

3

Gender and Negotiations¹

Gender and Skills

In the movie *Marriage Story*, the female lawyer (played by Laura Dern, who won the Academy Award for Best Supporting Actress) is incredibly empathetic to her client and tells the client they will move forward with the divorce “as gently as possible.”² When the husband goes to meet with his prospective male attorney, the attorney immediately starts explaining an aggressive plan so that they can “win” the case. When the attorneys meet, the male attorney, played by Ray Liotta, yells and tries to speak over the female attorney. However, the female attorney uses her social intuition to read her counterpart’s behavior and, instead of raising her voice and “fighting” back, remains calm and attempts to smooth over the interaction.

In the end, despite the fact that the male attorney was clearly the most aggressive and assertive, the female attorney was able to use her other skills in order to reach an agreement that was more favorable and acceptable to her client. Clearly, the moral of this story is that being aggressive isn’t the only way to be a successful negotiator.

There is a common misconception that women are not as successful negotiators as their male counterparts. This misconception may stem

1. Thank you to Professor Andrea Kupfer Schneider of Marquette University Law School for her assistance with this chapter.

2. MARRIAGE STORY (Heyday Films 2019).

from the stereotype that women are not as assertive as men, which is perceived as a crucial skill for successful negotiations. Essentially, the theory goes, society views men as assertive and aggressive in a way that will allow them to successfully negotiate for their position, whereas women are seen as more cooperative.

However, in reality, being a successful negotiator has little to do with the gender of the negotiator³ but is instead related to the different skills possessed by each individual. So, while there is no difference in effectiveness and success between men and women, there is often a difference in how men and women reach that success and effectiveness based on their skills. Although assertiveness is a fundamental tool for a negotiator, there are four other fundamental tools that can also make a lawyer successful in negotiations. Those other skills are empathy, ethicality, flexibility, and social intuition.⁴

Empathy is the ability of an individual to understand the emotions of his or her counterpart and where he or she is coming from even if there is a disagreement.⁵ This is a crucial skill for a negotiator because it allows him or her to truly understand his or her counterpart and what he or she is thinking in a way that will allow the negotiator to effectively strategize the best way to advocate for his or her position. Generally, research shows that women tend to possess this skill more often than men, and it is often demonstrated by active listening and respectful questions.⁶

Next, ethicality of a negotiator relates to his or her reputation, which is a tool used to predict how that negotiator will behave, and his or her trustworthiness, which determines the likelihood of his or her doing what was promised.⁷ Reputation plays a key role because if a negotiator has a good reputation, his or her counterpart is likely going

3. Charles B. Craver, *The Impact of Gender on Negotiation Performance*, 14 CARDOZO J. CONFLICT RESOL. 339, 353 (2013) (a law school professor teaching a negotiation course studied the performance of his students over 15 years and states that “there is little evidence that the nature of women and men is so inherently different that we are justified in making stereotypical generalizations,” because the professor found that women can be just as competitive and aggressive as men and equally successful in negotiating); Art Hinshaw & Jess K. Alberts, *Gender and Attorney Negotiation Ethics*, 39 WASH. U. J.L. & POL’Y 145 (2012) (a study of more than 727 attorneys in Milwaukee and Chicago found statistically no difference in overall perceived effectiveness based on gender of attorney negotiators).

4. Andrea Schneider, *Negotiating While Female*, 70 S.M.U. L. REV. 695, 710–12 (2017).

5. *Id.* at 711.

6. Andrea Kupfer Schneider, *What’s Sex Got to Do with It: Questioning Research on Gender & Negotiation*, 19 NEV. L.J. 919, 933 (2019).

7. *Id.* at 937–38.

to be willing to share more information, and the negotiations tend to go more smoothly with better results for both sides.⁸ Trustworthiness also plays a crucial role in being a successful negotiator because if that individual is trustworthy, the negotiation will likely be more efficient as parties are willing to share information.⁹ Women are presumed to be more ethical and trustworthy with higher levels of moral character and ethical standards; however, women are more likely to be lied to in a negotiation.¹⁰

Another crucial skill for a negotiator is flexibility in relation to outcome and process. Process flexibility is the ability to shift styles or approaches when needed, and outcome flexibility is the ability to be creative and find integrative solutions.¹¹ This skill is essential for a negotiator to possess because that flexibility allows him or her to adapt to the situation and be able to negotiate best for his or her position. In determining the flexibility of an individual, the amount of time it takes to make a decision and the amount of information that the negotiator can gather are considered.¹² Typically, research shows that women take longer to make decisions, which allows them to be more creative and establish more of a plan, and they are also more likely to get more opinions from others before deciding.

The next important skill for a negotiator to possess is social intuition, which is essentially the ability to be self-aware while also being able to read an individual's counterpart and then using cues to smooth over the social interaction of the negotiation.¹³ Women tend to be better at this skill than men because women commonly are better able to decode body language, tone, facial expression, emotions, and more, allowing them to better manage the mood and tone of the interaction since they are able to read what is going on with their counterpart.¹⁴ This can be done through physical touch and compliments, which are more socially acceptable for women to engage in than for their male counterparts.

Lastly, the skill that most people consider the most important in negotiation is assertiveness. Assertiveness is more than simply being aggressive; the skill includes the ability to prepare the substance of the negotiation and then use that information to make strong and

8. *Id.*

9. *Id.*

10. *Id.* at 939.

11. Schneider, *Negotiating While Female*, *supra* note 4, at 711.

12. Schneider, *What's Sex Got to Do with It*, *supra* note 6, at 943.

13. Schneider, *Negotiating While Female*, *supra* note 4, at 710.

14. *Id.*

persuasive arguments based on the negotiator's position.¹⁵ This is a skill that some believe is most commonly possessed by men, which has been explained by the fact that men tend to be more confident. However, there have been findings that women can be as assertive as men, although it is dependent on the context and expectations involved in the negotiating process.¹⁶

Gender and Social Interaction

In addition to differences in negotiating skills, gender can also have an impact on the social interaction aspect of negotiations. As mentioned above, men tend to be more aggressive and competitive when it comes to negotiating; however, men may change their behavior when negotiating with a female counterpart. Often, men find it difficult to adopt retaliatory approaches against women, which in turn results in a bargaining advantage for women.¹⁷ In addition, men and women sometimes wrongly assume that women will not use as many negotiating "games" as men, again providing an advantage to their counterpart, who may be using negotiating "games" that their counterpart is taken off guard by.¹⁸

Summary

Both men and women can have effective negotiating skills, which are not always gender related. There are, however, instances where gender seems to play a role in negotiating based on the skills commonly possessed by each gender. That is not to say that one gender is better or worse at negotiating than the other. Rather, women possess some skills that help them to be successful negotiators, while men possess others. Each gender has ways to be successful in negotiations using a variety of different skills. While one has to be careful not to stereotype a negotiator based on gender, it is interesting and useful to be aware of the differences and expectations related to each gender.

15. Schneider, *What's Sex Got to Do with It*, *supra* note 6, at 945.

16. Craver, *supra* note 3 (professor explains that women can be just as competitive as men in negotiations).

17. Charles B. Craver, *Gender Differences in Negotiations*, <https://www.negotiations.com/articles/gender-interaction/> (last updated Nov. 8, 2019).

18. *Id.*