

Alternative Dispute Resolution and the Potential for Gender Bias

Pursuant to a court order, Sharon reported to the mediator's office for her first scheduled mediation with her husband, James. James, who had never cared for the children and who had been verbally abusive to Sharon over the years, was asking for a divorce, for custody of the children, for the bulk of the marital assets, and for child support. Sharon, the children's primary caretaker, told the mediator that while she was willing to get divorced, she wanted custody and needed child support in order to adequately care for the children. The mediator never asked whether she had reason to fear James, and she did not volunteer that information.

When the mediation started, Sharon could not find her voice. James framed the terms of the mediation. He calmly explained to the mediator that Sharon was being irrational, that they could jointly parent the children. And as the mediator began

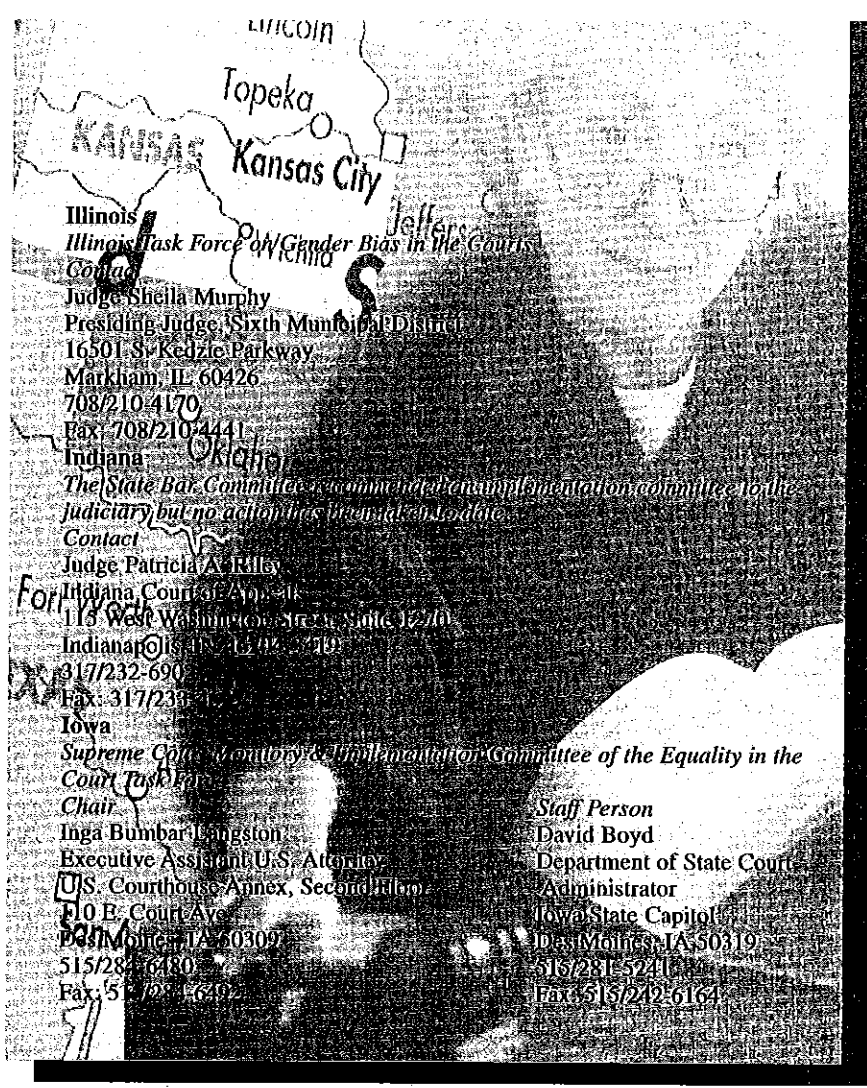
to question Sharon as to why a joint parenting agreement would not work, she felt a dull ache in the pit of her stomach. She had never been able to stand up to James, and knew that she would not be able to this time either.

