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THE IMPACT OF GENDER ON NEGOTIATION PERFORMANCE

*Charles B. Craver**

I. INTRODUCTION

In 2009, Professors Russell Korobkin and Joseph Doherty published an article suggesting that male law students are more proficient negotiators than female law students.¹ Their study was based upon student negotiation performance on a single employment discrimination hypothetical in which the only issue was money—a classic zero sum exercise, where there was no way the participants could engage in integrative bargaining based upon the different degrees to which the parties valued diverse issues. The exercise was given to 136 first-year law students at University of California—Los Angeles (U.C.L.A.) and University of Southern California (U.S.C.). The participants were not taking a course on negotiating, and had no law school training with respect to this critical lawyering skill.

For the past thirty-five years I have taught Legal Negotiation courses to several thousand second and third-year law students. I have also taught Effective Legal Negotiation skills to 90,000 practicing attorneys in Continuing Legal Education courses and in-house programs in over forty states and in countries around the world. While in these sessions, I have occasionally been asked by senior attorneys attending my courses whether female students can negotiate as effectively as male students. Since I also teach Employment Discrimination Law, I have been concerned that such stereotypical beliefs may overtly, or even subconsciously, disadvantage women when they initially seek employment with law firms, as well as when they are being considered for entry into partnership ranks. Thus, I conducted several studies comparing the male and female stylistic differences, and the results achieved by students in my Legal Negotiation class exercises.²

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¹ Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162 (2009).

² Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 299 (1999); Charles B. Craver, *The Impact of Gender on*

My previous studies found no statistically significant differences with respect to the average results achieved by male and female students, or with respect to the standard deviations involved. In light of the stark gender-based differences discerned by Professors Korobkin and Doherty in their study, I thought it would be beneficial to explore the results achieved by my students in negotiation exercises, since my last study was published in 1999.

First, I will explain my Legal Negotiation course methodology to let readers appreciate the relevant concepts explored and the substantial number of exercises negotiated by my students. Next, I will explore some of the real and perceived gender-based differences that might influence negotiation performance. I will then report my statistical findings with respect to the results achieved by the 640 students who have worked on the different exercises in my Legal Negotiation course. Finally, I will discuss the implications of my findings.

II. LEGAL NEGOTIATION COURSE METHODOLOGY

Practicing lawyers negotiate almost every day—frequently they do not even appreciate that they are negotiating. They negotiate within their own law firms, with their partners, associates and legal assistants. They negotiate with their prospective clients, their current clients, and on behalf of clients with external parties. They use their bargaining skills to resolve lawsuits, to structure business deals, to comply with government-imposed obligations, and for other similar purposes. Other than the ability to perform legal research and to think like lawyers, there is no other lawyering skill that is employed more frequently, yet most attorneys have never had formal training with respect to this crucial area.

It was not until the 1960s that law professors had begun to appreciate the fact that simulation exercises could be used in clinical courses to teach students about the negotiation process. Professors James White at the University of Michigan,³ and Corne-

Clinical Negotiating Achievement, 6 OHIO ST. J. ON DISP. RESOL. 1, 1 (1990). See also Charles B. Craver, *If Women Don't Ask: Implications for Bargaining Encounters, the Equal Pay Act, and Title VII*, 102 MICH L. REV. 1104 (2004) (review essay of LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2003)).

³ See generally James J. White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*, 19 J. LEGAL EDUC. 337 (1967). See also HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977).

lius Peck and Robert Fletcher at the University of Washington,⁴ developed simulation models designed to enhance the bargaining proficiency of future legal practitioners. Their students explored the negotiation process and worked on a series of exercises designed to demonstrate the different concepts being covered.

Over the past thirty-five years I have taught a three credit hour Legal Negotiation course based upon the White/Peck/Fletcher models.⁵ I assign the students readings from my *Effective Legal Negotiation and Settlement* book.⁶ The class explores the impact of different negotiator styles and approaches.⁷ The “win-win” cooperative/problem-solving approach, where the participants move psychologically toward each other, works to maximize joint returns achieved. This approach is open, trusting, and the parties reason together. The “win-lose” competitive/adversarial approach, where the individuals move psychologically away from each other, and seek to maximize their own returns, are less open, less trusting, and manipulative. The “win-win”⁸ competitive/problem-solving approach where the negotiators seek to maximize their own returns, are not entirely open or cooperative, are somewhat manipulative, but endeavor to maximize the returns achieved by their opponents once they have obtained what they want.⁹

The most successful negotiators are often persons whose opponents think they have been completely open and cooperative, but who admit to being not entirely open, and somewhat manipula-

⁴ See generally Cornelius J. Peck & Robert L. Fletcher, *A Course on the Subject of Negotiation* 21 J. LEGAL EDUC. 196 (1968). See also CORNELIUS J. PECK, *CASES AND MATERIALS ON NEGOTIATION* (1980).

⁵ Over the past ten years, I have also taught an intensive one credit hour Legal Negotiation class which meets for two whole days (at the University of Virginia) or four half days (at The George Washington University). For this class, I assign readings from CHARLES B. CRAVER, *SKILLS & VALUES: LEGAL NEGOTIATING* (2d ed. 2012). This class is graded entirely on a credit/no credit basis, and I do not record the actual results achieved by the students on the different bargaining exercises.

⁶ CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (7th ed. 2012).

⁷ See *id.* at 11-21; See generally GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Styles*, 7 HARV. NEGOT. L. REV. 143 (2002).

