

# CAREFUL TRAINING DOES ELIMINATE GENDER-BASED NEGOTIATION DIFFERENCES

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## I. INTRODUCTION

For many years I have taught Legal Negotiation courses to forty to fifty second and third-year law students. During the semester, I assign readings from my book *Effective Legal Negotiation and Settlement*.<sup>1</sup> We explore the impact of different negotiator styles: the “win-win” cooperative style where the participants seek to maximize the joint returns achieved; the “win-lose” competitive style, where the participants seek to maximize their own returns; and the “WIN-win” competitive/cooperative style, where the participants work to maximize their own returns, but endeavor to maximize the returns achieved by their counterparts once they have achieved their own goals.<sup>2</sup>

We then explore the six stages of the bargaining process to demonstrate how structured bargaining interactions are. During the Preparation Stage,<sup>3</sup> individuals must determine the relevant factual, legal, and economic issues, and then determine their bottom lines, their aspirations, and their planned opening positions. They try to place themselves in the shoes of their counterparts to estimate that side’s strengths, weaknesses, and underlying interests. They must then visualize how they plan to move from their opening positions toward their goals. What bargaining techniques do they expect to employ, and what tactics do they think their counterparts may use and how might they counteract those endeavors?

When they begin to interact with their counterparts, they enter the Preliminary Stage.<sup>4</sup> During this stage they try to establish rapport with those persons and positive negotiating environments that

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<sup>1</sup> CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (8th ed. 2016).

<sup>2</sup> See *id.* at 11–18; see also RONALD M. SHAPIRO & MARK A. JANKOWSKI, *THE POWER OF NICE* 5 (Rev. ed. 2001).

<sup>3</sup> See CRAVER, *supra* note 1, at 55–75.

<sup>4</sup> See *id.* at 77–86.

should enable the participants to interact with each other effectively and enhance the likelihood they will achieve agreements and efficient accords that maximize the joint returns generated. When the participants on both sides employ similar styles, this stage tends to develop smoothly. On the other hand, when one side is far more competitive—and even adversarial—it is critical for their counterparts to employ “attitudinal bargaining” to make it clear to such persons that their behavior will not be mutually beneficial.

During the Information Stage,<sup>5</sup> they determine the relevant issues to be resolved, and the underlying interests associated with the positions being articulated. This stage involves “value creation,” where the negotiators seek to determine what they have to share with each other. Proficient negotiators ask many broad questions to get their counterparts talking, and they carefully listen to the answers they obtain. As they get further into this stage, they ask more “what” and “why” questions—the “what” inquiries to identify the issues considered important by their counterparts, and the “why” inquiries to explore the underlying interests associated with those issues.

Once negotiators complete the Information Stage, they move into the Distributive Stage where they begin to decide how to divide the surplus they have created.<sup>6</sup> This can be a relatively competitive portion of bargaining interactions, as the participants compete with each other with respect to the items both sides value. Negotiators must plan their concession patterns carefully to be sure they are not making unreciprocated position changes or excessive changes vis-à-vis their counterparts. As the participants endeavor to claim value for themselves, they often resort to legal, factual, and even emotional arguments.<sup>7</sup> They may make negative threats or positive promises.<sup>8</sup> They may threaten to walk out or file lawsuits if their counterparts do not move in their direction, or they may promise to reciprocate position changes made by the other side. It usually helps to begin the serious discussions with the less significant items to enable the negotiators to achieve tentative agreements with respect to these issues.

As the negotiators tentatively resolve many of the issues involved, they become psychologically committed to the achievement of mutual accords, and they enter the Closing Stage where

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<sup>5</sup> See *id.* at 87–113.

<sup>6</sup> See *id.* at 115–44.

<sup>7</sup> See *id.* at 129–31.

<sup>8</sup> See *id.* at 132–34.

they try to close the gaps that remain between their current positions.<sup>9</sup> They have resolved so many issues by this point, and they definitely want to conclude their interaction successfully. Once they have reached an agreement, many less proficient negotiators think they have completed their interaction and they decide which party should draft the final agreement. As a result, they may omit a critical stage of the bargaining process.

