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# Mandatory ADR Notice Requirements: Gender Themes and Intentionality in Policy Discourse

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## **Mandatory ADR Notice Requirements: Gender Themes and Intentionality in Policy Discourse**

**Becky L. Jacobs**

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# Mandatory ADR Notice Requirements: Gender Themes and Intentionality in Policy Discourse

Becky L. Jacobs\*

*A number of regulatory bodies impose a mandatory duty on lawyers to notify their clients of alternative forms of dispute resolution in connection with any engagement involving a conflict, potential lawsuit, or lawsuit. The propriety of such a requirement is subject to an on-going, and increasingly predictable, debate focused upon the scope of the duty and any exemptions therefrom and upon its intrusiveness vis-à-vis lawyer autonomy. This article reviews the relevant ethical rules and the debate inspired thereby; considers the gender-related themes present and, more importantly, absent in this debate; and raises questions about the possible pragmatic and policy-related impacts and relevance of these themes.*

## CONTENTS

I.	Introduction .....	2
II.	The “Rules” and The “Duty” .....	3
III.	Gendered Differentials in ADR? .....	12
IV.	Concluding Thoughts - Gender Themes and Intentionality Vis-à-Vis Mandatory Notice of ADR Options .....	28

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## I. INTRODUCTION

Alternative dispute resolution, or “appropriate” dispute resolution as many refer to it (“ADR”), has become an essential and permanent part of the legal architecture.<sup>1</sup> Advocates maintain that the processing and resolution of disputes can be improved quantitatively, qualitatively, more democratically,<sup>2</sup> and with less of an emotional toll on everyone involved, with mediation, arbitration, and other forms of ADR. Law students, lawyers, and non-lawyers all are training to become neutrals, and to act as advocates, in ADR proceedings.<sup>3</sup>

A number of regulatory bodies impose a duty on lawyers to notify their clients of alternative forms of dispute resolution in connection with any engagement involving a conflict, potential lawsuit, or lawsuit. The propriety of such a requirement is subject to an on-going, and increasingly predictable, debate focused upon the scope of the duty and any exemptions therefrom and upon its intrusiveness vis-à-vis lawyer autonomy.

Absent from this debate is any consideration of the claims that have been made regarding the impact that this duty might have on women or other often subordinated parties. The controversy regarding this ethical obligation, mandatory or hortatory, at a minimum, fails to address, and, at worst, ignores, the critiques that have been expressed about the potential dangers that informal ADR processes may pose for women, racial and ethnic minorities, the poor, and others with “power imbalances” in particular disputes as well as in society generally.<sup>4</sup>

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mediation process in particular to bring forth, in the most startling ways and at the most unexpected times, that last remaining reserve of hope, trust, affection, or optimism to inspire parties to resolve their conflicts.

1. See Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29, 29 (1999). See also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2689-90 (1995).

2. See, e.g., Carrie Menkel-Meadow, *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference*, LAW, TECHNOLOGY AND ACCESS TO JUSTICE (Sept. 22, 2016, 10:20 PM), <http://law-tech-a2j.org/odr/is-odr-adr-reflections-of-an-adr-founder-from-15th-odr-conference/>.

3. See Kristin L. Fortin, *Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 617 (2009).

4. See Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1058-61 (1996).

This article reviews the relevant standards and ethical rules and the debate inspired thereby; considers the gender-related themes present and, more importantly, absent in this debate; and raises questions about the possible pragmatic and policy-related impacts and relevance of these themes.

## II. THE “RULES” AND THE “DUTY”

As ADR became a more recognizable landmark on lawyers’ philosophical road maps,<sup>5</sup> many commentators began to suggest that the ABA Model Rules of Professional Conduct (“ABA Model Rules”)<sup>6</sup> address the need for ADR consultations with clients.<sup>7</sup> The topic has been the subject of intense debate since the Ethics 2000 Commission hearings,<sup>8</sup> with some arguing that the existing language in the Rules creates an implicit obligation<sup>9</sup> to advise clients regarding ADR and others countering that this argument is “far-fetched.”<sup>10</sup>

Noted scholar Frank E.A. Sander, Jr., is among those who have argued that sections of the Rules create an implied obligation for lawyers to advise clients on the use of ADR. Professor Sander suggests that, while not stated explicitly, the Model Rules require an attorney to advise her or his client of ADR options. Others agree that “[a]ttorneys may have an ethical obligation to advise clients of ADR

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5. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO L. J. 29, 45 (1982) (“The lawyer’s standard philosophical map is useful primarily where the assumptions upon which it is based, adversariness and amenability to solution by a general rule imposed by a third party, are valid . . . . The problem is that many lawyers, because of their philosophical maps, tend to suppose that these assumptions are germane in nearly any situation that they confront as lawyers. The map, and the litigation paradigm on which it is based, has a power all out of proportion to its utility.”).

6. MODEL RULES OF PROFESSIONAL CONDUCT (Am. Bar Ass’n 2016), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) [hereinafter ABA Model Rules]. The Model Rules were amended in February 2002, August 2003, August 2012 and February 2013. These Rules have been adopted in whole or in significant part by forty-two jurisdictions. See Frank E.A. Sander, *Should There be a Duty to Advise of ADR Options? Yes: An Aid to Clients*, 76 ABA J. 50, 50 (Nov. 1990) [hereinafter Sander].

7. Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 239-41 (2004).

8. *Id.* at 240-43.

9. *Id.* at 244.

10. *Id.* at 244-45 (quoting Benjamin Bycel, in Benjamin Brand, *Ethical Obligations to Inform Clients of the ADR Option*, in *How ADR WORKS* 17, 19 (Norman Brand ed., 2002)).

methods.”<sup>11</sup> In a comprehensive and thoughtful paper written for the ABA Dispute Resolution Section, another analyst argues that “[i]t is only if one posits that ADR is outside the normal scope of legal practice”<sup>12</sup> that one would not consider ADR consultation to be part of an attorney’s normal consultation duties.

Five specific sections of the Model Rules have been identified as sources for this implied duty to inform. The first, Rule 1.1, with the heading “Competence,” states in pertinent part: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Competence arguably encompasses advice to clients regarding alternatives to litigation.

Model Rule 1.2(a) is the second. Titled, “Scope of Representation and Allocation of Authority Between Client and Lawyer[,]” this Rule provides that: “A lawyer shall abide by a client’s decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.” As one scholar writes, “under Rule 1.2, clients should have the opportunity to decide if an ADR method would best serve their needs.”<sup>13</sup> Model Rule 1.2 also requires attorneys to give clients adequate information to understand and accept or reject a settlement proposal. Given that ADR processes are often intrinsic to settlement, attorneys would need to explain the risks and benefits of ADR in order for clients to fully understand and evaluate settlement options.

The third, Model Rule 1.4(b), requires that a matter be explained sufficiently to enable a client to make informed decisions regarding representation. Titled the “Communications” rule, it also is seen as imposing a duty on lawyers to discuss dispute resolution options with clients.<sup>14</sup> “[I]f a lawyer fails to present an accurate picture of ADR to clients, he may risk a claim that he has not adequately ‘consulted’ with the client.”<sup>15</sup>

A duty to inform a client about ADR may also be implicit in the Model “Advisor” Rule 2.1, which provides that, “[i]n rendering advice, a lawyer may refer not only to law, but to other considerations such

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11. Monica L. Warmbrod, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 809 (1996-97).

12. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 458 (2000).

13. See Warmbrod, *supra* note 11, at 811.

14. See Breger, *supra* note 12, at 433-36; see also Warmbrod, *supra* note 11, at 811-12.

15. Warmbrod, *supra* note 11, at 811.

as moral, economic, social and political factors, that may be relevant to the client's situation." According to at least one scholar, Rule 2.1 may require lawyers to go beyond advice about legal factors to advise clients about ADR options consistent with their interests.<sup>16</sup>

Finally, Model Rule 3.2, indexed under the title "Expediting Litigation," may also speak to the issue of whether attorneys are required to advise clients about ADR options.<sup>17</sup> This Rule requires lawyers to "make reasonable efforts to expedite litigation consistent with the interest of the client."<sup>18</sup> As many lawyers believe that ADR options such as mediation result in earlier settlements and save time for both clients and attorneys, the efforts of an attorney who fails to consider alternative processes in a litigated case might be found to be unreasonable in violation of Rule 3.2.<sup>19</sup>

Despite these opinions regarding the duty to inform clients about less formal dispute resolution alternatives pursuant to the ABA Model Rules, the plain language of the Rules says nothing about ADR.<sup>20</sup> As one critic has so colorfully noted, "[t]he notion that ADR is implied in the terms of these Rules . . . is no more than wishful thinking on the part of some ADR supporters."<sup>21</sup>

Moving beyond the more academic debate, individual jurisdictions have addressed the issue more specifically. The normative trend is for the "duty to discuss ADR with clients" to appear in a multiplicity of legal vehicles within particular jurisdictions, including state professional creeds, ethical codes or norms, court rules, or statutes. These vehicles tend to adopt one of four general approaches vis-à-vis lawyer conduct: (1) lawyers, or courts, are explicitly mandated to counsel clients about appropriate ADR processes; (2) lawyers are explicitly encouraged to inform their clients; (3) lawyers are advised

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16. *Id.* at 812.

17. *See* Breger, *supra* note 12, at 436.