Over the past twenty-five years, judges, lawyers, and litigants have increasingly employed alternative dispute resolution (ADR) rather than or prior to engaging in traditional litigation. ADR, which includes such processes as arbitration and mediation, is widely considered a less expensive, quicker means of resolving contested matters. The availability of ADR has helped courts clear congested dockets and move cases more quickly through their systems. Moreover, some forms of ADR, most notably mediation, are touted as vesting litigants with greater control over and a more

personal stake in the process of reaching agreements. For many litigants, then, ADR is a godsend, making the experience of interacting with the legal system a more personal, less onerous one.

This may be the case for some litigants, but not all. For some women, ADR not only fails to help them achieve equitable agreements, but also disempowers and disenfranchises them. As increasing numbers of jurisdictions begin to require mediation in a variety of contexts ranging from family cases to small claims matters to employment discrimination suits, it becomes especially important to consider whether mediation is appropriate for all litigants in all cases. This article will look at the potential for gender bias in the practice of ADR, focusing on mediation. The article will also examine how the attitudes of the participants—mediators, lawyers, and litigants—can jeopardize the fairness of the mediation

By Leigh Goodmark



get the job done. Situations deteriorate from: Maybe we should re-assess this, to I don't think this is a good idea, to This is a bad idea, to If you do this, it will alienate us, to I'm not going to let you do this, to If you do this, I will destroy the kitchen, to If you do this, I will break your arm (threat only), to If you do this, I will break both legs and your neck. (At which time, I am no longer threatening—I am 100% sincere.)²

Even after physically separated, the batterer will continue to use the children, finances, and any means available to continue to control the victim.

The batterer in an abusive relationship has the power—economic, psychological, physical, and emotional. Expecting him to relinquish that power during mediation is unrealistic. At the most basic level, the battered woman's concern for her physical safety may preclude her from feeling comfortable mediating as her batterer glares at her from across the table. Even if the victim believes that the mediation setting is secure, "[p]hysical safety alone does not erase the effects of psychological terrorism."³

Memories of the batterer's power, and the way he has used that power, trigger fear of the abuser. As one abused woman noted, "When he had power over me, he didn't have to exert himself. The more powerful I become [in getting away from him], the more irrational he becomes. I wonder, would he hurt me physically?"⁴ These memories may render the victim inarticulate or angry, making it difficult for her to express her position during mediation. The victim may feel pressure to settle or to compromise, continuing to believe that the abuse (this time, the abuse associated with the process of mediation) will stop if she simply decreases her demands. In negotiations, the batterer may continually change his demands, a tactic designed to let the victim know that he still maintains the power to mold the agreement, and therefore her life, according to his wishes. As one advocate observed, "Typically, the batterer demands compromises that seem innocent to the mediator but speak only of power, control, and safety issues to the battered mother . . ."⁵ Because of the power imbalances inherent in a battering relationship, many battered women's advocates have argued that cases involving domestic abuse should never be mediated.

Simply excluding domestic violence

process unless they are acknowledged and addressed.

Mediation and the Potential for Gender Bias

Power: Successful mediation assumes that the parties to the mediation begin from equal positions of power. Power comes in a number of forms: economic, intellectual, physical, emotional, and procedural.¹ But many women are trapped in relationships—familial, employment, or contractual—that

are characterized by power imbalances. Mediating in the face of these power imbalances undermines the premise that mediation gives the parties greater control and self-determination than traditional litigation.

The impact of power imbalances on mediation has been most thoroughly discussed in the context of intimate relationships. For example, issues of power and control are central to the relationship between an abused woman and her batterer. Throughout their relationship, the batterer uses a variety of techniques ranging from isolation and emotional and economic abuse to intimidation, coercion, threats, and physical violence to establish his power and maintain control over his victim. Moreover, the batterer will frequently blame the victim for his abuse, making her believe that if she conforms her behavior to the standards he requires, the abuse will stop. As one batterer explained in a letter to his wife's parents:

I have, time and again, with varying degrees of success and volume, tried to bend her outlook and rhetoric At times, when there is no alternative but to do things in a certain, specific way, I have resorted to violence to



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Kansas

The task force has been disbanded. Recommendations have been incorporated into the annually reviewed Kansas Bar Association's strategic plan.