At the end of the Closing Stage, bargainers should move into the Cooperative Stage during which they endeavor to discover if there is any way they can expand the overall pie and simultaneously improve their respective gains by trading items that may have ended up on the wrong side of the bargaining table.<sup>10</sup> During the Information, Distributive, and Closing Stages, most negotiators have overstated and understated the value of items for strategic reasons. If they are confident that the other side really values something they do not particularly value, they overstate the degree to which they want that term, hoping to obtain a significant concession when they give it up. On the other hand, if they really want an item they think the other side does not value, they understate the degree to which they want it to enable them to get it in return for a minor concession. As a result of such behavior, when a final agreement is reached by the end of the Closing Stage, a number of items may have ended up on the wrong side of the table.<sup>11</sup> Proficient negotiators offer to exchange items they think their counterparts value more than they do for terms they value more than their counterparts. They hope to achieve final terms that maximize the results obtained by both sides.

During subsequent classes, we explore the different negotiation tactics individuals are likely to employ and encounter when they interact with others.<sup>12</sup> They have to think about the techniques they should employ, and understand how to recognize and counteract the tactics being employed by their counterparts. We discuss verbal and nonverbal communication to enable students to more effectively interpret counterpart signs and statements.<sup>13</sup> We explore specific negotiation issues concerning such things as telephone and email interactions,<sup>14</sup> transnational negotiations,<sup>15</sup> medi-

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<sup>9</sup> See *id.* at 145–49.

<sup>10</sup> See *id.* at 151–62.

<sup>11</sup> See generally Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 *CARDOZO J. CONFLICT RESOL.* 1 (2010).

<sup>12</sup> See CRAVER, *supra* note 1, at 163–99.

<sup>13</sup> See *id.* at 25–53.

<sup>14</sup> See *id.* at 224–28.

ator-assisted interactions,<sup>16</sup> and negotiation ethics.<sup>17</sup> Students find ethical issues to be quite complex, since Model Rule 4.1 proscribes knowing misrepresentations of “material fact” by lawyers, but indicates in Comment 2 that statements by negotiators concerning their settlement intentions and the way in which they value the items being exchanged do not constitute “material fact.”<sup>18</sup>

We examine the ways in which real and perceived gender-based differences might influence bargaining interactions. How might different masculine and feminine traits affect the way in which persons negotiate with each other and the results they achieve?<sup>19</sup> We explore what both men and women should do to minimize the possible impact of gender differences, and I emphasize the fact I have generally found no gender-based differences in the negotiation results obtained by male and female students.

During the first half of the semester, students work on six negotiation exercises designed to demonstrate the concepts being taught and to enable them to experiment with respect to their own styles and the various tactics they might utilize. At the conclusion of each exercise I share the different results, and we discuss what the participants should have agreed upon to maximize their joint returns. I ask students to think about what they have done well and what they should have done differently.<sup>20</sup>

I ask the students who have not generated beneficial terms for themselves what they thought they should have sought for their own side. I have often found that females had established more modest goals than their male cohorts on these practice exercises. I encourage such persons to raise their aspirations on subsequent exercises. Some students indicate that they were really afraid of generating non-settlements, causing them to make major concessions when bargaining deadlines approached. I have similarly found that more women fear non-settlements than their male classmates. I emphasize the fact that both sides suffer when they do not achieve

<sup>15</sup> See *id.* at 273–322.

<sup>16</sup> See *id.* at 323–88.

<sup>17</sup> See *id.* at 389–412.

<sup>18</sup> See *id.* at 390–93.

<sup>19</sup> See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003) [hereinafter BABCOCK & LASCHEVER, *WOMEN DON'T ASK*]; LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT* (2008) [hereinafter BABCOCK & LASCHEVER, *ASK FOR IT*].

<sup>20</sup> See CRAVER, *supra* note 1, at 201–08 (describing issues individuals should address during post-negotiation assessments).

mutual accords, and point out that when individuals move toward their own bottom lines their counterparts must be doing quite well. This should cause those persons to be more afraid of non-settlements than they are.

