving.

In any event, now female lawyers and mediators have a good explanation for our significant others of why we don't want to see that new movie coming out where scores of bad guys are sure to be killed — our brains are different and we will be worn out by all that empathizing while their reward circuits are lighting up.

One thing is still certain: Preparation levels trump gender differences in mediation.

In addition to knowing the legal case cold, any lawyer heading into mediation should identify the client's BATNA, or best alternative to a negotiated agreement; WATNA, or worst alternative; the other side's perspective; the aspiration point; the reservation point; and the zone of possible agreement.

It is also critical to determine, in advance, the style of mediator appropriate to the dispute; when and what information you will request and share; and possible creative nonmonetary options.

Finally, the importance of preparing to communicate with the other side in a manner by which they can "hear" your views cannot be overemphasized.

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