⁸ “If we negotiators were seeking truly equal terms and deals . . . we’d simply divide everything in half. In reality, we’re out to achieve *all* (or most) of *our* goals, to make *our most desirable deal*. But the best way to do so is to let the other side achieve *some* of *their* goals, to make their acceptable deal. That’s WIN-WIN: big win for your side, little win for theirs.” RONALD M. SHAPIRO & MARK A. JANKOWSKI, *THE POWER OF NICE* 5 (2d ed. 2001).

⁹ See GERALD R. WILLIAMS & CHARLES B. CRAVER, *LEGAL NEGOTIATING* 53-54 (2007); Charles B. Craver, *The Impact of Negotiator Styles on Bargaining Interactions*, 35 AM. J. TRIAL ADVOC. 1 (2011).

tive.¹⁰ These bargainers recognize the critical nature of the *bargaining process*. Studies have found that when individuals think the negotiation process has been fair, and feel they have been treated respectfully, they are actually more satisfied with objectively less beneficial terms than when they feel the process has not been fair.¹¹ It is also interesting to note that while many people think that cooperative/problem-solvers generate the most efficient joint returns, an empirical study found that individualistically motivated negotiators produced greater joint outcomes than cooperatively motivated pairs.¹² I have found this to be true among my Legal Negotiation class students. Even though they seek to obtain optimal results for themselves due to the impact of their bargaining outcomes on their course grades, they learn to be highly efficient in recognition of the fact that the greater the joint surplus they create with their adversaries, the easier it is for them to obtain beneficial outcomes for themselves.

The class then focuses on the six stages of the bargaining process.¹³ During the Preparation Stage, negotiators must ascertain the relevant factual, legal, economic, and cultural issues, and then determine their own bottom lines, their own goals, and their planned opening positions. They must also try to place themselves in the shoes of their opponents and estimate the goals and bottom lines of those parties.¹⁴ They must then determine how they picture getting from where they begin to where they hope to end up. They begin their interaction with opponents during the Preliminary Stage, where they seek to establish rapport with the people on the other side, and create positive bargaining environments that are likely to generate relatively cooperative and efficient interactions.

During the next phase, the Information Stage, negotiators must determine the pertinent issues to be resolved and the underlying interests associated with those terms. This is the “value crea-

¹⁰ See Keith G. Allred, *Distinguishing Best and Strategic Practices: A Framework for Managing the Dilemma Between Creating and Claiming Value*, 16 NEGOT. J. 387, 394-95 (2000).

¹¹ See generally Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008).

¹² See Kathleen M. O'Connor & Peter J. Carnevale, *A Nasty but Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 504, 515 (1997).

¹³ See Craver, *supra* note 6, at 53-164.

¹⁴ See GRANDE LUM, *THE NEGOTIATION FIELDBOOK: SIMPLE STRATEGIES TO HELP YOU NEGOTIATE EVERYTHING* 58 (2d ed. 2011); LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 28-29 (3d ed. 2005); KATHLEEN KELLEY REARDON, *THE SKILLED NEGOTIATOR: MASTERING THE LANGUAGE OF NEGOTIATION* 46-51 (2004).

tion” portion of bargaining interactions, where the parties must ascertain what they have to share with each other. The most effective way to obtain the relevant information from the other side is to initially ask broad, open-ended questions, which will get the opposing side talking.¹⁵ As negotiators get further into this stage, they should shift to “what” and “why” questions, with the “what” inquiries used to determine the specific issues involved, and the “why” inquiries used to discover the opponents interests underlying those particular terms. During this stage, negotiators must be active listeners, who look for verbal leaks and nonverbal signs, suggesting the true interests of the opposing side.¹⁶ During this portion of bargaining interactions the participants must be relatively open, but they may over or under-state the value of particular items for strategic purposes. Although Model Rule 4.1 prohibits a lawyer from knowingly misrepresenting a *material* fact, Comment 2 acknowledges that in the negotiation context statements concerning client values and settlement intentions do not constitute “material” fact, thus allowing negotiators to engage in puffing and embellishment.¹⁷

Once they complete the Information Stage, the negotiators move into the Distributive Stage, which is the “value claiming” portion of their interaction. During this portion of the bargaining process, they have to divide the surplus they created during the Information Stage, and both sides are usually seeking to claim more than they give up.¹⁸ Near the end of the Distributive Stage, the participants begin to see the likelihood of an agreement on the horizon, and they enter the Closing Stage. In the Closing Stage the parties are still a ways apart, but are becoming psychologically committed to an accord. This is a delicate part of bargaining interactions, because the parties are anxious to conclude their interaction, and the more anxious participant is likely to close more of the remaining gap. Negotiators should avoid bidding against them-

¹⁵ See RONALD M. SHAPIRO, DARE TO PREPARE: HOW TO WIN BEFORE YOU BEGIN 113-20 (2008); DEEPAK MALHOTRA & MAX BAZERMAN, NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND 40-41 (2007).

¹⁶ We carefully explore “verbal leaks” which inadvertently contain hidden messages, and nonverbal signals, which also convey important information. See Craver, *supra* note 6, at 25-52.

¹⁷ See Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, 306-08 (2010).

¹⁸ See generally Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 CARDOZO J. CONFLICT RESOL. 1 (2010).

selves with unreciprocated concessions, and should try to move in concert toward final terms.