During the second half of the semester, class members engage in six different exercises. Each exercise assigns point values for the different issues to be addressed, reflecting the way in which their fictional clients value those items. The results of each exercise are rank-ordered from high to low, with these placement points affecting half of their course grades. Class members also prepare ten- to fifteen-page papers analyzing what they have learned during the semester. The fact these six exercises affect course grades induces students to take them quite seriously.

## II. IMPACT OF GENDER STEREOTYPES ON NEGOTIATION INTERACTIONS

Gender-based stereotypes may influence the way in which many persons interact with people of the opposite sex.<sup>21</sup> Men—and even some women—expect women to behave like “ladies.” Aggressive behavior that would be viewed positively when employed by men may be characterized negatively when used by women.<sup>22</sup> Male negotiators who would usually counter aggressive tactics by other men with aggressive responses of their own often find it more difficult to do so when dealing with aggressive females. When they fail to counter such behavior in the way in which they think they should, they provide female counterparts with a bargaining advantage. Men who are similarly unwilling to act as competitively toward female counterparts as they would toward male counterparts provide their female counterparts with a bargaining advantage.

Many men naively believe that their female counterparts will not engage in as many negotiating “games” as male bargainers. Even a number of females mistakenly assume that other women would be unlikely to employ the Machiavellian tactics stereotypically attributed to members of the competitive male culture. Men

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<sup>21</sup> See generally DEBORAH M. KOLB & JUDITH WILLIAMS, *EVERYDAY NEGOTIATION: NAVIGATING THE HIDDEN AGENDAS IN BARGAINING* (2003); DEBORAH M. KOLB & JUDITH WILLIAMS, *THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS* (2000).

<sup>22</sup> See BABCOCK & LASCHEVER, *ASK FOR IT*, *supra* note 19, at 256–58.

and women who expect their female counterparts to behave less competitively and more cooperatively frequently ignore the reality of bargaining interactions, and provide a significant advantage to females who are willing to employ competitive and manipulative tactics.

Empirical studies have found that men and women do not behave identically in overtly competitive situations. Females tend to initially be more trusting and trustworthy than their male cohorts, but less willing than males to forgive violators of their trust.<sup>23</sup> Individuals interacting with female counterparts who behave in seemingly open and cooperative ways may be able to establish trusting and cooperative relationships with them, so long as they do not commit transgressions. Nonetheless, male are less likely to focus as much on relationship issues. They are more likely to establish elevated aspirations that should enhance their ability to obtain more beneficial results when they interact with female counterparts.<sup>24</sup>

When men and women prevaricate, they tend to have different objectives. Males tend to lie on a self-oriented basis to enhance their own reputations (“braggadocio”), while females who dissemble are more likely to engage in other-oriented lying that is designed to make other persons feel better.<sup>25</sup> This difference should cause males to feel more comfortable than females when they engage in deceptive behavior during bargaining encounters to advance their own interests.

A number of years ago it was suggested that “women are more likely [than men] to avoid competitive situations, less likely to acknowledge competitive wishes, and not likely to do as well in competition.”<sup>26</sup> Even today, many women are apprehensive with respect to the negative consequences they associate with competitive achievement, fearing that their competitive success will alien-

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<sup>23</sup> See LEE E. MILLER & JESSICA MILLER, *A WOMAN’S GUIDE TO SUCCESSFUL NEGOTIATING: HOW TO CONVINCE, COLLABORATE & CREATE YOUR WAY TO AGREEMENT* 42–45 (2002); JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 171–73 (1975).

<sup>24</sup> See Laura J. Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis*, in *NEGOTIATION THEORY AND RESEARCH* 203, 205 (Leigh L. Thompson ed., 2006).

<sup>25</sup> See Bella M. DePaulo et al., *Lying in Everyday Life*, *J. PERSONALITY & SOC. PSYCHOL.* 979, 986–87 (1996). See also Robert S. Feldman, James A. Forrest & Benjamin R. Happ, *Self-Presentation and Verbal Deception: Do Self-Presenters Lie More?*, *24 BASIC & APPLIED SOC. PSYCHOL.* 163 (2002).