18. Model Rule 3.2.

19. *See, e.g.,* Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 Mo. L. REV. 473, 515, 525 (2002) (responding to a survey, attorneys reported a belief that "ADR and mediation can save time and money"). The Pennsylvania Bar Association has opined that, "[i]f the lawyer fails to convey the mediation proposed to the client, he may not charge the client the expense of trial preparation if these expenses are incurred as a result of the lawyer's failure to communicate the offer." Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 90-125 (1991) (referencing Model Rules 1.2(a), 1.4, and 1.7, as well as 3.2).

20. *See* Benjamin J. Bycel, *Is There an Ethical Obligation to Inform Clients of ADR Options?*, 27 Vt. B.J. 49, 49 (2001).

21. *Id.* at 49.

that it might be necessary to discuss ADR; or (4) lawyers must infer or derive an implied duty regarding client ADR consultations.<sup>22</sup> The following section provides an overview of the scope of any notice obligation in various jurisdictions.

The first approach, an explicit, mandatory duty to counsel clients about ADR alternatives, provides the most clarity for lawyers. The following states have such a duty: Connecticut, Georgia, Massachusetts, Minnesota, Missouri, Texas, and Virginia.<sup>23</sup>

Oregon, California, and Massachusetts also adopt an “explicit, mandatory duty” approach, but with a twist. For example, an Oregon statute requires that *courts* rather than *lawyers* provide all civil litigants with written information about the mediation process and mediation opportunities in the courts.<sup>24</sup> Similarly, courts in California must make information about the potential advantages and disadvantages of ADR and descriptions of ADR processes available to plaintiffs in all general civil cases.<sup>25</sup> California civil plaintiffs then must serve a copy of the ADR information on each defendant with the complaint.<sup>26</sup> Several local courts in California also have instituted standards mandating that attorneys provide their clients with ADR information at “the earliest available opportunity.”<sup>27</sup>

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22. Ariel M. Kiefer & Stanley A. Leasure, *Arkansas Lawyers: An Ethical Obligation to Give ADR Advice?*, 50 ARK. L. 32, 32 (2015).

23. See RULES & REGS. OF THE STATE BAR OF GA. R. 3-107, ETHICAL CONSIDERATION 7-5 (“A lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation . . .”). The Massachusetts Supreme Court mandates that attorneys discuss ADR with their clients, while the Massachusetts Rules of Professional Conduct only suggest that attorneys help clients make informed decisions by discussing trial or negotiation strategy. MASS. SUP. JUD. CT. R. 1:18, DISP. RESOL. R. 5 (2016); MASS. SUP. JUD. CT. R. 3:07, MASS. R. PROF. COND. R. 1.4 cmt. 5 (2016). See also MINN. R. 114.03(b) (2010); MO. S. CT. R. 17.02(b) (“Counsel shall advise their clients of the availability of alternative dispute resolution programs.”). See also Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 246-47 (2004) (discussing Virginia’s mandatory obligation for a lawyer to advise clients about appropriate ADR by adding comments to Model Rules 1.2, 1.4, and 2.1).

24. See OR. REV. STAT. § 36.185 (1997). There does not appear to be any mention of ADR in any of the Rules of Professional Conduct in Oregon.

25. CA. ST. CIVIL RULE 3.221(a).

26. CA. ST. CIVIL RULE 3.221(c).

27. Local Rule 2.61 for the Sacramento Super. & Mun. Cts. (2017) (2.61 ADR Information. Attorneys shall provide their clients with a copy of the Sacramento County Superior Court ADR information package at the earliest available opportunity and prior to completing the Case Management Conference Statement. The ADR information package may be obtained from the Mediation Clerk, 720 9th Street, Room 102, Sacramento, CA 95814 or on the Court’s website at <http://www.saccourt.ca.gov>).



In Massachusetts, not only are court clerks required to make information about court-connected dispute resolution services available to attorneys and unrepresented parties, attorneys too must “provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantages and disadvantages of the various methods of dispute resolution; and certify their compliance with this requirement on the civil cover sheet or its equivalent.”<sup>28</sup>

Pursuant to the second approach to the ADR notice issue, lawyers in the states of Alaska, Arkansas, Colorado, Delaware, Hawaii, Louisiana, and New Jersey are explicitly encouraged, but not mandated, to advise clients about ADR options.<sup>29</sup> Hawaii, in particular, strongly encourages attorneys to address ADR with clients, stating: “A lawyer should raise and explore the issue of settlement and alternative dispute resolution in every case as soon as the case can be evaluated and, if feasible, mediation should be encouraged. Specifically, a lawyer who manifests professional courtesy and civility . . .

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Plaintiffs and cross complainants shall serve a copy of the Sacramento County Superior Court ADR information package on each defendant or cross-defendant at the time the complaint or cross-complaint are served as required by California Rules of Court, rule 3.221.).

28. MASS. SUP. JUD. CT. R. 1:18; DISP. RESOL. R. 5 (2016). The required Counsel Certification Form is available at <http://www.mass.gov/courts/docs/forms/bmc/bmc-counsel-certification.pdf>.

29. See ALASKA R. OF PROF. COND. R. 2.1, cmt. 5 (“a lawyer *should* advise the client of alternative forms of dispute resolution which might reasonably be pursued . . .”) (emphasis added); ARK. CODE ANN. § 16-7-204 (2016) (“An attorney . . . is encouraged to advise his or her client about the dispute resolution process options available to him or her and to assist him or her in the selection of the technique or procedure . . . deemed appropriate . . .”); COLO. R. OF PROF. COND. R. 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”); DEL. R. S. CT. 71(B) (Delaware State Bar Association Statement of Principles of Lawyer Conduct) (“Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution.”); HAW. R. OF PROF. COND. R. 2.1, cmt. 5 (Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.); Louisiana Mediation Act, LA. R.S. § 9:4102 (“Counsel are encouraged to discuss with their clients the appropriateness of using mediation in any civil case pending in the courts.”); N.J. CT. R. 1.40-1 (“Attorneys have a responsibility to become familiar with available [court-provided dispute resolution] programs and inform their clients of them.”).

[a]dvises the client at the outset of the availability of alternative dispute resolution.”<sup>30</sup>

The California Attorney Guidelines for Civility and Professionalism similarly exhort lawyers to “raise and explore with [clients and opposing counsel] the possibility of settlement and alternative dispute resolution in every case as soon possible and, when appropriate, during the course of litigation.”<sup>31</sup>

While Alabama does not appear to have any statewide rules regarding a lawyer’s duty to advise clients about ADR options, specific Alabama federal district court rules, such as those in the Middle District Court, “encourage litigants to consider the salutary benefits of resolving their dispute at an early stage through voluntary mediation.”<sup>32</sup>

Texas and New Mexico have taken the approach of adding aspirational creeds to their regulatory codes of professional conduct.<sup>33</sup> For example, the Texas Lawyer’s Creed states: “I will advise my client regarding the availability of mediation, arbitration and other alternative methods of resolving and settling disputes.”<sup>34</sup> However, as one scholar notes, “[t]he problem with an aspirational statement is that it is just that—aspirational. While lawyers’ creeds certainly recommend the most commendable behavior, they purposefully lack enforcement mechanisms . . . .”<sup>35</sup>

A number of states have adopted the third approach vis-à-vis lawyer conduct, with weaker language in their rules that merely references the possibility that it “may be necessary [for lawyers] to inform clients about ADR alternatives” rather than requiring or even encouraging ADR discussions with clients.<sup>36</sup> The Ethics Committee

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30. Hawaii State Bar Guidelines of Professional Courtesy & Civility Rule 11 (2014).

31. STATE BAR OF CAL., *California Attorney Guidelines of Civility and Professionalism* § 13 (2007), [http://ethics.calbar.ca.gov/Portals/9/documents/Civility/Atty-Civility-Guide-Revised\\_Sept-2014.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf).

32. M.D. Ala. Loc. Rule 16.1(a); *see also* Alternative Dispute Resolution Plan, N.D. Ala., <http://www.alnd.uscourts.gov/sites/alnd/files/forms/ADR%20Plan.pdf>.

33. *See* N.M. R. LAW. CREED (1999); TEXAS LAWYER’S CREED – A MANDATE FOR PROFESSIONALISM II (11) (1989). Breger, *supra* note 12, at 452-53 n.150 (stating that, in addition to Texas, the states of New Mexico, Ohio, and Georgia also have lawyers’ creeds which incorporate similar aspirational language and goals). *See* OHIO R. GOV. B., App. 5, A Lawyer’s Creed (1997).

34. *See* TEXAS LAWYER’S CREED – A MANDATE FOR PROFESSIONALISM II(11), *supra* note 33.

35. Breger, *supra* note 12, at 453.

36. *See* ARIZ. R. OF PROF. COND., E.R. 2.1, cmt. 5 (“when a matter is likely to involve litigation, it may be necessary under E.R. 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation”).

of New Hampshire, for example, appears to adopt this approach, advising that “Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.1. That Comment states that, when a matter is likely to involve litigation, Rule 1.4 may require a lawyer “to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” *This comment may prove important given the overlap of Rules 2.1 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer’s civil liability.*<sup>37</sup>

Other states that fall into this category include: Arizona, Florida, Indiana, Iowa, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia.<sup>38</sup> Additionally, these states refer to client ADR communications in the commentary accompanying the rules rather than within the text of any specific rule. Because the “[c]omments do not add obligations . . . but provide guidance for practicing in compliance with [the rules],” a lawyer’s potential duty to discuss ADR with clients in these states is, at best, a mere suggestion.<sup>39</sup>

A number of states conflate the obligation to notify clients of ADR options with pretrial planning. For example, while not specifically mandating that attorneys advise clients about alternatives to trial, the Illinois Supreme Court requires attorneys to consider the advisability of alternative dispute resolution as well as the possibility

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37. N.H. R. OF PROF. COND. Rule 1.4, Ethics Committee cmt. (emphasis added).