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cases from mediation will not fully address the problem of gender bias and power imbalances, however. Other categories of cases involve the same dynamics of power and control. For example, some studies estimate that over half of all cases referred for divorce and/or custody and visitation mediation involve issues of domestic violence.⁶ Frequently, however, those cases are not labeled "domestic violence" cases and mediation is deemed appropriate. The failure to screen for intrafamily violence in other cases involving intimate relationships increases the probability that the mediation will be flawed by the same problematic power dynamics.

Additionally, many women are just a divorce away from poverty. The power imbalance created by one spouse's greater access to resources can render mediation unfair, as do the procedural advantages available to the spouse with greater income. As one woman going through mediation noted, "Since we've been divorced, he's taken me back to court again and again and again. He's remarried, he has the kids, he makes several hundred thousand dollars a year (and I work for minimum wage). He won't stop until he has taken everything from me, stripped everything from me. He still needs to control me absolutely."⁷ The wealthier spouse can afford to ask for continuances while mediating at length, knowing that the failure to produce an agreement will not preclude him from paying his rent or feeding his children. The economically dependent spouse does not have the luxury

of time, especially where temporary support has not been established or is inadequate.

Moreover, the problem of gender-based power imbalances in mediation is not confined to cases involving families. In sexual harassment cases, for example, the dynamics of power and control are similar to those found in domestic violence cases, despite the lack of an "intimate" relationship between the parties. "In the workplace, particularly where women occupy sex-atypical jobs, gender-based power and its potential for being destructive becomes more acute."⁸ Women who have been sexually harassed, which can include being ridiculed, called humiliating and profane names, or being sexually and/or physically assaulted, often feel the same powerlessness in the presence of their harassers that battered women experience in the presence of their abusers. The dynamic in these cases "involved power, fear, and coercion."⁹ Women confronting these dynamics in sexual harassment cases are no more able to negotiate from a position of equal power than battered women and should not be required to participate in mediation.

Marginalization of Women's Issues. Negotiation is often referred to as "bargaining in the shadow of the law." Using mediation, in many cases, increases the risk that legal issues involving women will be pushed further into those shadows.

Using ADR can marginalize women's legal issues in a number of ways. First, routinely using mediation in certain types of cases involving women increases the possibility that the issues involved will be characterized as "nonlegal" or unworthy of the attention of the adversarial system. For years, battered women's advocates fought to establish the legal principle that battering is a crime, rather than an internal family issue to be addressed with cooling-off periods and marital counseling. Prosecutors and courts now routinely charge, try, and convict abusive men for assault, threats, destruction of property, rape, sexual assault, and other crimes against their spouses, girlfriends, and family members. Similarly, in the civil system, restraining orders have become powerful tools for preventing further violence and protecting battered women and their children. Requiring mediation of such cases casts them back into the shadows instead of sending the strong public messages that battering will be punished as any other crime and that battered women will be protected by the courts. Mediation

threatens the gains that advocates for battered women have made in publicizing these issues and ensuring that the abusers are held accountable for their actions.

Additionally, channeling cases involving women's issues through ADR systems precludes advocates from developing strong precedents in areas of the law involving women. Without adjudication of cases in the adversarial system, advocates have no mechanism for developing the law and no cases to refer back to when trying to stretch the boundaries of the law. Some cases "are better suited for a mechanism that involves fact finding and decision making. This is particularly true where, ultimately, we need to draw bright lines delineating acceptable behavior in the workplace. Sexual harassment is one such case type."¹⁰