<sup>26</sup> Irene P. Stiver, *Work Inhibitions in Women: Clinical Considerations* 5 (Wellesley Ctrs. for Women, Working Paper No. 3, 1983).

ate them from others.<sup>27</sup> On the other hand, men are frequently concerned about the embarrassment they will experience if female counterparts outperform them. A number of male students in my Legal Negotiation class have told me that they would rather accept the negative consequences associated with non-settlements over the possibility of being outperformed by female counterparts. Even some female students are more critical of female cohorts who achieve exceptional bargaining results for themselves than they are of males who do so.

Males tend to exhibit greater confidence than females in performance-oriented situations.<sup>28</sup> Even when minimally prepared, men think they can “wing it” and perform successfully, while thoroughly prepared women often feel unprepared.<sup>29</sup> Such male confidence may explain why men like to negotiate more than women,<sup>30</sup> and why they often seek more self-beneficial results than their female cohorts.<sup>31</sup> This may also explain why they tend to feel more comfortable in risk-taking situations than women.<sup>32</sup>

When they negotiate, men tend to use more forceful language and exhibit more dominant nonverbal signals than females.<sup>33</sup> Such gender differences may explain why women experience greater anxiety when they encounter bargaining situations than men.<sup>34</sup> In addition, studies have found that when women negotiate for themselves they tend to seek and achieve less beneficial results than men, but when they negotiate on behalf of others they tend to establish higher goals and obtain more beneficial results.<sup>35</sup> On the other hand, while men tend to be more win-lose oriented, women

<sup>27</sup> See BABCOCK & LASCHEVER, ASK FOR IT, *supra* note 19, at 256–58.

<sup>28</sup> See Muriel Niederle & Lise Vesterlund, *Gender Differences in Competition*, 24 NEGOT. J. 447, 450–56 (2008).

<sup>29</sup> See GAIL EVANS, PLAY LIKE A MAN, WIN LIKE A WOMAN: WHAT MEN KNOW ABOUT SUCCESS THAT WOMEN NEED TO LEARN 84–85, 90–91 (2001); Peggy McIntosh, *Feeling Like a Fraud* 1, 2 (Wellesley Ctrs. for Women, Working Paper No. 18, 1985).

<sup>30</sup> See Deborah Small, Michele Gelfand, Linda Babcock & Hilary Gettman, *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007).

<sup>31</sup> See BABCOCK & LASCHEVER, ASK FOR IT, *supra* note 19, at 146–47.

<sup>32</sup> See BABCOCK & LASCHEVER, ASK FOR IT, *supra* note 19, at 32; BABCOCK & LASCHEVER, WOMEN DON'T ASK, *supra* note 19, at 138.

<sup>33</sup> See BABCOCK & LASCHEVER, WOMEN DON'T ASK, *supra* note 19, at 105.

<sup>34</sup> See *id.* at 113–114.

<sup>35</sup> See Emily T. Amanatullah & Michael W. 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 & SOC. PSYCHOL. 256–58 (2010); Deborah M. Kolb, *Too Bad for the Women or Does It Have to Be? Gender and Negotiation Research Over the Past Twenty-Five Years*, 25 NEGOT. J. 515, 521–22 (2009).

tend to be more win-win oriented, making it easier for them to use integrative bargaining to expand the overall surplus and improve the results achieved by both sides.<sup>36</sup>

Empirical studies have found that formal education diminishes the presence of gender-based verbal differences.<sup>37</sup> This factor may explain why male and female lawyers tend to employ similar language when endeavoring to persuade others.<sup>38</sup> Even when women use the identical language of male cohorts, they are likely to be perceived as being less influential.<sup>39</sup> Nonetheless, this factor tends to be offset by the fact that women tend to be more sensitive to verbal leaks and nonverbal signals than men.<sup>40</sup>