38. See ARIZ. R. OF PROF. COND., E.R. 2.1, cmt. 5; FLA. ST. BAR Rule 4-2.1, cmt. Offering Advice; IND. R. OF PROF. COND., Rule 2.1, cmt. 5; I.C.A. Rule 32:2.1; ME. R. OF PROF. COND., Rule 2.1, cmt. 5; MISS. R. OF PROF. COND., Rule 2.1, cmt. 5; NEB. CT. R. OF PROF. COND. § 3-502.1, cmt. 5; N.C. BAR RULES, Ch. 2, Rule 2.1, cmt. 5; N.D. R. OF PROF. COND., Rule 2.1, cmt. 5; OHIO R. OF PROF. COND., Rule 2.1, cmt. 5; OKLA. R. OF PROF. COND., Rule 2.1, cmt. 5; R.I. SUP. CT. RULES, ART. V, R. OF PROF. COND., Rule 2.1, cmt. Offering Advice; S.C. R. OF PROF. COND., Rule 2.1, cmt. 5; S.D. CODIFIED LAWS Ch. 16–18 App., R. OF PROF. COND., Rule 2.1, cmt. 5; UTAH R. OF PROF. COND., Rule 2.1, cmt. 5; VT. R. OF PROF. COND., Rule 2.1, cmt. 5 (recognizing “the increasingly important role being played by alternative dispute resolution in litigation”); WASH. R. OF PROF. COND., Rule 2.1, cmt. 5; W. VA. R. OF PROF. COND., Rule 2.1, cmt. 5; WIS. SUP. CT. R. 20:2.1, cmt. 5; WYO. R. OF PROF. COND., Rule 2.1, cmt. 5; D.C. R. OF PROF. COND., Rule 2.1, cmt. 5.

39. See Breger, *supra* note 12, at 460.

of settlement during the initial case management conference.<sup>40</sup> Similarly, Maryland and Tennessee attorneys may be required to consider alternative dispute resolution at pretrial conferences.<sup>41</sup>

Montana requires every party to file a "Preliminary Pretrial Statement" that addresses the "feasibility [of] invoking alternative dispute resolution procedures."<sup>42</sup> Nevada's rules, on the other hand, simply state that "pretrial conferences shall include settlement negotiations."<sup>43</sup> ADR case management duties, however, do not necessarily encompass a client consultation requirement because, while pretrial conference settlement discussions may include the judge, they are often between the lawyers and may take place without client input.<sup>44</sup>

Finally, the rules in Kansas, Michigan, and Pennsylvania reflect the fourth "implied in the rules" approach regarding a lawyer's duty to counsel clients about ADR. In these states, attorneys only must convey an ADR proposal by a court or opposing counsel to the client.<sup>45</sup>

As a brief aside, one wonders if the debate as to whether the Rules create an obligation, mandatory or hortatory, for lawyers to advise clients on the use of ADR has become a purely academic one.

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40. See ILL. ST. S. CT. R. 218(a)(6)-(7). But see Thomas E. Spahn, *A Practical Road Map to the New Illinois Ethics Rules*, 35 S. ILL. U. L.J. 27, 50 (2010) (noting that Illinois's most recent Rules of Professional Conduct specifically left out a sentence from the comment to ABA Model Rule 2.1 which explained that a lawyer representing a client may have a duty to inform the client of ADR options).

41. See Breger, *supra* note 12, at 467-68 (citing MD. R. CIV. P. 2-504.1(c)(1) and TENN. R. CIV. P. 16.03(7)).

42. See *id.* at 470 (citing D. MONT. CT. CIV. R. 235-1).

43. See *id.* at 468 (citing NEV. CT. R. 9(B)).

44. See *id.* at 446.

45. See KAN. STAT. ANN. § 60-216 (Supp. 2009) (noting that, during mandatory pretrial conferences, a court may consider and take appropriate action concerning matters such as alternative dispute resolution of the claim in the dispute therefore attorneys should advise clients of this); Kan. Bar Ass'n Prof. Ethics Advisory Comm., Informal Op. 94-01 (1994) ("When a lawyer's professional judgment indicates ADR is a viable option, the lawyer should discuss that option with the client, whether or not the issue is raised by opposing counsel or the court" and "[i]f an ADR technique is proposed by opposing counsel or the court, the lawyer must advise the client of the benefits and disadvantages of the ADR techniques proposed."); State Bar of Mich., Standing Comm. on Prof. & Jud. Ethics, Op. RI-255 (1996) ("[I]f counsel for the opposing party offers to resolve the pending dispute through alternative dispute resolution forums, a lawyer is required to convey that offer to the client."); Penn. Bar Ass'n., Comm. on Legal & Prof. Responsibility, Informal Op. 90-125 (1991) (stating that Rule 1.2 and Rule 1.4, read together, obligate a lawyer to inform a client when the opposing side suggests mediation); see Breger, *supra* note 12, at 464-65 (discussing Kansas, Michigan, and Pennsylvania as states that have an implied duty to inform clients of ADR).

Given the ubiquity of ADR processes in most law practices, a lawyer's failure to consider or discuss alternatives to trial with a client certainly would at least raise the specter of legal malpractice. Even as early as 1968, one court already had concluded that an attorney has an obligation to a client "to attempt to effectuate a reasonable settlement of the . . . action where the general standards of professional care [require] that the most reasonable manner of disposing of the action was by settlement."<sup>46</sup>

Assuming for the moment that lawyers do have some level of responsibility to inform clients of ADR options, what would the scope of such a duty be, and how would lawyers discharge it? Regarding scope, such a duty may be understood to be either specific or more general. A more specifically-envisioned duty might require lawyers to conduct detailed analyses of their clients' cases in order to recommend a particular DR option to their clients.<sup>47</sup> A more generalized duty might only require that lawyers inform clients that there are ADR options available to explore.<sup>48</sup> This general option, however, would not appear to be sufficient to permit clients to make informed decisions regarding the representation.<sup>49</sup>

Even if a generic discussion or presentation of ADR options might suffice for legally sophisticated clients, should communications not always be tailored to specific clients? If the goal is to maximize client awareness and autonomy (rather than litigation efficiency), generic presentations arguably would be inadequate for certain clients or client groups. Given the rigorous debate over the existence of this duty, the absence of voices advocating on behalf of client populations that might be affected in particular or negative ways is surprising and disturbing.

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46. *Lysick v. Walcom*, 258 Cal. App. 2d, 136, 151 (1968). This trend has continued. *See, e.g.*, *Attorney Grievance Comm'n v. Gisriel*, 409 Md. 331, 974 A.2d 331 (2009) (finding attorney to be in violation of Rule of Professional Conduct 1.4 for failing to discuss the meaning and consequences of the mediation clause in a contract with his clients).

47. *See Breger, supra* note 12, at 451 (citing Edwin H. Greenebaum, *Lawyers' Agenda for Understanding Alternative Dispute Resolution*, 68 IND. L.J. 771, 788 (1993)).

48. *See id.* at 439.

49. As space does not permit a nuanced discussion of the scope of any ethically-, or otherwise, required mandatory ADR notice or a detailed exploration of possible practical options for its provision, the author plans a future article on the topic.

### III. GENDERED DIFFERENTIALS IN ADR?

Assuming that most lawyers either fulfill their duty to, or voluntarily, discuss ADR processes with their clients, it is alarming that the debate surrounding the imposition of any such mandate has not involved a consideration of the possible adverse consequences of these alternatives for women in certain circumstances as well as for all potentially vulnerable parties<sup>50</sup> or between parties of significantly unequal power.<sup>51</sup>

This section will address two particular themes that have emerged regarding the experience of women as represented parties in ADR, with a focus on the mediation process. The first theme relates to a negative *process-oriented* gender differential that may arise when women participate in the more informal ADR processes. The second theme pertains to negative gender differentials in *outcomes or results*.

With regard to the first theme, focusing on a negative process-oriented gender differential, many scholars, practicing mediators, and lawyer-advocates believe that ADR, and mandatory mediation more specifically,<sup>52</sup> may fail women and weaker, less assertive parties under certain circumstances.<sup>53</sup> For example, this process danger

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50. "Vulnerable" in this context encompasses a broad set of dimensionalities. For example, at least one commentator has argued that a lawyer's mandatory ADR notice may presents risks to medical malpractice defendants due to the negative consequences of the public accessibility of out-of-court settlement records. See, e.g., Katerina P. Lewinbuk, *First, Do No Harm: The Consequences of Advising Clients About Litigation Alternatives in Medical Malpractice Cases*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 416 (2012).

51. See, e.g., Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 45 (1988); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991). Because the focus of this article is the intersectionality of the lawyer's mandatory ADR notice and possible gender bias in those alternative processes, it will not explicitly distinguish feminist critiques that are concerned primarily with the experience of women who are unrepresented in these fora. See Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 221 (2003). Clearly, the presence of competent counsel mitigates much of the risk about which the critiques caution — much, but not all. See *infra*.

52. See Grillo, *supra* note 51, at 1585-92.

53. See, e.g., Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies, The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 954 (1997). At least one scholar has remarked upon a recent decline in what

is, some assert, particularly acute when female victims of intimate partner violence (IPV) are mandated to mediate with their abusers, a grave concern as it is estimated that approximately one quarter of all women will suffer physical violence in intimate relationships during their lifetimes.<sup>54</sup>

While men suffer physical violence in domestic partnerships, women are more likely to be victims of more severe forms of intimate abuse.<sup>55</sup> One scholar reports data estimating that over 60% of the more than 7.7 million intimate-partner rapes and physical assaults that occur in the U.S. annually involve female victims and that intimate partners commit one-third of all homicides of women.<sup>56</sup> These data compel mediators to take seriously the obvious physical risks inherent in mediations involving parties with a history of IPV.