Moreover, the use of mediation could actually cause women to lose some of the legal ground that they have gained. As the Honorable Harry Edwards, Chief Judge of the United States Court of Appeals, District of Columbia Circuit, has noted, "There is a real danger . . . that these new rights will become simply a mirage if . . . 'family law' disputes are blindly pushed into mediation."¹¹ For example, many states' custody laws now require that courts consider evidence of domestic violence when making custody and visitation determinations. Some of these laws prohibit an award of custody or even unsupervised visitation to a parent who has been abusive to the other parent. But mediators often push parties toward joint custodial agreements, seeking compromise without considering the inability of the parties to work together given the violence that looms over their relationship. These same mediators may tell a battered parent that her unwillingness to accept joint custody "may result in an award of custody to the other spouse as the 'friendlier' parent."¹² Given the overwhelming number of unrepresented women in family law cases and some mediators' failure to inform the parties about the law, the battered woman who enters mediation might never know that she has the right to oppose a joint custodial arrangement based on the history of abuse. She might actually believe that she risks losing her child if she does not accept a joint custody agreement. The pressure to accept a joint custodial arrangement ignores the advances in the law that protect battered women, and provides a powerful example of how mediation can deprive women of their hard-won rights.

Finally, mediation encourages, and in a sense, demands, that the parties "compromise in order to develop a solution."¹³ But in some cases, and about some issues, there should be no compromise. Mediation of some categories of cases deprives women of the clear societal sanction that should accompany certain types of behavior. In mediation, a party is required to concede points in the interests of reaching an agreement. In domestic violence and sexual harassment cases, however, compromise means accepting part of the blame for the abuser's behavior. This is blame that the victim does not deserve and guilt that she may be actively working to alleviate through counseling in order to cope in the aftermath of the abusive treatment. Moreover, it is blame that the perpetrator has been trying to convince the victim was hers all along. If the victim had only listened more carefully, if she had dressed differently, if she had kept quiet, if she had acted more "feminine" or "womanly"—if she had done all of the things that the abuser wanted her to do, she would not have had to suffer. "Pressure for the victim to accept at least partial responsibility for this illegal conduct can only be eliminated by using the law to protect her rights and to punish the transgressor."¹⁴

The suggestion that mediation be used in "simple" or acquaintance rape cases highlights all of these problems.¹⁵ Mediating acquaintance rape cases because of the legal system's failure to treat such rapes as seriously as stranger rapes cedes the legal argument that, in fact, rape is rape regardless of the relationship between the parties. All rapes should be vigorously prosecuted; all rape victims are entitled to the process of the criminal system. Pushing rape victims towards mediation rather than prosecuting acquaintance rape cases also deprives those seeking to enforce rape laws of valuable precedents to use in their struggle to hold acquaintance rapists criminally liable for their actions. Moreover, acquaintance rape is beginning to be treated much more seriously within the legal system; diverting such cases to mediation at this point risks losing the gains in the law that have been achieved. Finally, shunting acquaintance rape into mediation blunts the message that rape is wrong, that it is behavior for which there is no excuse. The focus on "help[ing] the parties to accept the event by allowing the parties to fully express negative emotions about the dispute" and

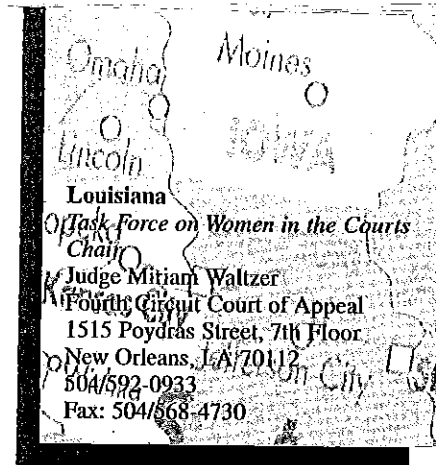
"help[ing] the parties to produce an agreement for the future that both parties can accept,"¹⁶ ignores the reality that one party has engaged in criminal behavior; that one party has violated the other party; that one party's actions were simply wrong and are deserving of societal sanction.

Participants and Gender Bias

Mediation is inappropriate in cases where there is a clear power imbalance or where there is a societal stake in developing the law through the adversarial process. In a wide range of other types of disputes, however, mediation can also work to the disadvantage of women if the players in the process are not sensitive to issues of gender bias. This section considers how the participants in the mediation process contribute to the disadvantaging of women.