An additional factor that could influence male and female bargaining interactions is the fact that men and women differ with respect to their views of appropriate outcomes. Women tend to value “equal” exchanges, while men tend to desire “equitable” distributions.<sup>41</sup> These different dispositions might cause female bargainers to accept relatively equal outcomes even when they possess greater economic strength than their counterparts, while their male cohorts strive for equitable exchanges, which reflect relevant power imbalances. Despite this female tendency, however, when women are asked to negotiate on behalf of others—instead of for themselves—they tend to work more diligently to obtain beneficial results for the individuals they are representing.<sup>42</sup>

Other gender-based stereotypes may influence the way in which men and women interact during bargaining situations. Men are expected to be rational and objective, while females are expected to concentrate more on relationships.<sup>43</sup> Men tend to be more individualistic and define themselves by their own accom-

<sup>36</sup> See Kolb, *supra* note 35, at 520–21; BABCOCK & LASCHEVER, *WOMEN DON’T ASK*, *supra* note 19, at 164–72.

<sup>37</sup> See Nancy A. Burrell, William A. Donohue & Mike Allen, *Gender-Based Perceptual Biases in Mediation*, 15 *COMM. RES.* 447, 453, 464 (1988).

<sup>38</sup> See Andreas Feidakis & Aspasia Tsaoussi, *Competitiveness, Gender and Ethics in Legal Negotiations: Some Empirical Evidence*, 14 *INT’L. NEGOT.* 537, 545, 549 (2009).

<sup>39</sup> See *id.* at 563.

<sup>40</sup> See ALLAN PEASE & BARBARA PEASE, *THE DEFINITIVE BOOK OF BODY LANGUAGE* 13–14 (2006); LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 18–19 (2005).

<sup>41</sup> See Catherine Eckel, Angela C. M. de Oliveira & Philip J. Grossman, *Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative Than Men?*, 24 *NEGOT. J.* 429, 441 (2008).

<sup>42</sup> See Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 *J. PERSONALITY & SOC. PSYCHOL.* 951, 958–62 (2005).

<sup>43</sup> See Kray & Babcock, *supra* note 24, at 206–07.

plishments, while women tend to be more group-oriented and define themselves by their relationships and group endeavors.<sup>44</sup> Males are expected to be dominant and openly competitive, while women are expected to be more passive and submissive.<sup>45</sup> In distributive bargaining situations, particularly zero-sum interactions where the only issue is money, participants possessing stereotypically male traits could reasonably be expected to outperform participants possessing stereotypically female traits.<sup>46</sup> On the other hand, in multiple-item negotiations that lend themselves to integrative bargaining, the tendency of women to interact more cooperatively should enhance the likelihood they would achieve more efficient agreements.<sup>47</sup>

Professor Kay Deaux noted many years ago that behavioral predictions based upon gender-based stereotype beliefs are likely to be of questionable validity in most situations:

[D]espite the persistence of stereotypes, the studies of social behavior suggest that there are relatively few characteristics in which men and women consistently differ. Men and women both seem to be capable of being aggressive, helpful, and alternatively cooperative and competitive. In other words, there is little evidence that the nature of women and men is so inherently different that we are justified in making stereotypical generalizations.<sup>48</sup>

### III. IMPACT OF GENDER ON NEGOTIATION RESULTS

Over the past thirty-five years, I have taught negotiation skills to over 95,000 lawyers and business persons throughout the United States and in other countries. When I began to conduct in-house programs at law firms, senior partners often asked me if I thought women could negotiate as effectively as men. Since I also teach Employment Discrimination Law, I knew what this might mean. These gender-based stereotypes would make it more difficult for

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<sup>44</sup> See Deborah M. Kolb & Linda L. Putnam, *Negotiation Through a Gender Lens*, in THE HANDBOOK OF DISPUTE RESOLUTION 135, 137 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

<sup>45</sup> See BABCOCK & LASCHEVER, WOMEN DON'T ASK, *supra* note 19, at 62–63, 75.

<sup>46</sup> See Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942, 946 (2001).

<sup>47</sup> See KRAY & BABCOCK, *supra* note 24, at 209.