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he perceives to be “legal scholarship critical of key aspects of ADR[ ]” and asks “why has this been so[, positing perhaps that] ‘it [is] . . . linked to a ‘failing faith’ in adjudication and our collective pressing need to embrace an encompassing ‘alternative[,]’ [or that] . . . policymakers seem to care little for chasing after facts about ADR because ‘that train has already left the station[.]’” Yamamoto, *supra* note 4, at 1056. While beyond the scope of this article, the debate regarding mandatory arbitration in the consumer context also can be framed as a process danger involving a power balance based upon arbitration clauses within contracts of adhesion that offer little recourse to the consumer against the party with stronger bargaining position exercising its contractual right to arbitrate. See, e.g., Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 701 (2013).

54. U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, Table 2, U.N. Doc. A/61/122/Add.1.

55. Noel Semple, *Mandatory Family Mediation and the Settlement Mission: A Feminist Critique*, 24 CAN. J.W.L. 207, 216 (2012). This article will not address the so-called “gender symmetry debate” concerning intimate partner violence. For those interested in a scholarly analysis of what some have framed as an “ideological polemic” undertaking, see Michael S. Kimmel, “Gender Symmetry” in *Domestic Violence - A Substantive and Methodological Research Review*, 8 VIOLENCE AGAINST WOMEN 1332, 1336 (2002). Nor will it take a position regarding “the possibility that not all violence in relationships is abusive” and that aggression in intimate partnerships should be differentiated by types and degrees of aggression along a continuum. Tamara L. Kuennen, *Stuck on Love*, 91 DENV. U. L. REV. 171, 179 n.48 (2013) (citing EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 104-06 (2007)). Some have suggested, however, that, from a policy perspective, focusing on “the most dangerous, and always-gendered, type of intimate partner violence, ‘coercive control[,]’” *id.* at 179, and moving away from “the current victimization narrative” might create a narrative with a much broader public appeal. *Id.* at 181 n.52. This extreme category of aggression, alternatively known as “patriarchal terrorism” and “coercive controlling violence,” is particularly perilous in ADR processes as it may lead “to the total domination of the abuser over the victim.” Semple, *supra* note 55, at 217.

56. Thomas L. Hafemeister, *If All You Have Is a Hammer: Society’s Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 920-22 (2011) (citations omitted).

Mediators all are aware of the possibility of, and take precautions to prevent, tragedies such as that described in *People v. May*, in which a husband was convicted of first degree murder with the “lying in wait” special circumstance enhancement for stabbing his wife in their mediator’s office building shortly after an unsuccessful mediation session.<sup>57</sup>

IPV patterns of physical violence, coercion, and attendant control have been causally related to Post-Traumatic Stress Disorder (PTSD),<sup>58</sup> a disorder characterized by physiological changes to the brain that impair critical judgment, memory, and concentration and that create the risk of attention and logic problems<sup>59</sup> and self-destructive behavior.<sup>60</sup> Research findings reveal that IPV victims suffering PTSD experience cognitive difficulties that affect their perception and memory and that lead to feelings of helplessness and increased levels of depression and anxiety.<sup>61</sup>

These symptoms, as well as the physical injuries and pain that they endure,<sup>62</sup> may compromise the mediation process itself when

57. *People v. May*, No. A113365, 2007 WL 594468 (Cal. Ct. App. Feb. 27, 2007), *rev. denied*, (May 09, 2007). This case is the stuff of nightmares for everyone involved in this work. At the conclusion of an unsatisfactory mediation to discuss their failed marriage and child custody arrangements, the husband exited and waited in his car while the victim remained in the mediator’s office before returning to the office building armed with a pair of scissors and confronting his wife. *Id.* at \*5-\*6. When observers found them, his wife had been stabbed over 100 times in her upper body, face, neck, and shoulders. *Id.* The husband’s first degree murder conviction was affirmed, and he was sentenced to life without the possibility of parole. *Id.* at \*8.

58. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 17, 34 (2001).

59. *Id.* at 26-27.

60. Criteria for PTSD, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [DSM-5].

61. MARGARET J. HUGHES & LORING JONES, WOMEN, DOMESTIC VIOLENCE, AND POSTTRAUMATIC STRESS DISORDER (PTSD) 20 (2000), <https://numerons.files.wordpress.com/2012/04/domestic-violence-and-ptsd.pdf>.

62. These symptoms may be exacerbated in victims who sustain minor head injuries or concussions from blows to the head and face, or from being severely shaken, which can result in damage to the brain. See D.L. Rhatigan, et al., *The Impact of Posttraumatic Symptoms on Women’s Commitment to a Hypothetical Violent Relationship: A Path Analytic Test of Posttraumatic Stress, Depression, Shame, and Self-Efficacy on Investment Model Factors*, 3 PSYCHOL. TRAUMA: THEORY, RES., PRAC., AND POLICY 181 (2011). Studies show that women who report having received these injuries from partners display evidence of cognitive deficits in concentration, attention, and memory; obvious confusion; and poor judgment, poor problem-solving, and poor decision-making. *Id.* Neurobiological research indicates that there are other alterations in brain morphology that individuals exposed to trauma present, *i.e.*, reductions in cortical thickness in regions of the brain that are involved in flexible decision-making, emotion regulation, and response inhibition. See N. Sadeh, et al., *Neurobiological*



the decision-making ability or critical judgment of a victim of IPV has been impaired such that it interferes with her competence to participate meaningfully. For example, PTSD symptoms may influence a victim's ability to evaluate and prioritize settlement options in mediation.<sup>63</sup> Lawyers experienced with clients suffering PTSD note that self-destructive symptoms may manifest when victims propose or appear willing to accept settlements or engage in other behaviors that have the potential to negatively affect their legal matters, impacting both legal processes such as negotiation and mediation and the results of those processes.<sup>64</sup>

The threat of physical danger is not the only process-related risk to women in these situations. For example, feminist and other critiques posit mandatory mediation as a potential institutional perpetuation of victim oppression.<sup>65</sup> Victim advocates caution that mediation has the potential to create an environment that not only may risk victims' physical safety, but will replicate their gender, racial, class, or educational subordination and exacerbate relational and societal power imbalances amongst the parties.<sup>66</sup> As one scholar summarized, power is not monolithic, and it can be exerted economically, intellectually, physically, emotionally, and, in the legal sphere, procedurally.<sup>67</sup>

The dynamics of abusive relationships often involve all of these power elements: economic; intellectual, including not only a possible inequality of education but also of access to, control of, or expertise about, information; physical/sexual; emotional/psychological; and, in cases entering the legal system, procedural. Some of these elements may not be readily discernible, even to those closely observing the

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*Indicators of Disinhibition in Posttraumatic Stress Disorder*, 36 HUMAN BRAIN MAPPING 3076 (2015).

63. Captain Evan R. Seamone, *Attorneys as First Responders: Recognizing the Destructive Nature of PostTraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 166-67 (2009).

64. *Id.* at 164-68. Professor Leigh Goodmark has written about advocates who argue that "women who have been battered are incapable of making authentic choices[.]" Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 28 (2009) ("Accepting that women who have been battered are incapable of engaging in independent deliberation devalues these women as members of the political society and invites and justifies what some might characterize as paternalism on their behalf"). I am not among such advocates; PTSD is not a "gender" construct.

65. See Grillo, *supra* note 51, at 1585-92.

66. See, e.g., Semple, *supra* note 55, at 208.

67. Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 575 (1995).

interactions.<sup>68</sup> The power imbalances in such relationships often are so deeply entrenched that, regardless of the skill of the mediator, any agreement resulting from the mediation process might be the product of those coercive dynamics.<sup>69</sup> Exploiting a woman's ethic of care and appealing to her eagerness to cooperate might force her "to acquiesce in [her] own oppression."<sup>70</sup>

Moreover, the confidential nature of informal processes such as mediation shields the potentially criminal conduct of perpetrators from public view.<sup>71</sup> The very act of according a batterer the "right" of self-determination in a process that may have legal consequences grants this behavior an unacceptable imprimatur of institutional approval and normalizes violence.<sup>72</sup> It also "deprives women of the clear societal sanction that should accompany certain types of behavior" and may imply that they share responsibility for the abusive conduct.<sup>73</sup> Victims of IPV should not be made to feel that they must bargain for their safety.<sup>74</sup>

Mediation confidentiality poses other dangers when it involves a direct confrontation between two disputants of disparate power, including not only female victims of IPV, but also racial minorities, the poor, and other disempowered parties in certain situations. Perhaps

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68. See Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 151 (2003).

69. Hughes, *supra* note 67, at 574-76.

70. Grillo, *supra* note 51, at 1610.

71. See generally Hughes, *supra* note 67.

72. The future-focus of the mediation process generally discourages a discussion or distribution of blame, accountability, legal rights, or principles. Accordingly, in a court-mandated mediation program, the abuser may perceive that a court has accorded him the power to negotiate the terms of, or apportion blame for, the abuse. See, e.g., Semple, *supra* note 55, at 216-18. Although mandatory mediation of abuse cases may promote court efficiencies, it can appear to an IPV victim that her access to justice has been denied in a societally-recognized court system by failing to punish past violence and by preventing future attacks. See, e.g., Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984). But see Ver Steegh, *supra* note 68, at 181-82 ("[D]ivorce mediation need not supplant the use of the criminal system. If an abuse survivor chooses to do so, she can file criminal charges, pursue a protective order, and mediate the divorce. Use of the criminal courts is not an exclusive remedy. Second, a growing body of evidence suggests that applying criminal sanctions may not deter further abuse. . . . [T]here is some evidence that mediation prevents future violence. Researchers . . . report that voluntary multi-session mediation is more effective in preventing future violence than either coerced mediation or lawyer negotiations. (Citations omitted)).