Once negotiators agree upon final terms, they often think their interaction is over, and prematurely end the bargaining process. Individuals who make this mistake are likely to end up with less efficient terms than they might have achieved if they had moved into the Integrative Stage, which is designed to ensure that the parties have divided the different items in a mutually efficient manner. They should look for items that may have ended up on the wrong side of the bargaining table due to puffing and embellishment. They must try to determine if there is any way they can trade items already agreed upon in a manner that will enable them to expand the overall bargaining pie and simultaneously improve their respective positions. They want to avoid the situation in which they leave potential client gains on the bargaining table.

During subsequent classes, we examine the different negotiation techniques individuals are likely to employ during bargaining interactions to advance their interests.¹⁹ There are a limited number of tactics negotiators can employ, and they must decide which ones they will use to advance their own interests. Negotiators must also learn to recognize the techniques being employed by their opponents, to enable them to effectively counter those actions. We also explore specific negotiation issues concerning the way to initiate bargaining talks, and the use of telephone and e-mail communications during such interactions.²⁰ Separate classes focus on transnational negotiations,²¹ mediator assisted interactions,²² and negotiation ethics.²³

During the first half of the semester, students engage in seven or eight negotiation exercises designed to demonstrate the concepts being taught, and to enable them to experiment with their personal styles and the bargaining techniques being employed. One or two exercises are zero-sum, in which the only issue is money, and where one side's gain generates an equal loss for the opposing side. The other exercises contain a number of issues, many of which are valued differently by each side. At the conclusion of each exercise, the results are disclosed, and we focus on the terms they should have achieved to maximize their joint gains. The

¹⁹ See Craver, *supra* note 6, at 165-203.

²⁰ *Id.* at 213-58.

²¹ *Id.* at 279-334.

²² *Id.* at 335-405.

²³ *Id.* at 407-30.

results vary by five, ten, or even twenty fold, and the students begin to appreciate the fact that if they leave client satisfaction on the bargaining table through inefficient agreements, both sides suffer due to the fact that they find less to share than they could have found through more efficient bargaining. I do not record the results of these practice exercises.

During the second half of the semester the students engage in six diverse exercises, the results of which affect two-thirds of their grade.²⁴ Each exercise describes the point values associated with the different issues, and indicates how participants would be evaluated if no agreement is achieved. On most exercises, the students work on a one-on-one basis, but on two assignments they are assigned partners in order to help them with the complex issues involved, and to demonstrate the fact that their most difficult negotiations may be with their partners instead of their opponents. The results are ranked in order from high to low, with these placement points being recorded for grading purposes. At the conclusion of the semester, I discard the lowest of each student's six scores, and add up the five remaining scores. They are also required to prepare a ten to fifteen page paper in which they discuss what they have learned during the course, what they have done well, and what they would do differently in the future. The grades on these papers accounts for the other one-third of their final grades.

Model Rule 4.1 is incorporated into the course rules, and if any student is accused of an ethics violation, a trial is conducted in front of the other class members. I am happy to report that in all of the years in which I have taught my class, I have never had a formal ethics charge filed against any student. As an alternative, a student can raise the issue informally, and generate a class discussion that would not result in any penalty being imposed. During a full semester, such issues tend to be raised several times. In most cases, class members dismiss their concerns by indicating that the conduct in question was acceptable puffing or embellishment: on rare occasions, class members suggest that the behavior was inappropriate. The students being discussed face trouble in further negotiations because of the negative impact the allegations have on their reputations. By the end of the term, these individuals usually end up with one or even two non-settlements due to the fact that their future opponents do not think they can be trusted. Students

²⁴ I recently decided to modify my grading system by having the negotiation results count toward half of the course grades, with paper scores accounting for the other half.

who develop negative reputations based upon their highly aggressive and competitive behavior frequently suffer similar difficulties. These individuals then begin to appreciate the degree to which reputations affect bargaining interactions in the real world.

During the final class of the semester we talk about the factors possessed by the most proficient negotiators.²⁵ Proficient negotiators are thoroughly prepared for their interactions. They have established elevated, but realistic, aspiration levels for each item to be exchanged. They have planned raised, but principled opening offers, which they can logically explain. They have developed such confidence in their own positions causing less confident opponents to begin to question their own objectives. They use the Preliminary Stage to establish good relationships with opponents and positive bargaining environments. They are effective and persuasive communicators, as well as excellent active listeners. They also possess the patience and perseverance needed to keep the process going until their adversaries feel the need to lower their sights if agreements are going to be achieved. It is interesting to note that students never find gender to be relevant to negotiation performance.

III. REAL AND PERCEIVED GENDER DIFFERENCES

Gender-based stereotypes can influence the way in which some persons interact with people of the opposite sex.²⁶ Men—and even many women—frequently expect women to behave like “ladies.” Aggressiveness that would be considered vigorous advocacy if employed by men, may be characterized as offensive and inappropriate when used by women.²⁷ Male negotiators, who would normally counter aggressive tactics by other men with similar responses, may find it difficult to do so when dealing with females. When men fail to counter such behavior the way they think

²⁵ See Charles B. Craver, *What Makes a Great Legal Negotiator?*, 56 *LOY. L. REV.* 337, 350-58 (2010).

²⁶ 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).

²⁷ See LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT* 256-58 (2008); Laura J. Kray & Connson C. Locke, *To Flirt or Not to Flirt? Sexual Power at the Bargaining Table*, 24 *NEGOT. J.* 483, 485 (2008).

that they should, they provide their female opponents with an inherent bargaining advantage. Men who are similarly unwilling to act as competitively toward female opponents as they would act toward male adversaries provide their female opponents additional leverage.