<sup>48</sup> KAY DEAUX, THE BEHAVIOR OF WOMEN AND MEN 144 (1976).

women to obtain entry-level job offers and to be promoted to partner later on. This factor induced me to make a statistical comparison of the results obtained by male and female students on my negotiation course exercises. There was not a single year for which the average results achieved by men were statistically different from the results obtained by women at the 0.05 level of significance.<sup>49</sup> In 1999, David Barnes and I compared the negotiation results obtained by male and female students during the thirteen years I had taught at George Washington University, and we again found no statistically significant differences with respect to the results obtained.<sup>50</sup>

In 2009, Professors Russell Korobkin and Joseph Doherty published an article based on a distributive negotiation exercise where the only issue concerned the amount of money to be paid by a company to a former employee who claimed to have been terminated because of his age. The exercise had been conducted among first-year law students at U.C.L.A. and U.S.C. The exercise participants had been given no formal training with respect to bargaining interactions. Professors Korobkin and Doherty found that the male students established higher aspirations than their female counterparts, and achieved more advantageous results.<sup>51</sup> Following the publication of this article, I examined the Legal Negotiation class data for the fourteen years since the publication of my most recent article to see if I might find any gender-based differences with respect to the results achieved by students on my negotiation exercises. I did not find a single year in which there was a statistically significant difference with respect to the results generated by male and female students.<sup>52</sup> These results made me wonder why Professors Korobkin and Doherty had found significant gender-based differences in their study, while I continued to find none among my Legal Negotiation course students.

The more I thought about the substantial difference between my long-term findings and those of Professors Korobkin and Doherty, the more I began to appreciate the fact that my results pertained to exercises conducted by law students who had received

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<sup>49</sup> See Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DISP. RESOL. 1, 12–16 & Table 1 (1990).

<sup>50</sup> See Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299 (1999).

<sup>51</sup> See Russell B. Korobkin & Joseph W. Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162 (2009).

<sup>52</sup> See Charles B. Craver, *The Impact of Gender on Negotiation Performance*, 14 CARDOZO J. CONFLICT RESOL. 339, 354–56 (2013).

formal training regarding negotiation skills—and who had worked on a number of practice exercises before they worked on the ones I had compared in my own studies. I thus decided to perform a new study in which I would compare the results achieved by male and female students on the practice exercise I assigned to them in the first class with the results they achieved on the graded exercises conducted during the second half of the semester. I wanted to see if formal training was what eliminates differences between male and female performance. I thought I might find some statistically significant differences between male and female students on the initial class exercise, but expected to find no such differences concerning the results achieved on the exercises conducted during the second half of the semester.

The initial exercise in my Fall 2015 Legal Negotiation class concerned a serious automobile accident where the sole issue was the amount of money the Defendant would provide to compensate the Plaintiff. I had the students pair off with persons of the opposite sex. The average result achieved by men who represented the Plaintiff was \$1,204,167, while the average result achieved by the women on that side was \$951,818. The average result achieved by men who represented the Defendant was \$969,286, while the average result achieved by women on that side was \$1,261,111. I rank-ordered the results from greatest to least for both sides, just as I do for the graded exercises assigned during the second half of the semester. The average placement score for men was 13.885, while that for women was 9.550. I conducted a t-test to compare the results statistically and found a clear gender-based difference at the 0.0276 level of significance.

I was not particularly surprised by the statistically significant difference I found. The students had not yet received any formal negotiation training, and when students work on the first practice exercise they often think they are really negotiating for themselves rather than for the parties they are theoretically representing. As noted earlier, when men and women negotiate for themselves, men tend to achieve more beneficial results than their female cohorts.<sup>53</sup> As we go through the semester, I encourage students to think they are truly acting on behalf of the clients they are asked to represent on the various exercises. I also encourage students who achieve below-average results on subsequent practice exercises to raise their aspirations to induce them to seek more beneficial results.

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<sup>53</sup> See *supra* note 35 and accompanying text.