Mediators. Perhaps no one in the system has as great an impact on the process of mediation as the mediator. "The mediator helps the parties define the issues, generate potential solutions, validate feelings, and, in some cases, confront reality."¹⁷ The relative comfort levels of the parties and their sense that they are bargaining within an equal power structure hinges on the mediator's ability to create such a feeling in the minds of the parties and to remedy power inequities between the parties.

The sensitivity to the treatment of women's issues in mediation depends in large part on the sensitivity of the mediator to women's concerns. Just as minority litigants bring different perspectives, values, and cultural histories to the mediation table,¹⁸ women have issues and insights that are unique to their gender that mediators should understand and appreciate. The



potential for gender bias exists in both male and female mediators; all need training to perceive and address how their notions about women impact their ability to conduct fair mediations. Although the mediator strives to create a neutral environment within which to mediate, the mediator's own perspectives and biases will necessarily color how he or she perceives the positions of the parties. For example, a mediator who is a sexist might not appreciate the economic consequences of divorce for the woman, and may believe that her property and support demands are unreasonable as a result. A sexist mediator may believe that behavior that a woman experiences as sexual harassment is actually good-natured teasing and push her to back down from her position. A mediator who embraces traditional gender roles might not see why the failure to hire available female contractors or construction workers is a form of gender-based employment discrimination, which could color his or her handling of the mediation. All mediators should be thoroughly trained on gender and cultural issues to ensure that biases are not distorting the mediation process.

Mediators must take special precautions in cases involving domestic violence. Whether the mediator believes that domestic violence cases should never be mediated, or can be mediated with special safeguards in place, he or she must first be able to screen for and identify cases involving abuse. "As an essential first step, mediators must learn that violence against women is common, frequent, and pervasive in our society."¹⁹ Mediators must understand that the dynamics of domestic violence may render the victim unable to mediate from a position of equal strength. Mediators should explicitly question all mediation participants to determine whether domestic violence is a factor in the relationship and should seek to provide a balance of power if the mediation goes forward. They must also acknowledge that in some relationships, they will be unable to rectify the power imbalance between the parties and that, therefore,

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Maine
The Commission on Gender Justice and the Courts disbanded after presenting its report in December, 1996. Implementation was assigned to the Performance Council, a group already in existence in the courts.

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some cases should not be mediated at all. Mediators must remember that "[v]iolence and coercion cannot be mediated,"²⁰ and consequently they should not try to resolve domestic violence issues through mediation. Likewise, mediators should not be resentful of the victim's mistrust of a

process that requires her to face her batterer. Oftentimes, mediators ask, "Why are you frightened?" and claim that "I will protect you," but the battered woman knows that few have lived up to that promise.²¹ How crucial is it for mediators to acquire this knowledge? "When mediators cannot rec-

ognize and respond to domestic violence, they may literally be jeopardizing their clients' lives."²²

Lawyers. For many lawyers, sending a client to mediation means an opportunity to take a break from a difficult or demanding case. Nonetheless, lawyers have a role to play in the mediation process and should not abandon their clients in mediation. In fact, the lawyer's failure to be involved in the mediation process can produce especially adverse results for some clients.

Many unseasoned litigants do not understand what ADR is, how it works, and what their rights and responsibilities are within the process. It is the lawyer's job to explain the process thoroughly to the client so that the client can make an informed decision as to whether she wants to engage in mediation. Especially in cases where mediation may be inappropriate, as with those discussed above, the lawyer has a responsibility to explain why the client might find mediation uncomfortable or untenable. That mediation is mandatory in some cases does not relieve the lawyer of his or her duty to counsel the client. Simply accepting that all divorce cases must be mediated, for example, ignores the lawyer's obligation to ensure that clients who have been or are currently in abusive relationships understand the process and are willing to go forward with it. Lawyers, like mediators, should examine their cases to determine whether mediation is appropriate and must understand the dynamics of gender and power in order to counsel their clients effectively.