Males occasionally make the mistake of assuming that female opponents do not engage in as many negotiating “games” as male adversaries do. Even many females mistakenly assume that other women are unlikely to employ the Machiavellian tactics stereotypically attributed to members of the competitive male culture. Men and women who expect their female adversaries to behave less competitively, and more cooperatively, often ignore the reality of bargaining interactions, and accord a significant advantage to females who are willing to employ manipulative tactics.

Male negotiators occasionally endeavor to obtain a psychological advantage against competitive female bargainers by casting aspersions on their femininity. Female negotiators should not permit opponents to employ this approach successfully. They have the right to employ any style they think is appropriate, regardless of any gender-based stereotypes they may contradict. If males raise inappropriate objections to their otherwise proper conduct, they should reply that they do not wish to be viewed as “ladies,” but merely as advocates for the parties they are representing. On some occasions, female bargainers may wish to address the issue of gender-based stereotyping directly, since this may be the most effective way to counter such presumptions²⁸: they may directly ask their male opponents if they find it difficult negotiating with females. Although most men will usually deny such beliefs, they would be likely to internally re-evaluate their stereotypical treatment of their female adversaries.

Empirical studies have found that male and female subjects do not behave identically in overtly competitive situations. Females tend to be initially more trusting and trustworthy than their male cohorts, but less willing than males to forgive violations of their trust.²⁹ Individuals interacting with female opponents who behave in seemingly open and cooperative ways may be able to establish

²⁸ See Andrea Kupfer Schneider, *Effective Responses to Offensive Comments*, 10 NEGOT. J. 107, 112-13 (1994).

²⁹ 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).

trusting and cooperative relationships with those female opponents, as long as they do not commit transgressions. Males, on the other hand, are less likely to focus on such relationship issues: they are more likely to establish elevated aspirations that enhance their ability to obtain more beneficial results when they interact with female adversaries.³⁰

One negotiation observer has 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.”³¹ Many women are apprehensive with respect to the negative consequences they associate with competitive achievement, fearing that competitive success will alienate them from others.³² Males in my Legal Negotiation class have occasionally indicated that they are especially uncomfortable when female opponents obtain more advantageous results than they achieve. Several males have suggested that they would prefer the negative consequences associated with non-settlements, as opposed to being defeated by a female adversary.³³ Even some female students are more critical of other women who attain exceptional bargaining results, than they are of males who achieve equally advantageous negotiation terms.³⁴

Males tend to exude greater confidence than females in performance-oriented situations.³⁵ Even when minimally prepared, males think they can “wing it” and get through such situations successfully, while thoroughly prepared females tend to feel unpre-

³⁰ 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).

³¹ Irene P. Stiver, *Work Inhibitions in Women: Clinical Considerations* 5 (Wellesley College, Working Paper, 1983). See LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE 102-03 (2007); Fiona Greig, *Propensity to Negotiate and Career Advancement: Evidence From an Investment Bank that Women Are on a “Slow Elevator”*, 24 NEGOT. J. 495, 496-97 (2008).

³² See BABCOCK & LASCHEVER, *supra* note 27, at 32; Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 115-17 (2008).

³³ See MILLER & MILLER, *supra* note 29, at 132.

³⁴ See Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, 103 ORG. BEHAV. AND HUM. DECISION PROCESSES 84, 87 (2007).

³⁵ See Muriel Niederle & Lise Vesterlund, *Gender Differences in Competition*, 24 NEGOT. J. 447, 450-56 (2008); ROGER VOLKEMA, LEVERAGE: HOW TO GET IT AND HOW TO KEEP IT IN ANY NEGOTIATION 154 (2006).

pared.³⁶ I frequently see this phenomenon with my Legal Negotiation students: successful males think they can achieve beneficial results in any setting, while successful females continue to express doubts concerning their own capabilities.

The confidence males exude may explain why men like to negotiate more than women,³⁷ and why they tend to seek more advantageous results than their female counterparts.³⁸ Males tend to feel more comfortable in risk-taking situations than women.³⁹ When males bargain, they are inclined to use more forceful language, and they exhibit more dominant nonverbal signs (e.g., intense staring and loud voices) than females.⁴⁰ Such gender differences may explain why women experience greater anxiety more frequently than men do when they have to negotiate.⁴¹ Also, women tend to seek and achieve less than men do when they negotiate for themselves, but they usually set higher goals and obtain more advantageous results when they bargain on behalf of others.⁴² However, while men tend to be more win-lose oriented, women tend to be more win-win oriented, making it easier for them to use integrative bargaining techniques to expand their overall surplus, and improve the results achieved by both sides.⁴³

During personal interactions, men are more likely to employ “highly intensive language” to persuade others, and they tend to be more effective using this approach.⁴⁴ Women, on the other hand,

³⁶ 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 (2000); Peggy McInosh, *Feeling Like a Fraud*, 1, 2 (Wellesley Centers for Women, Work in Progress, 1985).

³⁷ See Deborah Small, Michele Gelfand, Linda Babcock & Hilary Gettman, *Who Gets to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCH. 600 (2007). See also Karin Hederos Eriksson & Anna Sandberg, *Gender Differences in Initiation of Negotiation: Does the Gender of the Negotiation Counterpart Matter?* 28 NEGOT. J. 407, 414 (2012) (finding that men are more likely to initiate negotiation than women.).