Individuals of both genders who obtained below-average results indicated that as they approached the bargaining deadline, they felt substantial pressure to give in to their counterparts' demands to avoid the risk of non-settlements. These persons focused entirely on what would happen to their own side if no accords are reached. I emphasized the need for them to appreciate how much their counterparts wished to avoid non-settlements, and how important it was for them not to move more quickly than their counterparts toward final accords.

At the conclusion of the semester, I added up the placement points for all of the students on the graded exercises. I then compared the male and female averages. I was surprised by the fact I found statistically significant differences. The male mean was 78.559, while the female mean was 61.643, with the difference being statistically significant at the 0.002 level. These findings were completely inconsistent with the previous comparisons I had made.

Despite the formal training provided in the course readings and the class discussions, I found significant male-female differences. When I conducted the final class of the semester, I disclosed my statistical findings and asked students what they thought might have accounted for these results. A number of class members indicated that some men and women had employed highly adversarial tactics when interacting with others, and they found that more females gave in to these tactics than males. In addition, a number of female students indicated that they had been particularly concerned about the risks of non-settlements, inducing them to make larger concessions to their counterparts when negotiation deadlines approached. These results undermined my belief that formal training always eliminates gender-based negotiation differences.

#### IV. CAREFUL TRAINING TO DIMINISH MALE-FEMALE DIFFERENCES

In the Fall of 2016, 2017, and 2018, I decided to carefully focus on issues I thought explained the differences I had encountered in the Fall of 2015. I talked about how intimidating adversarial tactics could be, and emphasized the need for students confronted by such behavior to counteract it. We explored ideas discussed by William Ury in *Getting Past No*,<sup>54</sup> regarding the ways in which persons

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<sup>54</sup> See generally WILLIAM URY, *GETTING PAST NO* (1991). See also WILLIAM URY, *THE POWER OF A POSITIVE NO* (2007).

should politely but forcefully push back against such conduct. They should make it clear that they will not give in to such behavior and will accept non-settlements if such aggressive counterparts do not behave more appropriately. I also emphasized the fact that all students generally do poorly when they fail to achieve bargaining agreements. I pointed out that when individuals move toward their own bottom lines, their counterparts are always doing quite well. As a result, it would be completely irrational for such persons to accept non-settlements, instead of behaving more cooperatively.

At the conclusion of the 2016 semester, I compared the average placement scores achieved by male and female students. The male mean was 68.4 and the female mean was 67.0, with a p-value of 0.8087 indicating a complete lack of statistical significance between the two. In the Fall of 2017, the male mean was 51.229, while the female mean was 47.100, with a p-value of 0.5435, again indicating a lack of any statistically significant difference. In the Fall of 2018, the female mean of 61.750 was quite a bit higher than the male mean of 54.080, but with a p-value of 0.1530 there was still no statistically significant difference.

In future years, I will continue to emphasize ways in which students can effectively counter aggressive counterpart tactics. I will also remind class members to remember that their counterparts generally fear non-settlements as much as they do. I am confident that this approach will continue to eliminate gender-based negotiation differences.

## V. CONCLUSION

Over the many years I have taught Legal Negotiation courses, I have generally found no statistically significant differences with respect to the exercise results achieved by male and female students. Nonetheless, after Professors Korobkin and Doherty conducted a comparison regarding the results achieved by first-year law students on a single negotiation exercise, they found that the men substantially outperformed the women. In 2015, when I compared the results achieved by male and female students on the first practice exercise, I was not surprised by the fact men achieved better results than women. I was surprised, however, when I compared the exercise results obtained on the graded exercises conducted after formal negotiation training and found that the men significantly outperformed the women.

Students in my 2015 class indicated that some men and a few women had behaved in a particularly adversarial manner, which intimidated more females than males. Students also suggested that women were more fearful of non-settlements than men, causing them to concede more as exercise deadlines approached. As a result of these findings, I subsequently explored the ways in which students could effectively counter adversarial behavior by politely, but forcefully, pushing back. I also encouraged students to appreciate the fact that their counterparts would do as poorly as they would if no accords were achieved. As a result of this careful training, I found no statistically significant differences with respect to the results achieved by male and female students in 2016, 2017, and 2018.