73. Leigh Goodmark, *Alternative Dispute Resolution and The Potential for Gender Bias*, 39 JUDGES' J. 21, 25 (2000).

74. See Goodmark, *Autonomy Feminism*, *supra* note 64, at 15.

one of the most serious critiques is reflected in the textured debate regarding the potential impact of ADR processes on the development of law pertaining to issues of public concern,<sup>75</sup> *i.e.*, confidential settlements prevent the development of legal principles and rights in matters with significant public dimensions. To paraphrase one prominent scholar, “race and gender critiques of ADR” as well as victim and civil rights advocates caution that powerful, hard-won legal protections can be overlooked or deliberately ignored in informal processes, particularly when unrepresented parties are involved.<sup>76</sup> Also, social-psychological research indicates that people are more likely to act upon their biases or impulses in an informal ADR-type setting than in a more formal adjudicatory setting.

Some have argued that most court-related family mediation programs have responded to these critiques and that mediation is now, or can be, designed to better protect the interests and safety of victims of IPV and other potentially disadvantaged parties.<sup>77</sup> Mediations involving IPV, for example, generally are conducted in separate sessions using a caucus-driven, evaluative model.<sup>78</sup> Particularly for female victims of domestic abuse, “face-to-face” intimidation and shame in open court are much more traumatic than facilitated dialogue in shuttle-style mediation.<sup>79</sup>

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75. See Yamamoto, *supra* note 4, at 1067. See also 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 (1999).

76. Goodmark, *Alternative Dispute Resolution and The Potential for Gender Bias*, *supra* note 73, at 24.

77. Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 YALE J.L. & FEMINISM 97, 129-31 (2010). See also Lerman, *supra* note 72, at 98-99 (noting that mediation may be potentially more effective than prosecution or litigation options when these options reflect the same social values which have historically prevented effective intervention in IPV cases). Too, from a normative perspective, there are some experts who assert that there are various levels of violence and that not all acts or histories of violence will have an impact on the parties’ balance of power in a mediation or other informal ADR processes. See, *e.g.*, Semple, *supra* note 55, at 217. Others cite data that report a relative gender symmetry in violent acts, frequently acute or situational. See, *e.g.*, Murray A. Straus, *Gender Symmetry in Partner Violence: Evidence and Implications for Prevention and Treatment*, in PREVENTING PARTNER VIOLENCE: RESEARCH AND EVIDENCE-BASED INTERVENTION STRATEGIES 245-71 (D.J. Whitaker & J.R. Lutzker eds., 2009).

78. Adkins, *supra* note , at 129-31.

79. Studies have reported that significant majorities of litigants thought the court processes in divorce proceedings made the system “impersonal, intimidating, and intrusive” and that they escalated the level of conflict and distrust “to a further extreme.” Ver Steegh, *supra* note 68, at 163. These negative impressions are lasting: a former divorce litigant told an author that, ten years after her divorce trial, it remained “the worst experience of my life.” Adkins, *supra* note 77, at 128.

Additional pro-mediation arguments relate to financial considerations. Not only is litigation an expensive proposition that takes longer to conclude, but “[s]tudies [also] have consistently shown that rates of compliance with mediated agreements are higher than they are for judicial decrees . . . This is particularly important at a time when, for every dollar owed in child support in the United States, the overall compliance rate is fifty-five cents.”<sup>80</sup>

The mediation process itself is, some have theorized, a feminized construct within the legal system,<sup>81</sup> a statement that requires two explicit caveats. First, it is essential to carefully distinguish, as did Professor Naomi Cahn, a “feminine” process focused on connections from one concentrated solely on ending the subjugation of women, a “feminist” process.<sup>82</sup> I do not believe these notions are mutually exclusive, and, in fact, often are mutually reinforcing. However, in this particular context, it is important to note the distinction.

Somewhat relatedly, the second caveat pertains to the negative associations arising from the labels “feminine” or “feminist.” Of course, there is no homogenized paradigm of “feminist” theory or of the analytical orientations of those who self-identify as “feminists,”<sup>83</sup> nor is there likely to be a distinct set of characteristics that define the adjective “feminine.” As both terms have been used to explicitly, and to subtly, insult, stigmatize, and discredit in both public and private discourse, I seek only to highlight “the tyranny of language or of prior experience,”<sup>84</sup> even within seemingly positive contexts and exchanges.

Setting aside the caveats, the more “feminized” process of mediation is a natural platform for each woman to construct and communicate her own narrative rather than to assort organic situations, perhaps artificially, into the highly conscribed and silo-ized legal categories available in what has been described as our patriarchal legal system.<sup>85</sup> Mediation narratives are personally unique to each individual mediation, based upon the exploration and clarification of party

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80. Adkins, *supra* note 77, at 127.

81. See Christine B. Harrington & Janet Rifkin, *The Gender Organization of Mediation: Implications for the Feminization of Legal Practice* (Inst. for Legal Studies Working Papers Series 4, 40, 1989).

82. Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1, 3-4 (1991).

83. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833-35 (1989).

84. Gordon A. Christenson, *Thinking Things, Not Words: Irvin Rutter's Pragmatic Jurisprudence of Teaching*, 61 U. CIN. L. REV. 1281, 1298 (1993).

85. See generally Kate McCabe, Comment, *A Forum for Women's Voices: Mediation Through A Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 468 (2001).

interests and upon relational ethics rather than abstract principles.<sup>86</sup> According to noted psychologist and feminist Carol Gilligan, a woman's "voice" is very different than that of a man's: men organize social relationships hierarchically and subscribe to an ethic of justice or of individual rights while women prioritize interpersonal connectedness and responsibility and adhere to an ethic of care.<sup>87</sup> Mediation can provide a space that accommodates the expression of a woman's voice without formalistic evidentiary restrictions and that allows her to participate in the design of a resolution that is more responsive to her specific values and needs.

Awareness and mastery of these process characteristics, as well as the safeguards that have been put into place in response to feminist and other critiques, certainly have improved the experience of victims of IPV in mediation programs, yet skeptics remain. The point of this article is not to settle the debate on whether, or the extent to

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86. Danya Shocair Reda, *Critical Conflicts Between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193, 211-12 (2011).

87. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1785 (1991) (citing, *inter alia*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1-2 (1982)). From the client perspective, this corresponds to scholar Christine Littleton's discussion of "Robin West's exploration of the 'connection thesis' of feminism," which describes women as connected to others and as fearing abandonment and isolation. Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 49-50 (1989). In her canonical article, *Portia in A Different Voice: Speculations on a Women's Lawyering Process*, Carrie Menkel-Meadow draws upon Carol Gilligan's work to explore how women's voices may redefine the practice of law by expressing an ethic of care and a responsibility for others that enables them to better understand a range of client needs and objectives. Carrie Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 57 (1985). Linguist Deborah Tannen's research on gendered communication demonstrates that women, both as lawyers and as parties, may be more effective in the more informal dispute resolutions environments because they are more comfortable communicating their needs and engaging in problem-solving. "We note[ ] . . . the . . . work of the linguist, Deborah Tannen, who posits that women, who use emotional language and articulate needs with ease, might actually be better at "mediation talk" than some men." Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1427 (1997) (citing DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION (1990); DEBORAH TANNEN, TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATION STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK (1994)). Some view conceptualizing an "ethic of care," whether as a uniquely feminine trait, or "voice," a feminist ethic; or a style of lawyering; as a "problem of essentialism." See Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1051 (1992). "By identifying characteristics as male or female, we ignore differences based on race, class, sexual orientation, or other significant social and cultural experiences which shape how we view the world and act in it." *Id.*

which, violence and the culture of battering can severely interfere with a woman's ability to assert oppositional positions against her aggressor in mediation. Rather, it is to focus attention on the issue inherent in this specific theme, that there may be negative gender differentials for women in ADR fora, particularly when victims of intimate partner violence are mandated to mediate with their abusers.

The second theme that has emerged regarding the experience of women in ADR, with an emphasis in this article on mediation, focuses more on potential negative gender differentials in *results*. Perhaps because of what scholar Carrie Menkel-Meadow labels a "serious 'baseline' problem in empirical analysis of dispute resolution processes,"<sup>88</sup> there is not a significant body of research that evaluates the substantive "fairness" of mediated agreements, particularly in cases involving parties of unequal power.<sup>89</sup> However, a belief persists that women have objectively inferior outcomes in mediation than do men.<sup>90</sup>

What data exist, however, are inconsistent as to the hypothesis that women suffer worse outcomes empirically in mediation than do their male counterparts.<sup>91</sup> Several studies of divorce cases, for example, report results for women in mediation similar to those in litigation and negotiated settlements.<sup>92</sup> Conversely, in one other study, divorce mediation produced agreements for "joint custody" far more often than such custody was awarded in court decisions, a result that may support the premise that women, who seek primary custody more often, fare worse in mediation than men.<sup>93</sup>

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88. CARRIE MENKEL-MEADOW, *Dispute Resolution*, in THE OXFORD HANDBOOK OF LEGAL RESEARCH 596 (2012).