Similarly, lawyers have the opportunity to protect their clients within the process. Clients who have been battered, or who are naturally shy, inarticulate, or unassertive, may find themselves particularly lost in a mediation environment, unable to voice their concerns or defend their positions. The lawyer "can potentially protect clients in a mediation both by speaking on their behalf and also, in terms of perception, by effectively standing between the client and the opposing party or attorney."²³ Disempowered women engage lawyers specifically because they are seeking a voice within the legal system.

The lawyer's opportunity, and indeed his or her obligation, to serve as that voice is not suspended when the client enters mediation. Finally, lawyers fail their female clients when they push them to accept mediation

agreements that do not meet their needs or achieve their goals. Lawyers who accept prevailing gender stereotypes may fail to understand what their clients are hoping for in a settlement. They must take care to listen to and really hear the goals and the needs of their clients, without allowing their biases to mute the client's voice. A lawyer who believes that all women value motherhood may work harder to retain custody for his client to the exclusion of all other outcomes and may push the client to accept an agreement that undermines her other goals (like obtaining sufficient child support). The client, believing that the lawyer is advocating for the settlement based on his legal knowledge, rather than his or her stereotypical perspective, may accept the settlement despite her belief that she is entitled to a greater share of marital assets or a larger child support award. Similarly, a lawyer representing a female client in any case where her sexual history could be raised might encourage her to settle for a lesser

amount rather than try her case, valuing the maintenance of her "good reputation" over the compensation for the real harm done to the client. Needless to say, depending on the client, these settlements might, in fact, inure to the client's best interests. The point is that lawyers who push such settlements without understanding how their biases affect their perceptions of agreements are doing a disservice to their female clients. Lawyers, too, need to recognize gender bias and understand and counteract its impact on their practices.

Women Litigants. Mediation will rarely provide an opportunity to reach a fair settlement for a subgroup of women. For some women, as already discussed, the dynamics of power and control that have framed the relationships at issue make mediation from a position of equality nearly impossible. Other women perceive themselves as lacking equal bargaining power as a result of their internalization of traditional notions of male privilege and a woman's

place. For these women, thinking of themselves as equals, asserting themselves strongly, and insisting on putting their needs before those of others is taboo. Their inability to perceive themselves as powerful in their daily lives robs them of their actual power in mediation, and therefore, their ability to bargain equally. Whether mediating the damages in a personal injury case, the amount of rent due to a landlord, or the provisions of repayment in a small claims case, these women will not be served well by the process because of their lack of empowerment.

Moreover, the cooperative nature of mediation reinforces the tendency of women who value the maintenance of relationships over individual aspirations to avoid conflict and to achieve consensus. When women bargain cooperatively and men competitively, women are almost always sure to lose.

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OCTOBER				
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Court Management for Judges and Court Administrators	Newport, RI	October 29 - November 3	1 week	D
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Domestic Violence	Nashville, TN	November 5-10	1 week	MJS, D, G, S
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Civil Mediation		November 12-17	1 week	A, C, D, G, S
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Lines) are two popular examples. Dial up account users who switch to a "nailed up" connection may notice dramatic changes in Internet access patterns. When it only takes a second or two to access the Internet, instead of a minute or so, it frequently becomes easier to find answers on the Internet than to use a hardcopy reference book that is near your desk. Consumers with nailed up connections will eventually find it easier to access a lawyer through the Internet than through traditional means like the Yellow Pages.

Portal. A Website that a large number of users select as their preferred Internet entry point. Many of the major search engines, like Excite, www.excite.com, have tried to become portals by adding directories, free e-mail, maps, discussion groups around various themes, and so on. A Vertical Portal, sometimes called a "vortal," is a portal targeted at a particular industry or interest group. Findlaw, www.findlaw.com, tries to be the premier vertical portal for the legal profession.

Sticky. The quality of a Website that makes it inconvenient for users to stop visiting it. For example, Websites that provide free e-mail may encourage users to store address book data on the Web, because the investment of time necessary to recreate this information on another site is impractical.