³⁸ See BABCOCK & LASCHEVER, *supra* note 27, at 146-47; BABCOCK & LASCHEVER, *supra* note 31, at 130-35, 140-41.

³⁹ See BABCOCK & LASCHEVER, *supra* note 27, at 32; BABCOCK & LASCHEVER, *supra* note 31, at 138.

⁴⁰ See BABCOCK & LASCHEVER, *supra* note 31, at 105.

⁴¹ See *id.* at 113-14.

⁴² 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. PSYCH. 256, 258 (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).

⁴³ See Kolb, *supra* note 43, at 520-21; BABCOCK & LASCHEVER, *supra* note 32, at 164-72.

⁴⁴ See Michael Burgoon, James P. Dillard & Noel E. Doran, *Friendly or Unfriendly Persuasion: The Effects of Violations of Expectations by Males and Females*, 10 HUM. COMM. RES. 283,

are more likely to employ less intensive language during persuasive encounters, and are inclined to be more effective behaving in that fashion.⁴⁵ Females often use language containing more disclaimers (such as, “I think” and “you know”) than their male cohorts,⁴⁶ which may cause listeners to view women as less forceful. Women also tend to have more acute hearing than men, causing them to use softer voices than males when they interact with others: this factor may cause females to consider slightly raised voices more aggressively than men would.⁴⁷

Studies have found that formal education diminishes the presence of gender-based verbal differences. When individuals receive specific training, male-female communication distinctions tend to disappear.⁴⁸ This factor would explain why male and female lawyers tend to employ similar language when endeavoring to persuade others.⁴⁹ Nonetheless, even when women use identical language that men use, they are often perceived as being less influential.⁵⁰ However, this gender-based factor is offset by the fact that women tend to be more sensitive than men to verbal leaks and nonverbal signals.⁵¹

Another factor that could influence male and female bargaining interactions concerns the fact that men and women differ with respect to their views of what is an appropriate outcome. Women tend to value “equal” exchanges, while men tend to desire “equitable” distributions.⁵² These different predispositions could cause female bargainers to accept equal results even when they possess greater economic strength than their opponents, while male negoti-

284, 293 (1983). See also Ayala Malach Pines, Hamutal Gat & Yael Tal, *Gender Differences in Content and Style of Argument Between Couples During Divorce Mediation*, 20 CONFLICT RESOL. Q. 23, 36-37 (2002).

⁴⁵ See Linda L. Carli, *Gender and Social Influence*, 57 J. SOC. ISSUES 725, 732-36 (2001).

⁴⁶ See Larry R. Smeltzer & Kittie W. Watson, *Gender Differences in Verbal Communication During Negotiations*, 3 COMM. RES. REP. 74, 78 (1986).

⁴⁷ See LEONARD J. SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 18 (2006).

⁴⁸ See Nancy A. Burrell, William A. Donohue & Mike Allen, *Gender-Based Perceptual Biases in Mediation*, 15 COMM. RES. 447, 453 (1988).

⁴⁹ See Andreas Feidakis & Aspasia Tsaoussi, *Competitiveness, Gender and Ethics in Legal Negotiations: Some Empirical Evidence*, 14 INT'L. NEGOT. 537, 545, 549 (2009).

⁵⁰ See *id.* at 563.

⁵¹ See ALLAN PEASE & BARBARA PEASE, THE DEFINITIVE BOOK OF BODY LANGUAGE 13-14 (2006); SAX, *supra* note 48, at 18-19; MILLER & MILLER, *supra* note 30, at 60-61.

⁵² 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); ROY J. LEWICKI, JOSEPH A. LITTELER, JOHN W. MINTON & DAVID M. SAUNDERS, NEGOTIATIONS 330 (2d ed. 1994).

ators strive for equitable exchanges that reflect pertinent power imbalances. On the other hand, when women are put in situations in which they are asked to negotiate on behalf of others—instead of just themselves—they tend to work more diligently to obtain optimal results for the individuals they are representing.⁵³

Women are expected to present themselves in a modest manner, while men are expected to behave in a more masculine and self-promoting way. Consequentially, females who endeavor to establish their authority in a stereotypically male fashion are often viewed more negatively than their male peers are viewed.⁵⁴ This double standard even affects law students who are characterized differently by their fellow students when they openly demonstrate their intellectual capabilities through class participation. Although male participants tend to be given negative labels, these are usually of a gender-neutral variety (e.g., “gunner”); female participants are generally given labels that directly relate to their femininity (e.g., “man-hating” or “feminazi”).⁵⁵ These forms of disparate treatment of women may place females at an unfair disadvantage in situations where participants are expected to assert themselves, and it may be designed to undermine their negotiation endeavors.

Gender-based competitive differences may be attributable to the dissimilar acculturation processes for boys and girls.⁵⁶ Parents tend to be more protective of their daughters than of their sons.⁵⁷ Additionally, most boys are exposed to highly competitive situations at an early age.⁵⁸ Competitive little league sports introduce boys to the “thrill of victory and the agony of defeat” during their formative years.⁵⁹ On the other hand, “[t]raditional girls’ games like jump rope and hopscotch are turn-taking games, where com-

⁵³ See Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCH. 951, 958-62 (2005).

⁵⁴ See Bowles, Babcock & Lai, *supra* note 34, at 85-87; Catherine H. Tinsley, Sandra I. Cheldelin, Andrea Kupfer Schneider & Emily T. Amanatullah, *Women at the Bargaining Table: Pitfalls and Prospects*, 25 NEGOT. J. 233, 236-37 (2009).