89. See Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Injustice: Risk and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 23 (2012). However, the absence of research confirming the fairness of outcomes does not prove the absence of substantive fairness at the micro-level. *Id.* at 23-24.

90. See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES 189-96 (2009).

91. Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center*, 83 GEO. L.J. 461, 511 (1994) (noting that data from a study of mediation and adjudication in small claim civil cases in New Mexico were inconsistent with the hypothesis that mediation is unfair to women because they are likely to have "worse" outcomes).

92. See Stevens Clarke et al., *A Report on Current Research Findings—Implications for Courts and Future Research Needs* 19-20 (St. Just. Inst.) (Oct. 15-16, 1993) (unpublished working paper).

93. See Bush & Folger, *supra* note 89, at 23 n.76 (citing Roz Zinner, *Joint Custody: Smart Solution or Problematic Plan*, ADR RESOURCES, <http://www.adrr.com/adr4/joint.htm>). Another study reported that racial minorities more often than not achieved

Data in other settings are similarly variable. In a study of party satisfaction with the British Columbia Human Rights Tribunal's voluntary mediation program, women were more likely to settle than men and appeared to be more satisfied than men with their mediation results even though average monetary settlements for men were higher by seven percent.<sup>94</sup> Further, while at least some empirical studies of mediated outcomes in court-annexed mediation suggest that women and minorities may be disadvantaged in mediation as compared to the courtroom,<sup>95</sup> other studies of small claims randomly assigned to mediation and adjudication reported that outcomes for women were better in mediation than in adjudication.<sup>96</sup> Non-empirical, observational data based upon first-person accounts of mediation participants, however, are more consistent. These reports suggest that most mediators and attorney advocates have been confounded by female parties and clients who have, for their own reasons and despite reality testing and strong advice to the contrary, agreed to terms that were, in the reporters' opinions, obviously and objectively unfavorable in economic terms.<sup>97</sup>

Setting aside the empirical evidence, or the lack thereof, there are numerous rationales posited for any gendered differential outcomes that may exist. Many argue that, because women, more than

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poorer outcomes in mediation than in court, whereas the reverse was true for nonminority parties. See Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 788-94 (1996).

94. Gerald P. Heckman, Laverne A. Jacobs & Justice Anne L. MacTavish, Eds., *Dialogue between Courts and Tribunals - Essays in Administrative Law and Justice (2001-2007)* (Montreal: Les Éditions Thémis, 2008), 27 WINDSOR Y.B. ACCESS TO JUST. 485, 494 (2009) (book review).

95. See LaFree & Rack, *supra* note 93, at 788-794 (reporting that minority claimants consistently received less, and minority respondents consistently paid more, than non-minorities and had comparatively worse outcomes than in adjudication, but that they perceived mediation to be fairer and less biased than adjudication).

96. See, e.g., James Alfini et al., *What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 316-17 (1994).

97. For example, consider this quote from an experienced mediator: "Very clearly she was negotiating to her disadvantage. Neutrality would allow . . . it all to happen because she was choosing it. You are raising [the issue] and she is saying, 'No I want to settle, I want it out of my hair, I don't want to focus anymore, I'm sick of this . . . You [try] reality testing: 'If you got legal advice and found that there are different outcomes possible for you?' but she is still wanting [to settle]. I have been caught, and my co-mediator too, [in] allowing [parties] to go ahead [and settle]. Making a choice about whether it goes ahead knowing there is a disadvantage, that's one that has occurred. Yes. I still struggle with it." Susan Douglas, *Neutrality in Mediation: A Study of Mediator Perceptions*, 8 QUEENSLAND U. TECH. L. JUST. J. 139, 146 (2008).

men, have a relational concept of self;<sup>98</sup> they may feel compelled to engage with, and maintain their connections to, other parties in mediations, even when this puts them at what others might perceive as a great disadvantage.<sup>99</sup> This is particularly true where children are involved; women frequently bargain away financial benefits and property in divorce mediations where custody is concerned.<sup>100</sup> Research indicates that female parties in mediation are often more concerned with the emotional aspects of their cases than with the compensatory issues.<sup>101</sup>

Others argue that women will and do fare worse in mediation because of the procedural delegitimization of anger, and, concomitantly, of women. The socialized message is that, should a woman dare to express anger, she will be discredited and labeled as a "bitch."<sup>102</sup> Discouraging the expression of anger can disempower a woman in mediation as well as in all other aspects of her life. Rather than acknowledging the almost inevitable anger associated with nearly every conflict, women are taught to suppress it or risk being trivialized as irrational or petty. In divorces, angry women are often characterized as selfish and are warned that their anger is a threat to their children.<sup>103</sup>

This relates to another basis for any potential gender differential, the impact on women of power imbalances between disputing parties. Particularly when mandatory ADR is involved, women may experience the process as a very coercive legal intervention by someone more powerful. "Understanding gender as a social construction with men in a superior position and women in an inferior position can create a power imbalance in mediation where men set the terms and

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98. See Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 10-11 (1995) (citing Trina Gillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1581 (1991)).

99. Grillo, *supra* note 51, at 1550.

100. REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS 25 (1989).

101. RELIS, *supra* note 90, at 58-61.

102. See Grillo, *supra* note 51, at 1576-77.

103. See, e.g., Grillo, *supra* note 51, at 1578.



women acquiesce.”<sup>104</sup> These imbalances can be compounded by mediator microsanktions that subtly punish non-conformity with existing paradigms of “appropriate” gender behavior.<sup>105</sup>

Data on gender in the context of negotiation are often cited to support the claims of relatively poor performance of women in mediation. The conventional wisdom is that women and men behave differently in a variety of bargaining and dispute resolution contexts. However, the research on alleged gender differentials in negotiation is highly complex, spans multiple disciplines, and examines numerous questions, and it has uncovered no single reason or simple account of how or why women and men may differ in negotiation performance or results.<sup>106</sup>

Theoretically, any gender variable in negotiation has been explained as a product of socialization or of situational power.<sup>107</sup> It also has been posited that gender and status operate in an additive or intersectionality model that incorporates a variety of personal characteristics that may impact others’ perceptions and expectations and constrain negotiating behavior.<sup>108</sup> A related theory broadly envisions the negotiation process as a series of interactions in which women affect, and are affected by, observers’ descriptive stereotypes and acculturated gender norms.<sup>109</sup>

Empirically, researchers have found that there is a “marginal and inconsistent relationship between gender and negotiation outcomes.”<sup>110</sup> Current studies indicate that there is no significant difference in male and female effectiveness in negotiating.<sup>111</sup> As two of the

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104. Deborah Rubin, *Re-Feminizing Mediation Globally*, 12 N.Y. CITY L. REV. 355, 367–68 (2009). The issue of power imbalances in mediation is one that warrants its own analysis, the scope of which exceeds this article. Their influence in the mediation dynamic, however, cannot be underestimated, and sometimes, cannot be corrected.

105. See Grillo, *supra* note 51, at 1555–58. See also Carrie Menkel-Meadow, *What Trina Taught Me*, *supra* note 87, at 1418–19.

106. See Lu-in Wang, *Negotiating The Situation: The Reasonable Person in Context*, 14 LEWIS & CLARK L. REV. 1285, 1292–93 (2010).

107. Carrie Menkel-Meadow, *Teaching About Gender and Negotiation: Sex, Truths and Videotape*, 16 NEG. J. 357, 362–64 (2000).

108. *Id.*

109. Emily T. Amanatullah & Michael Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women’s Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 J. PERSONALITY AND SOC. PSYCH. 256, 256 (2010).

110. See M. AFZALUR RAHIM, *MANAGING CONFLICT IN ORGANIZATIONS* 137 (2001).

111. See Charles Craver, *Why Negotiation Assumptions about Women May Be Wrong*, 20 ALTERNATIVES TO HIGH COST LITIG. 45 (March 2002).

leading researchers on the effects of gender in negotiations have explained: “[m]ale and female negotiators sometimes fulfill the sex stereotypic expectations that men will be more competitive bargainers and claim a greater portion of the pie than women, but people’s gender is not a consistent predictor of their negotiating behavior or performance . . . . [W]hat recent research has shown is that gender effects on negotiation are contingent on situational factors that make gender more or less relevant, salient, and influential.”<sup>112</sup>

The data on the situationality of gendered influences<sup>113</sup> suggest that individuals of both genders are highly attuned to the many contextual variables within negotiations, and studies consider how negotiators interpret and act upon those variables.<sup>114</sup> In highly ambiguous negotiations, for example, in which bargaining expectations about outcomes such as economic structures or quality standards are not clear, parties tend to fall back upon environmental contexts and mental schema for cues on conducting the negotiation.<sup>115</sup> Here, it becomes more likely that gender triggers, those situational cues that prompt male-female differentials in preferences and expectations, i.e., stereotype threat, entitlement effect, etc., will influence negotiation behaviors and outcomes.<sup>116</sup> By contrast, in low ambiguity situations, where terms and standards are more clearly

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112. See Wang, *supra* note 106, at 1293 (quoting Iris Bohnet & Hannah Riley Bowles, *Gender in Negotiation: Introduction*, 24 NEGOTIATION J. 389, 390 (2008)).

113. See Dorothy E. Weaver & Susan W. Coleman, *The Literature on Women and Negotiation: A Recap*, 18 DISP. RESOL. MAG. 13, 19 (Spring 2012). Studies demonstrate that women negotiate better than men when cases present the potential for collaborative outcomes. *Id.* (citing Carol Watson, *Gender Versus Power as a Predictor of Negotiation Behavior and Outcomes*, 10 NEGOT. J. 117 (1994)).

