MEDIATION: THE “GIRLY” LITIGATION?

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Abstract

In this article we argue that mediation, as a process, is gendered. Although it is not a simplistic, binary opposition, mediation is primarily gendered female and litigation is primarily gendered male. As a result of this female gendering, mediation is devalued as compared to litigation in North America. In order to demonstrate this, in the first part of our article we focus on (i) the goals, (ii) skills, and (iii) language of mediation. When they are compared with litigation’s goals, skills, and language, the gendering of both processes can be identified and the resulting devaluation of mediation observed. The goals, skills, and language of mediation are not simply “female traits” that come naturally to some individuals based on gender. They are real and difficult skills to master, and therefore mediation education is implicated. In the second part of our article we focus on ways to improve the mediation education experience in law schools. We make some recommendations for mediation pedagogy and consider how law professors can better teach mediation so that law students understand and value the process. We conclude by arguing that mediation will continue to be devalued, especially as compared to litigation, until the process is revalued and mediators’ contributions are appropriately evaluated. By demanding an assessment of mediation success that is not constricted by notions of “female” and “male”, both the profile and valuation of mediation and mediators will increase.
1. Introduction & Background

Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.\(^1\) Both mediation and litigation require a neutral third party to move the disputants toward an outcome. Litigators focus on the law and ask a decision-maker to render a binding, public decision. Mediators assist parties to find their own consensual, private, mutually beneficial resolution. In this article we argue that mediation, as a process, is gendered. Although it is not a simplistic, binary opposition, mediation is predominantly gendered female and litigation is predominantly gendered male.

We do not wish to perpetuate stereotypes. However, for ease of reference, the shorthand of “female” and “male” has been employed throughout this article. We are fully cognizant of the limitations of using “female” and “male” as shorthand terms of description.\(^2\) However, we are buoyed and guided by third wave feminist energy that understands


\(^{2}\) We are also fully aware of feminist critiques of mediation. Very valid concerns about the capacity of mediation to protect women’s interests have been articulated. For example, in the family mediation context it has been argued that mediation can perpetuate inequality because some women, motivated by a desire to ensure custody, will give up rights they are legally entitled to. Or, that women in traditional marriages have unequal bargaining strength so they should not be in mediation, but rather, protected by advocates in the litigation system. The feminist critique of mediation is important, but it is not what our paper is about. For more see: Trina Grillo, “Mediation Alternative: Process Dangers for Women” (1992) 30 *Family Court Review* 415; Deborah Kolb, “Too Bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years” (2009) 25 *Negotiation Journal* 515; N. Nelson et al., “Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators’ Perceptions of Mediation” (2010) 26 *Negotiation Journal* 287; L. Babcock & S. Laschever, *Women Don’t Ask: Negotiation and the Gender Divide* (Princeton University Press, 2003); L. Stamato, “Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution” (1992) 9 *Mediation Quarterly* 375; and C. Watson, “Gender versus Power as a Predictor of Negotiation Behaviour and Outcomes” (1994) *Negotiation Journal* 117.
the need to make complex ideas understandable and accessible. So, despite the fact that a contradictory response can always be found for every generalization about “female” or “male” and “mediation” or “litigation”, we stand by our argument that mediation is primarily gendered female and litigation is primarily gendered male. How these two processes operate is gendered; what occurs privately – mediation – is feminized, and litigation, in the public sphere, is masculinized. Often, mediation is compared to and valued against litigation, and is found wanting. We argue this is because the value attached to each process is informed by the gender assigned to the particular process.

Mediation, whether a field, an occupation, a calling, or a profession, is gendered female and therefore devalued within North American society. In order to demonstrate this, in the first part of our article we focus on the (i) goals, (ii) skills, and (iii) language of mediation. When they are compared with litigation’s goals, skills, and language, the gendering of both processes can be identified and the resulting devaluation of mediation observed. The goals, skills, and language of mediation are not simply “female traits” that come naturally to some individuals based on gender. They are real and difficult skills to master, and therefore mediation education is implicated. Because our writing collaboration came out of the professor-student relationship, in the second part of our paper we focus on ways to improve the mediation education experience in law schools. We make some recommendations for mediation pedagogy and consider how law professors can better teach mediation so that law students understand and value the process. We conclude by arguing that mediation will continue to be devalued, especially as compared to litigation, until the process is revalued and mediators’ contributions are properly evaluated. By demanding an assessment of mediation success that is not constricted by notions of “female” and “male”, both the profile and valuation of mediation and mediators will increase.

For many years it was widely accepted that gender was an achieved status which one “constructed through psychological, cultural, and social means,” whereas sex was dictated by biology. Understanding gender as an achieved status became problematic upon the realiza-

3. Melissa L. Nelken, Negotiation: Theory and Practice, 2nd ed. (Newark, NJ: LexisNexis Matthew Bender & Company, 2007) at 442 notes that another convenient method to ensure that women’s work is undervalued is the division of men and women into separate spheres of work to ensure that their relative skills and contributions cannot be effectively compared and evaluated using the masculine measuring stick.

tion that gender was not simply “achieved” by a specific age, only to remain stagnant forever. Judith Butler worked extensively not only to destabilize what people considered gender, but also what we understand as sex. Butler challenged the idea that sex was an appropriate natural categorization and attempted to destabilize what people considered to be the most basic distinction between women and men. She pointed out the difference between “expressively performed” and “performatively created” notions of sex and gender. Butler argued that gender was not simply within us and performed for an audience, but was actively created through the performance itself. This means gender is constructed inside and outside oneself continuously. Individuals often perform gender to conform to society’s ideas of “male” and “female.” Candace West and Don Zimmerman argue that an individual “doing” gender was based on surrounding social guides rather than simply acting out an inherent gender from within. West and Zimmerman discuss the ways in which doing gender is an “ongoing activity embedded in everyday interaction” allowing individuals to use specific behaviours to “mark or display gender,” which can then be evaluated by others based on notions of appropriate behaviours for each gender. It is now commonly accepted that “[g]ender is not a rigid or reified analytical category imposed on human experience, but a fluid one whose meaning emerges in specific social contexts as it is created and re-created through human actions.” We accept this understanding of gender – that it is produced and performed by individuals in interaction with others.

Because we are interested in mediation, we are concerned with the production of gender in the practice of mediation. Therefore, we turned to Joan Acker’s work. Acker has written extensively about the need to understand the gender of workers, but also the gender and sexuality of the workplace itself. She states that the very concept of “a job” is gendered as it “already contains the gender-based division of labor and

6. Ibid.
7. Ibid.
9. Ibid.
10. Ibid.