⁵⁵ See Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 51-52 (1994).

⁵⁶ See Carrie Menkel-Meadow, *Teaching About Gender and Negotiation: Sex, Truths, and Videotape*, 16 NEGOT. J. 357, 362-64 (2000).

⁵⁷ See BABCOCK & LASCHEVER, *supra* note 31, at 30-31; NICKY MARONE, WOMEN AND RISK: HOW TO MASTER YOUR FEARS AND DO WHAT YOU NEVER THOUGHT YOU COULD DO 42-45 (1992).

⁵⁸ See EVANS, *supra* note 36, at 12-13; DEBORAH TANNEN YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 43-47 (1990).

⁵⁹ See BETTY LEHAN HARRAGAN, GAMES YOUR MOTHER NEVER TAUGHT YOU: CORPORATE GAMESMENSHP FOR WOMEN 75-78, 282 (1977).

petition is indirect since one person's success does not necessarily signify another's failure."⁶⁰ Therefore, while directly competitive games teach boys how to resolve the disputes that inevitably arise, girls are less likely to be exposed to these dispute resolution skills.⁶¹ It is true that little league and interscholastic sports for women have become more competitive in recent years, but most continue to be less overtly competitive than corresponding male athletic endeavors.⁶²

Other gender-based stereotypes affect the way in which men and women interact in bargaining situations. Males are expected to be rational and objective, while females are expected to concentrate more on relationships.⁶³ Men tend to define themselves by their individual achievements, while women tend to define themselves by their relationships and group endeavors.⁶⁴ Male negotiators are expected to be dominant and openly competitive, while females are expected to be passive and submissive.⁶⁵ In competitive bargaining situations, particularly zero sum interactions, participants possessing stereotypically male traits could reasonably be expected to outperform participants possessing stereotypically female traits.⁶⁶ 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 that they would achieve more efficient agreements.⁶⁷

When men and women interact in non-intimate settings, men tend to speak for longer periods of time, and interrupt conversations, more frequently than women do.⁶⁸ This masculine tendency, to dominate male-female interactions, can provide men with an advantage during bargaining situations by enabling them to control the discussions. Men also tend to be more direct than women: if a man is hungry, he is likely to say so directly, and indicate a desire for food. On the contrary, women tend to be more indirect: if a

⁶⁰ CAROL GILLIGAN, *IN A DIFFERENT VOICE* 10 (1982).

⁶¹ See BABCOCK & LASCHEVER, *supra* note 31, at 34-35.

⁶² See EVANS, *supra* note 36, at 80.

⁶³ See Kray & Babcock, *supra* note 30, at 206-07; Pines, Gat & Tal, *supra* note 44, at 25, 39.

⁶⁴ 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); Babcock & Laschever, *supra* note 31, at 117.

⁶⁵ See Babcock & Laschever, *supra* note 31, at 62-63, 75.

⁶⁶ See Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 *J. PERSONALITY & SOC. PSYCH.* 942, 946 (2001).

⁶⁷ See Kray & Babcock, *supra* note 30, at 209.

⁶⁸ See KAY DEAUX, *THE BEHAVIOR OF WOMEN AND MEN* 60 (1976).

woman is hungry, she is likely to ask the people around her if they are hungry, hoping that they will appreciate the fact she wants something to eat.⁶⁹ This factor might cause men to be perceived as more forceful than women at the bargaining table.

Students enrolled in my negotiation classes explore the relevant factors that influence bargaining interactions. They learn about negotiator styles, verbal leaks and nonverbal signals, the different stages of the bargaining process, and the various tactics that individuals employ to advance their interests. During the practice exercises, the students experiment with different approaches to determine the optimal way for them to negotiate. If their initial expectations are modest, they learn how to raise them in a defensible manner. They appreciate the need to place themselves in the shoes of their opponents, enabling them to understand the factors influencing those people. By the time they begin to work on the exercises that will affect their course grades, the students have become relatively proficient negotiators. Even if both male and female students continue to be influenced at least partially by gender-based differences, they learn how to use those differences to their own advantage. As a result, I have observed almost no differences with respect to the results they achieve.

Professor Kay Deaux sagaciously noted many years ago that behavioral predictions based upon stereotypical beliefs regarding men and women are likely to be of questionable validity in most situations. Despite 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 alternately 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.⁷⁰

⁶⁹ See Lynn Smith-Lovin & Dawn T. Robinson, *Gender and Conversational Dynamics in GENDER INTERACTION, AND INEQUALITY* 122, 124-26 (Cecilia L. Ridgeway ed., 1992); DEBORAH TANNEN, *THAT'S NOT WHAT I MEANT! HOW CONVERSATIONAL STYLE MAKES OR BREAKS RELATIONSHIPS* 71-73 (1986).

⁷⁰ DEAUX, *supra* note 68, at 144. See Andrea Kupfer-Schneider, Catherine H. Tinsley, Sandra Cheldelin & Emily T. Amantullah, *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER L. & POL'Y 363, 373-80 (2010); Andreas Feidakis & Aspasia Tsaoussi, *Competitiveness, Gender and Ethics in Legal Negotiations: Some Empirical Evidence*, 14 INTL. NEGOT. 537 (2009); Amy J. Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis?*, 13 TEX. J. WOMEN & L. 169, 169 (2003).