114. See *id.* at 20 (citing Gerard Callanan & David Perri, *Teaching Conflict Management Using a Scenario-Based Approach*, 81 J. OF ED. FOR BUS. 131 (2006)).

115. See Hannah Riley Bowles, *Psychological Perspectives on Gender in Negotiation*, in THE SAGE HANDBOOK OF GENDER AND PSYCHOLOGY 472 (2013).

116. See Dina W. Pradel, Hannah Riley Bowles & Kathleen L. McGinn, *When Does Gender Matter in Negotiation?*, NEGOTIATION (November 2005). “In high-ambiguity industries, male participants negotiated [higher] salaries than the female participants[.] The competitive context cued negotiators to the traditionally “masculine” nature of the interactions, and the ambiguity in certain industries elicited different negotiating behavior from men and women.” See *id.* at 4. Another element of bargaining that coincides with ambiguity is the parties’ attitude toward risk. See Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM, 1015, 1025 (1984-1985). When parties have different risk preferences, uncertainties in potential outcomes can differentially affect two parties. *Id.* If substantial variance exists, or is even perceived to exist, among the possible outcomes, then the relatively more risk-averse party is comparatively disadvantaged. *Id.* Negotiation studies report that women tend to be more risk-averse than men. Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J.L. & GENDER 437, 447 (2013).

defined or bounded, outcomes are less likely to reflect gender triggers.<sup>117</sup> Rather than indicating any inherent gender differences, these triggers reflect mental schema, biases, and behavioral expectations that may impact negotiations.<sup>118</sup>

As in the mediation context, however, beliefs persist that gender more fundamentally influences negotiation performance and results,<sup>119</sup> perhaps increasing the susceptibility of women to internalizing, and experiencing backlash from, these gender schemata in situations in which they are triggered or invoked.<sup>120</sup> Experiments suggest that women may moderate their negotiating approaches to avoid anticipated backlash for gender stereotype violations, an adaptive response to bounded social constraints rather than any deficit in skill or motivation.<sup>121</sup>

This is consistent with the findings in *Women Don't Ask: Negotiation and the Gender Divide*, in which Linda Babcock and Sara Laschever report that women are less likely than men to ask for what they want and that they avoid negotiation altogether in uncomfortable situations.<sup>122</sup> Even when objective outcomes are equivalent, men are deemed by evaluators to perform better in negotiations than are women, and women "tend to rate their own work more harshly . . . and are less likely to take credit for favorable results."<sup>123</sup> A woman's

117. See Pradel et. al., *supra* note 116, at 3. There was no difference in the salaries negotiated by male and female participants hired into low-ambiguity industries. See *id.* at 4.

118. See *id.* at 3.

119. One scholar theorizes that these notions "reflect 'commonsense' beliefs about gender. Among these assumptions are that men are logical and women emotional, that females are "more manipulative" than males, and that men are more 'agentically competent' than their female counterparts." Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 512-13 (2016).

120. The influence of stereotype or gender schema may be situational. While not conducted in association with ADR research, "[o]ne study showed that when Asian American subjects' Asian identity was made salient, they performed better on a test, whereas when their gender identity was activated, they performed worse." Joan C. Williams, *Double Jeopardy? An Empirical Study With Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 214 (2014) (citing Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 81-82 (1999)). See also Deborah M. Kolb, *Negotiating in the Shadows of Organizations: Gender, Negotiation, and Change*, 28 OHIO ST. J. ON DISP. RESOL. 241 (2013).

121. Amanatullah & Morris, *supra* note 109, at 263-65.

122. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* ix, 1-4, 9-10 (2003).

123. Deborah L. Rhode, *The 'No Problem' Problem: Feminist Challenges and Cultural Change*, *supra* note 87, at 1753 (citing, *inter alia*, D. KOLB & G. COOLIDGE, *HER PLACE AT THE TABLE: A CONSIDERATION OF GENDER ISSUES IN NEGOTIATION* 23 (Harvard Program on Negotiation Working Paper Series No. 88-5, 1988)).

positive contributions often pass unremarked, but her mistakes are more frequently noted. This can inhibit and impair performance in ADR processes by decreasing confidence, increasing anxiety, and perpetuating self- and external performance-based gender stereotypes.<sup>124</sup>

Interestingly, however, the data indicate that women will ask and do improve their negotiated outcomes when they negotiate on behalf of a third party.<sup>125</sup> This “other-advocacy” appears to alleviate gender role incongruity, decreasing the risk of backlash and empowering women to negotiate more assertively for more favorable outcomes.<sup>126</sup> Perhaps this offers some explanation for the somewhat paradoxical perspectives that one scholar recently summarized:

[Trina] Grillo, Penelope Bryan, Martha Fineman and others have long argued that in situations of informal and non-public or not strong law-enforcing dispute processing (e.g., negotiation, mediation), women are “disempowered” and do less well than they might in more formal, rule and procedure based settings such as full court adjudication . . . . But, researchers outside of law have empirically demonstrated that in fact women are more effective at speaking the language of problem solving which is particularly used in such informal settings as mediation. . . . [R]ecent research comments on this, noting that some women plaintiffs are less comfortable talking and advocating strongly in mediation settings, but that female lawyers are more likely to

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124. *Cf. id.* at 1005-06 (footnotes omitted) (“The force of traditional stereotypes is compounded by the subjectivity of performance evaluations and by other biases in decision-making processes. People are more likely to notice and recall information that confirms prior assumptions than information that contradicts them. . . . These assumptions can then become self-fulfilling prophecies. Expectations affect evaluations, which then affect outcomes that reinforce initial expectations.”).

These gender biases appear to extend to neutral selections. In their empirical analysis of survey results, Andrea Schneider and Gina Brown reported that overall representation of women as neutrals is 31%; the percentages varied based on practice area from the single digit lows of seven percent (7%) women in intellectual property to a majority of women neutrals in small claims, at 64%. Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, 47 AKRON L. REV. 975, 987 (2015).

125. Bowles et al., *supra* note 110.

126. Amanatullah & Morris, *supra* note 109, at 264.

engage in problem solving and collaborative behavior in mediation settings, suggesting that the role that gender plays in dispute resolution is strongly tied to role (professional), as well as to place or site of dispute resolution.<sup>127</sup>

However, gender differentials, real or perceived, do not appear in some of the newer, nuanced studies. Recent workplace data, for example, reveal that women are negotiating, or “asking,” for promotions and raises at the same rates as their male colleagues.<sup>128</sup> Scholar Andrea Schneider’s work in this area has reported that female lawyers were judged as effective in negotiations as their male colleagues and, while rated more highly in assertiveness than their male counterparts, did not seem to suffer a backlash effect.<sup>129</sup> Clearly, the role of gender in negotiations as well as in dispute resolution settings is complex, and the data are nuanced and must be interpreted with great care.

One final thought on these gender themes: evaluating the results of a mediated or negotiated agreement vis-à-vis gender neutrality is a Nicomachean exercise that has the potential to perpetuate and “normalize” stereotypical and inherently paternalistic constructs of concepts of “fairness,” “good,” or “better.” While a central goal of ADR is to produce fair mediation agreements<sup>130</sup> and to obtain the “best” outcomes for negotiation parties, the characteristics of these aspirational

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127. Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers-What Difference Does ‘Gender Difference’ Make?*, 18 DISP. RESOL. MAG. 4, 6 (2012).

128. Benjamin Artz, Amanda H. Goodall & Andrew J. Oswald, *Do Women Ask?* (Discussion Paper No. 10183, The Institute for the Study of Labor (IZA) 5-11, Sept. 2016). Statistical analyses of Australian employee and workplace data from the 2013-2014 Australian Workplace Relations Survey reveal that 75% of males reported asking for a raise, while 66% of women reported asking. *Id.* at 7. However, when the data were controlled for the number of hours worked, there is no gender differential in “asking” rates. *Id.* at 8-9. These data also tantalizingly hinted that there might be an age effect in the results. Based upon a finding that, for workers under the age of 40, women in the labor market appear statistically indistinguishable from the younger men, the report concluded that “it could be that negotiating behavior has begun to change.” *Id.* at 11. *But see* WOMEN IN THE WORKPLACE 2016 12 (McKinsey & Company 2016) (“The bad news is that women who negotiate are disproportionately penalized for it. They are . . . more likely than men . . . to receive feedback that they are “intimidating,” “too aggressive,” or “bossy” . . . [and] less likely to be promoted.”).

129. Andrea Kupfer Schneider et. al., *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER L. & POL’Y 363, 377-80 (2010).

130. *See e.g.*, Joseph B. Stulberg, *Must a Mediator Be Neutral? You Better Believe It!*, 95 MARQ. L. REV. 829, 830 (2012); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 49 (1996).

results, and how best to consistently achieve them, are topics of considerable debate among ADR scholars and practitioners.<sup>131</sup> Not only is there the methodological question of what baseline measure for process is appropriate,<sup>132</sup> but notions of “fairness” also are inherently subjective and have ideological, philosophical, and political overtones. Any attempt by non-participants to characterize the outcome of an individual mediation or negotiation as an “unfair,” “worse,” or “bad” result for individual women, even if well-intentioned, might, paradoxically, reinforce pervasive gendered stereotypes about women and ADR.