Suboptimization. Settling for less than the highest quality product or service available. The Internet frequently makes this attractive for consumers. For example, the *Washington Post's* Legi-Slate congressional information service was widely respected for its high quality, but it recently went out of business. Suboptimization is

believed to have been one key contributing factor: many consumers elected to save money by using free Internet sites instead of paying expensive fees. Some analysts believe that suboptimization will result in many consumers of legal services opting to purchase legal services through Internet sites like Arthur Miller's Americounsel.com, <http://www.americounsel.com>, instead of retaining conventional law firms.

Unbundling. Sometimes known as "discrete task representation." Giving clients the option to purchase specific services, without necessarily requiring them to enter into a full lawyer-client relationship. The Internet makes unbundling more attractive as a business model. ABA Model Rule of Professional Conduct 1.2(c) provides: "A lawyer may limit the objectives of the representation if the client consents after consultation."

Conclusion

The Desktop Lawyer software is only one of many technology-driven challenges that the legal profession will face over the next decade. In my view, other new business models, some of which are hinted at in the definitions above, will probably be even more serious challenges in the long run. It will not be easy to work out sensible strategies for dealing with the changes that technology will bring. The first step toward understanding the issues is to keep up with the new terminology. A Webpage with hyper-text links to all the Websites mentioned in this article and other definitions of technical terms relevant to the legal profession is available at: www.netlawtools.com/articles/.

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Dispute Resolution

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Some have argued that despite its focus on working through the parties' emotions concerning their dispute, mediation discourages the expression of anger.²⁴ Mediation seeks instead to forge areas of agreement between the parties; anger is seen as counterproductive where consensus is the goal. But the point at which mediation is beginning may be the first time that the woman involved in the mediation has been able to express her anger at her spouse, her boss, or her adversary. Coupling the traditional societal proscription on female anger with mediation's devaluation of anger may cause mediators to silence women expressing these emotions for the first time, and may ultimately preclude women from achieving their goals through mediation.

Judges. Judges, too, bear responsibility for ensuring that mediation treats women fairly. First, judges, like other actors in the system, must be sensitive to the potential for gender bias not only in their courts but also within the systems to which they are referring female litigants. Training on women's issues and specifically on the problems that mediation poses for some women is essential.

Additionally, judges should maintain oversight of the mediation programs that operate within court systems. "[A]n effective judge with a leadership role in the court system is in the best position to coordinate both the policies and procedures required for operation of a successful [ADR] program."²⁵ If judges require that mediators be properly trained, fairly represent the population of potential litigants, and screen for issues of domestic violence and other potential power problems, the problem of gender bias in these systems can be alleviated. Judges need not reflexively refuse to send certain kinds of cases to mediation, but can thoughtfully make determinations as to whether the litigants that they see before them will be fairly served by the mediation process. Moreover, judges should be open to the possibility that some women litigants will be unwilling to mediate and that their unwillingness stems in part from the issues discussed above.

Conclusion

Alternative dispute resolution, with its promise of quicker, cheaper, and more empowering interactions with the legal system, is mandated in a number of contexts where women have much at stake. Although some women will be able to mediate effectively and some men involved in mediation will be sensitive to the issues discussed in this article, certainly the potential for gender bias within the mediation process is great. Failing to ensure that mediation not only treats women fairly, but meets their unique needs, will foster alienation from alternative forms of dispute resolution and ultimately, from the legal system itself.

Notes

1. Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 574 (1995); see also Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 37 (1993) ("Power based on gender is not merely a difference in physical strength. It can be grounded in the emotional, psychological, or financial hold one person has over another.").
2. Hughes, *id.* at 554.
3. Douglas D. Knowlton & Tara Lea Muhlhauer, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track*, 70 N.D. L. REV. 255, 268 (1994).
4. Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION COURTS REV. 335, 348 (1999).
5. Interview with Lois Kanter, February 23, 2000.
6. Maxwell, *supra* note 4, at 337 (citations omitted).
7. *Id.* at 348-49.
8. Irvine, *supra* note 1, at 38.
9. *Id.* at 27.
10. *Id.* at 28.
11. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 680 (1986) (cited in Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 873 (1999)).
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