IV. STATISTICAL RESULTS

My database for this study incorporates data from my Legal Negotiation course, which I have taught for the past sixteen years, since I last published my study with Professor Barnes in 1999. Since I am comparing male and female negotiation exercise achievements, I only used student negotiation exercise placement scores in this study. The means and standard deviations were calculated for the male and female students in each of the fifteen classes on an aggregate basis. A t-test was performed for each class to determine if there was a statistically significant difference between the male and female means for any year. T-probability values of 0.10 or lower would establish statistical significance at the 0.10 level, while t-probability values of 0.05 or lower would demonstrate significance at the 0.05 level.⁷¹ Since I hypothesized that no statistically significant differences would be found, and I had reason to suspect that any differences would favor males over females, I used two-tailed t-probability values. The relevant data are set forth in the following table:

A review of the means and t-probability values set forth in the Table suggests that there were no differences in the negotiation exercise results based upon gender. There is not a single year for which any male or female mean score difference was statistically significant at even the 0.10 level, let alone at the preferred 0.05 level. The only two years for which t-probability values approached the 0.10 level were 2008, when the male mean was higher, and 2009, when the female mean was higher. When the data for all sixteen years is considered, male and female means are almost identical, with a t-probability of 0.9731.

When I first decided to compare male and female negotiation exercise results a number of years ago, several colleagues of mine suggested that the means might be similar but the result spreads would be quite different. Their theory was that male scores would be widely varied due to the stereotypical male competitive/adversarial styles, while the female scores would be more closely together due to their more cooperative styles. If these stereotypical assumptions were correct, the standard deviations for the men

⁷¹ At the 0.10 level of significance, the probability that any determined difference has occurred by random chance would be one in ten, while at the 0.05 level it would be one in twenty. See MORRIS H. DEGROOT, STEPHEN E. FIENBERG & JOSEPH B. KADANE, *STATISTICS AND THE LAW* 10-13 (1986); DAVID W. BARNES & JOHN M. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION* 306-08 (1986). D.F. indicates the degrees of freedom involved for each year's calculation.

T-TEST COMPARISONS OF GENDER-BASED MEANS

Year	N	Mean	Std. Dev.	D.F.	T-Prob.
1997					
Males	26	27.835	5.493	38	0.3329
Females	14	25.729	8.039		
1998					
Males	27	34.259	8.637	44	0.3923
Females	19	32.247	6.332		
1999					
Males	30	32.240	9.396	46	0.6207
Females	18	30.828	9.698		
2000					
Males	27	27.137	7.651	39	0.9157
Females	14	26.864	8.021		
2001					
Males	20	24.015	6.465	33	0.1662
Females	15	27.260	7.029		
2002					
Males	17	46.429	10.232	30	0.2474
Females	15	41.600	12.904		
2003					
Males	17	33.941	10.867	25	0.3636
Females	10	37.900	10.493		
2004					
Males	15	45.467	11.805	30	0.8166
Females	17	44.400	13.734		
2005					
Males	22	46.705	12.542	33	0.3798
Females	13	42.962	11.046		
2006					
Males	38	72.368	22.965	55	0.3908
Females	19	77.947	22.929		
2007					
Males	13	39.808	9.080	25	0.8831
Females	14	40.393	11.188		
2008					
Males	25	75.400	19.159	45	0.1003
Females	22	67.227	13.240		
2009					
Males	43	86.198	23.717	59	0.1211
Females	18	96.556	22.814		
2010					
Males	39	80.359	20.075	51	0.9627
Females	14	80.071	18.261		
2011					
Males	39	87.167	26.335	57	0.5496
Females	20	82.975	23.158		
2012					
Males	30	82.400	19.164	55	0.5254
Females	27	85.930	22.519		
ALL YEARS					
Males	428	52.491	22.861	31	0.7886
Females	269	50.331	23.021		

would be higher than those for the women. It is interesting to note that for eight of the sixteen years the female standard deviations were higher, while for the other eight years, the male standard deviations were higher. When the standard deviations for all sixteen years are examined, the male and female scores are almost identical. These statistics would indicate that the male and female spreads were quite similar, negating any suggestion that the male results would reflect a greater degree of competitive/adversarial bargaining.

I have never recorded and compared the male and female results from the first couple of negotiation exercises I assign to students during the first two weeks of the semester. It is possible that some statistically significant differences would occur, based upon the fact that male students tend to feel more comfortable with the overtly competitive nature of my exercises, and because males tend to set higher goals when they negotiate for themselves. At the end of each of those exercises, I disclose the results and we talk about what the participants should have agreed upon to maximize their joint returns. I then ask the students who achieved below average results what they initially hoped to obtain. The students with below average results almost always have modest objectives: well below the objective level of their more successful cohorts. We next talk about the direct correlation between negotiator aspirations and exercise results. I encourage the individuals with low aspirations to raise their aspirations on their future exercises. We also explore the anchoring impact of opening offers, and usually discover that the less successful students initially articulated less demanding positions.

As the weeks pass by, and students work on additional practice exercises, the less successful students tend to raise their expectation levels, and plan more beneficial opening offers. Once students raise their expectation levels, they begin to obtain better results for themselves, and develop greater confidence in their ability to do so. As a result, by the time the graded exercises begin, almost all of the students have had the opportunity to learn how to prepare for, and approach bargaining exercises, if they hope to achieve beneficial results. This is why courses on Legal Negotiation are so important, and I wish that all law students could be offered such practical training.