#### IV. CONCLUDING THOUGHTS - GENDER THEMES AND INTENTIONALITY VIS-A-VIS MANDATORY NOTICE OF ADR OPTIONS

There are strong critiques of ADR options as institutional perpetuations of oppression, and many warn that these informal alternatives may create process dangers for women.<sup>133</sup> Further, although it is not at all clear that women fare worse in ADR by objective measures, a belief persists that the performance and results of women are “worse” in these fora than those of men.<sup>134</sup>

If ADR may pose risks for women, one must ask why these gender themes appear to be absent from the prolonged, vigorous debate regarding the propriety of imposing a duty on lawyers to advise clients about ADR. This is deeply troubling, particularly when one considers the sheer volume of explicit mandates, explicit exhortations, and implicit reminders on this subject that already exist within the

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131. See Michael T. Colatrella Jr., *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring The Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT. RESOL. 705, 714-15 (2014). Under one interpretation of the Model Standards, an agreement should be deemed fair “if the party made a settlement decision uncoerced [and] assisted by an impartial mediator who empowered the participant as fully as their resources allowed.” See *id.* at 715. Under this formulation, the fact that an agreement is the result of unequal bargaining power is not enough for the agreement to be deemed unfair. See *id.* at 716 (citing Jennifer M. Ralph, *Unconscionable Mediation Clauses: Garrett v. Hooters-Toledo*, 10 HARV. NEGOT. L. REV. 383, 396 (2005)). In order to fail the procedural fairness requirement, an agreement must be so one-sided that it would be considered unconscionable under the law of the relevant jurisdiction. Colatrella, *supra* note 131, at 713.

132. CARRIE MENKEL-MEADOW, *Dispute Resolution*, *supra* note 88, at 597. Not to mention that this ignores “an unstated assumption that if law is the baseline for ‘justice’ in settlements, then majoritarian enacted laws (by legislatures) are just for all.” Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2676 (1995).

133. See *infra* Section III.

134. RELIS, *supra* note 90.

ethical codes and norms, court rules, statutes, and professional creeds of individual jurisdictions.<sup>135</sup>

These existing norms make it all the more compelling to continue to raise questions and concerns and to educate the bar and the public about the potential impact of ADR on women. These gender themes do, I believe, raise a number of significant questions.

A first question is primarily rhetorical: has ADR failed to fulfill its promise?<sup>136</sup> This question has several layers, one of which relates to several somewhat diametrical critiques of the contemporary ADR project as either: (1) an increasingly institutionalized and formalistic isomorph that categorizes dispute processes and defines the attributes of each type or style,<sup>137</sup> or (2) an informal, private form of social control, the critique with which the gender theme is aligned.<sup>138</sup>

The second layer of the question is the more pragmatic: if not mediation or some form of ADR, then what? Or, as one colleague put more bluntly, “Just when you ADR people have caused trials to virtually vanish,<sup>139</sup> are you now telling us that your alternatives are flawed?” While this is a provocative question, no one seriously suggests that every alternative process is appropriate for every dispute.<sup>140</sup> To quote a common aphorism amongst statisticians,

135. See, e.g., *infra* Section II.

136. This is not an oblique reference to a seminal work in our field, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). The question is in no way related to the transformative model of mediation described therein.

137. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted of “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1 (1991); Austin Sarat, *The “New Formalism” in Disputing and Dispute Processing*, 21 LAW & SOC’Y REV. 695, 695-701 (1988).

138. See, e.g., Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 305-06 (2006).

139. This is, of course, a somewhat tongue-in-cheek reference to Marc Galanter’s report, funded by the ABA. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL STUD. 459 (2004), available at <http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf>. For the resulting conference publication, see volume 1 of the *Journal of Empirical Studies*. *Id.* The report generated an extraordinarily prodigious and polarized debate regarding the causes, consequences, and significance of the collected data that indicated a general reduction in the rate and, in some instances, the number of trials. As one scholar stated the “phenomenon known as the vanishing trial . . . has taken on a life of its own that transcends empirical reality.” John Lande, *Shifting the Focus from the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 191 (2005).

140. See, e.g., Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61 (2010).

“Essentially, all models are wrong, but some are useful.”<sup>141</sup> ADR can be “wrong” when parties and counsel do not participate in good faith; ADR processes have been used for strategic, and sometimes blatantly nefarious, purposes.<sup>142</sup> Like the courts, informal alternatives also can be “wrong” when they are engaged in ways that genericize “women,” IPV victims; racial, ethnic, or religious minorities; the poor, or the disabled into undifferentiated, unidimensional singularities, all susceptible to the same vulnerabilities as others who might be particularly exposed to exploitation in ADR. Context does matter.

Finally, more practice-oriented questions arise regarding responses to gender differentials. What form do responses to the issue take, and where and how might they be implemented most effectively? These questions require reflection and serious inquiry: others have begun this work. For example, the Uniform Collaborative Law Act requires that clients provide informed consent to participate in an alternative dispute resolution process and that lawyers assure the safety of clients who do consent to participate.<sup>143</sup>

This article does not propose definitive answers. Rather, it poses the questions and urges neutrals and lawyers advising clients about ADR options to become educated about and alert to gender or similar differentials in these processes, perceived or real, and how they may be impacting their work or clients. Continuing to ignore, or remain ignorant of, possible process dangers or to reflexively institute special rules or enhanced duties of care for “at risk” clients may reinforce entrenched gender schemata. This concern is not abstract. One male commentator reported this on the process dangers for women in divorce mediation:

Although none of the answers that have been given . . . are particularly flattering to women, three stand out as being most prevalent. The first is based on the assumption that men tend to think more logically and analytically than women. Women, it is claimed, tend to think more in terms of relationships. This, so

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141. GEORGE E.P. BOX & NORMAN R. DRAPER, EMPIRICAL MODEL-BUILDING AND RESPONSE SURFACES 414 (2007).

142. See generally Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 377-78, 391 (2011) (examining a number of attempts to define a “good faith” standard in the context of mediation, several of which would include conduct such as using the process to impose hardship on one’s counterpart, to gain a strategic advantage, to intimidate, or to convey misrepresentations).

143. Unif. Collaborative Law Act §§ 14, 15 (2009), in 38 HOFSTRA L. REV. 421, 457-63, 484 (2010). See also Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Looking at Interjurisdictional Recognition*, 43 FAM. L.Q. 923, 932 (2010).



the argument goes, leaves them at a disadvantage in their dealings with men because they will be more inclined to ignore principles of right and fairness to maintain relationships within the family. The second is that, not being experienced in either the world of finance or the art of negotiation, they will be at a disadvantage vis-à-vis their husbands, who are experts in both. The third, which is the one most commonly voiced, is that because of their historical social position, men are more powerful than women.<sup>144</sup>

These characterizations of the root causes of this situation are not only insensitive, they also are not particularly precise. Rather than allow such comments to depict women in these circumstances as vulnerable, victimized, or disadvantaged,<sup>145</sup> it would be preferable to deconstruct inaccurate gender labels and craft solutions that respond more broadly for the advantage of a larger set of beneficiaries. Nearly all clients would benefit from counseling about the advantages and disadvantages of the various DR processes, including litigation. Lawyers should counsel each client individually and contextually to identify, evaluate, and select the options that satisfy the client's interests in a given situation.<sup>146</sup>

Lawyers and policymakers should bring intentionality to their deliberations, both public and private, regarding the potential for gender bias arising from the fulfillment of a mandatory ADR notice. These deliberations should not become an opportunity to exploit caricatures of gendered powerlessness<sup>147</sup> or to perpetuate stereotypes about the lack of competency of women. Rather, the focus should be on improving the quality of lawyering and legal services and the

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144. Lenard Marlow, *Samson and Delilah in Divorce Mediation*, 38 FAM. & CONCILIATION COURTS REV. 224, 224 (2000).

145. Cf. Lori Beaman-Hall, *Abused Women and Legal Discourse: The Exclusionary Power of Legal Method*, 11 CAN. J.L. & SOC'Y 125, 136-37 (1996) ("Women who do not have the economic resources to hire their own lawyers must rely on the provincial legal aid system to provide legal assistance[ ] . . . [and] must premise their application on their status as a victim because only victims of abuse are eligible for services. Thus, even if an abused woman wishes to characterize herself as a survivor, the legal aid system insists that she identify herself as a victim. Lucinda Finley notes that legal language has the power 'to construct and contain individual and cultural understandings of situations and social relationships,' thus inhibiting change. The legal aid system therefore functions to preserve the status quo. In this way, the control of abused women is perpetuated by both their abusive husbands and legal discourse.").

146. And, regardless whether those goals are legal or non-legal. See Leigh Goodmark, *Clinical Cognitive Dissonance: The Values and Goals of Domestic Violence Clinics, the Legal System, and the Students Caught in the Middle*, 20 J.L. & POL'Y 301, 305-06 (2012).

147. CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 38-39 (1987).

skills of ADR practitioners, a priority being to increase attorney familiarity with, training in, and direct experience with dispute resolution processes as counsel or third-party neutrals.<sup>148</sup> Critical too is an intentional acknowledgement that a wide range of “voices,”<sup>149</sup> intelligences, and capacities exist within the practicing bar and amongst its clients and that this multiplicity of competencies should be recognized, respected, and embraced.

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148. While it is not likely that other states would follow suit, Georgia requires that, in “order to educate the bar about the benefits of ADR and the specifics of ADR processes, each member of the State Bar of Georgia shall be required to complete a one-time mandatory three hour CLE credit in dispute resolution.” Ga. Sup. Ct., Alternative Dispute Resolution Rules VIII (May, 28, 2014), [http://godr.org/sites/default/files/Godr/supreme\\_court\\_adr\\_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf](http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf). Law school ADR courses, courses in which neutrals are trained, and approved CLE seminars devoted to ADR are deemed to satisfy the requirement. *Id.*

149. See *infra* Section III.