V. RESULT IMPLICATIONS

During the thirty-five years I have taught Legal Negotiation, I have always been surprised by the degree to which practitioners and law students of both sexes permit gender-based stereotypes to influence their bargaining interactions. Many individuals assume that males will be more highly competitive and adversarial, and that women will be more accommodating and more pleasant. I have often had two women that had been paired against each other assume that they would have pleasant win-win interactions, and they are shocked when competitive instincts take over.

My Legal Negotiation students quickly learn not to judge their future opponents by their gender. They begin to appreciate the fact that females may be as Machiavellian and competitive as males, and they realize that the grade impact of negotiation results causes almost all class members to seek highly beneficial results for themselves. On the other hand, as I noted earlier, my students also learn to be highly efficient negotiators in recognition of the fact that the more surplus they create, the easier it is for them to obtain what they hope to achieve.⁷²

When I teach Continuing Legal Education and in-house training programs, I still get the impression that a number of practicing attorneys underestimate the capabilities of female negotiators. Bargainers who underestimate the proficiency of their opponents solely because of their gender are disadvantaging themselves. The best way to get even with such male chauvinists is to clean them out! On the other hand, such stereotypical beliefs may negatively affect females when they graduate from law school and are seeking entry level associate positions, or when they are being considered for entry into partnership ranks at their present firms.

It is clearly unlawful under Title VII of the Civil Rights Act of 1964,⁷³ and state fair employment practice laws, for law firms to discriminate against job applicants and current employees based upon their gender.⁷⁴ It would be quite rare to find evaluating attorneys who would openly discriminate against female applicants based directly on their sex; they know that this is unlawful. What is difficult to determine; however, is the degree to which subtle gen-

⁷² See Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiation Styles*, 7 CARDOZO J. CONFLICT RESOL. 1, 12-13 (2006).

⁷³ 42 U.S.C.A. §§ 2000e (West 2012).

⁷⁴ Even decisions regarding entry into partnership ranks are covered by the Title VII proscription against sex discrimination. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

der-based stereotypes may subconsciously influence such decisions. Even the persons making the discriminatory determinations are not aware of the degree to which this factor may influence them. This is why studies, like the one published by Professors Korobkin and Doherty can have a negative impact on employment opportunities for females. Lawyers who read about such studies' findings can have the gender-based stereotypes described in those studies reinforced. They may not appreciate the fact that those statistics were based upon a single negotiation exercise given to first year law students who had no formal negotiation training. Women in such situations tend to achieve less beneficial results because they think men are rational, assertive, unemotional, and self-centered.⁷⁵ These women are afraid they might confirm the negative beliefs concerning the capabilities of members of their own sex. In negotiation courses, students learn that they all possess the skills needed to be effective negotiators. Even if students initially experience some stereotype threat, they quickly change their behavior to counteract those beliefs.

When men are offered new positions, and they endeavor to negotiate more beneficial employment terms, they tend to be evaluated favorably. Women who seek to enhance their initial terms tend to be evaluated negatively.⁷⁶ When they negotiate for themselves, women tend to set lower goals than when they bargain on behalf of someone else.⁷⁷ When female law students tell me they may have to negotiate with law firms about their initial terms of employment, I tell them that they need to have "out of body" experiences. Instead of negotiating for themselves, I tell them to imagine that they are representing someone with their resumes. What do they believe they would seek on behalf of such a person? I have had a number women tell me that they found it easier to negotiate from this perspective than if they had simply been seek-

⁷⁵ See Laura J. Kray, Jochen Reb, Adam Galinsky & Leigh Thompson, *Stereotype Reactance at the Bargaining Table: The Effect of Stereotype Activation and Power on Claiming and Creating Value*, 30 *PERSONALITY & SOCIAL PSYCH. BULL.* 399, 400 (2004). It is interesting to note that when these gender-based stereotypes were subtly acknowledged, women tended to obtain less beneficial negotiation results than their male cohorts due to stereotype threat, but when the suggested gender-based advantage was explicitly acknowledged, women were induced to behave more competitively and they achieved better results than the males due to stereotype reactance. *Id.* at 405-06, 408-09.

⁷⁶ See Bowles, Babcock & Lai, *supra* note 34, at 89-91, 99; Tinsley, Cheldelin, Schneider & Amanatullah, *supra* note 54, at 236-37. When men and women are negotiating on behalf of others, however, women are permitted to be as assertive as their male cohorts. *Id.* at 238; Kolb, *supra* note 42, at 522.

⁷⁷ See Kolb, *supra* note 42, at 518, 522.

ing better terms for themselves. Female law graduates, who either fail to determine if initial employment terms are negotiable, or who set lower goals for themselves than their male cohorts, are likely to obtain lower salaries. Although this result might contravene the Equal Pay Act,⁷⁸ courts might decide that pay differentials based upon the willingness and ability of job applicants to negotiate fall within the statutory exception for “any other factor other than sex.”

VI. CONCLUSION

Many people continue to believe that men are more proficient negotiators than women. They may consciously—or even subconsciously—think that males are more assertive and more competitive than females. These assumptions might adversely affect the employment opportunities of female law graduates, especially if they are reinforced by statistically questionable studies. The data from my Legal Negotiation class over the past sixteen years clearly contradicts the validity of such stereotypical beliefs. There are no statistically significant differences with respect to the average results achieved by my male and female students on course negotiation exercises, or with respect to the standard deviations. While it is true that some male and female differences may continue to exist, these findings should unequivocally demonstrate that any such differences do not influence the results of bargaining interactions; nor should they affect law firm hiring and promotional determinations.

⁷⁸ 29 U.S.C.A. § 206(d) (West 2007).

