
NOTES

HOW TO CREATE A BETTER MEDIATION: USING DIVORCE MEDIATION OUTCOMES TO ASSESS GENDER'S EFFECT ON MEDIATION

*Emily Rothkin**

ABSTRACT

The COVID-19 pandemic has invariably changed not only many facets of life but also many aspects of the legal system. Due to a backlog of court cases, several jurisdictions and organizations have started to require presumptive mediation before would-be litigants are permitted to proceed to trial. It is therefore more important than ever to examine what, if any, effects mediation has on would-be litigants' outcomes compared to trial.

This Note uses tools from behavioral economics, specifically mental shortcuts such as heuristics and biases, to assess how participants in mediation may be harmed relative to litigants. Because few studies exist comparing mediation and trial outcomes, this Note uses outcomes from divorce mediation as a vehicle to comment on mediation generally. Divorce mediation is one of the few areas of mediation where studies exist comparing outcomes to litigation. Additionally, divorce mediation in the context of cisgender, heterosexual couples provides salient information on gender effects, which helps to determine how differences in mediation outcomes may intersect with gender.

Mediation, compared to trial, is a more flexible and informal process, allowing participants to render custom agreements not bound by precedent that

* J.D. Candidate, Boston University School of Law, 2022; B.A. Economics and American Studies, Wellesley College, 2015. There are too many people to thank in one footnote. Thank you to Professor Kathryn Zeiler for her detailed feedback and guidance. Thank you to all the members of the *Boston University Law Review* who put a great deal of time and effort into improving this Note, including Amanda Baird, Alina Cathcart, Laura Jarvis, and Seth Montgomery. Thank you to my parents, who were not quite sure what to make of the news I was having something called a Note published but were nonetheless very excited. And because it will thrill my grandmother to see her name in print, thank you to Dr. Patricia Lesnick. Thank you to all my friends and loved ones who supported me throughout this process. Thank you especially to everyone who asked to read my work. Thank you to Mie Morikubo for answering questions whenever they occurred to me at the drop of a hat. Thank you to Edmond Choi, who was, as always, whatever was needed at every stage of this process—cheerleader, sounding board, editor, and everything else in between. And thank you to Bubba, my cat, for without your constant crying for food, I may have finished this Note a good deal sooner.

best fit their unique preferences. However, scholars caution that mediation's informality leads to worse outcomes for lower-powered individuals. In the context of heterosexual divorce, this often means that women—hampered by stereotypes of weakened negotiating ability—are harmed by mediation's current informal structure despite research suggesting women have at least the same inherent negotiating ability as men. But by identifying potential heuristics and biases that may arise during mediation, mediation agencies can modify their current structures to create a more even playing field between both genders.

This Note makes seven suggestions to counter reliance on harmful heuristics and biases to improve mediation: (1) requiring pre-mediation surveys where participants write down weaknesses, (2) providing more information and statistics before mediation, (3) using open-ended questions, (4) actively using framing to combat power imbalances, (5) adding certain formalities to the mediation process, (6) requiring pre-mediation surveys for mediators, and (7) utilizing co-mediation to counteract mediator bias. Any suggestion to correct for one heuristic or bias can intersect and aggrandize other heuristics. Therefore, many of these suggestions will need to be studied further prior to implementation. Nonetheless, these seven suggestions provide a useful starting point for improving mediation for all parties.

CONTENTS

INTRODUCTION	634
I. UNDERSTANDING THE EFFECTS OF GENDER AND BEHAVIORAL ECONOMICS ON MEDIATION	638
A. <i>What Is Mediation?</i>	638
B. <i>Benefits of Mediation for Participants</i>	640
C. <i>Disadvantages of Mediation for Participants</i>	642
D. <i>What Is Behavioral Economics?</i>	645
E. <i>Intersection of Behavioral Economics and Gender</i>	650
II. ASSESSING PROBLEMS IN MEDIATION THROUGH BEHAVIORAL ECONOMIC BIASES AND HEURISTICS.....	652
A. <i>How Women Participants Fare in Divorce Mediation</i>	655
B. <i>How Mediators Affect Divorce Mediation Outcomes</i>	659
III. PROPOSED CHANGES TO MEDIATION TO IMPROVE PARTICIPANT OUTCOMES AND SATISFACTION	662
CONCLUSION.....	674

INTRODUCTION

In the wake of the COVID-19 pandemic, courts are simultaneously experiencing increased filings and an inability to resolve matters quickly due to safety restrictions and reduced capacity.¹ As a result, courts are progressively turning to mediation.² Some states, for instance, have instituted a policy of presumptive Alternative Dispute Resolution (“ADR”) for civil small claims court.³ Other courts across the country are taking similar measures. Maricopa County Superior Court, for example, issued an order to steer litigants toward mediation and arbitration over trial.⁴ Institutions such as the Equal Employment Opportunity Commission have also expanded mediation programs.⁵ This has been a cause for celebration for mediation proponents who claim that mediation, as an alternative to trial, can benefit participants by allowing for flexible and creative solutions not bound by legal precedent or a judge’s approval.⁶

¹ Greg Land & Amanda Bronstad, *Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle*, LAW.COM (July 30, 2021, 5:37 PM), <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/> (noting “COVID-19 court shutdowns have left judges looking for ways to trim dockets or move cases quickly”); Griff Witte & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delayed Justice Lingers*, WASH. POST (Dec. 19, 2021, 6:00 AM), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html (noting courts across country continuing to operate at reduced capacity due to the pandemic with some courts continuing to suspend jury trials).

² Land & Bronstad, *supra* note 1.

³ Press Release, New York State Unified Ct. Sys., *New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice* (Apr. 20, 2018) (available at <https://nysba.org/NYSBA/Sections/Coursebooks/Dispute%20Resolution/2019%20Fall%20Meeting/Panel%202.pdf>) (announcing plan to offer parties access to free or reduced-fee ADR for wide range of disputes). In addition to this program, New York has rolled out a new Landlord-Tenant Mediation Program to handle the current multitude of housing cases that have arisen since the beginning of the COVID-19 pandemic. *See* Abby Tolchinsky & Ellie Wertheim, *Mediation in the Pandemic*, N.Y. L.J. (Aug. 18, 2020, 1:00 PM), <https://www.law.com/newyorklawjournal/2020/08/18/mediation-in-the-pandemic/>; *see also* NYPI *Launches New Landlord-Tenant Mediation Project in Partnership with NYC and Other Local CDRCs*, N.Y. PEACE INST. (July 29, 2020), <https://nypeace.org/landlord-tenant-mediation-project/> [<https://perma.cc/YS33-V6C8>].

⁴ Michael Gossie, *Here’s Why Pandemic Is Increasing Mediation and Arbitration Cases*, AZBIGMEDIA (Sept. 16, 2020), <https://azbigmedia.com/business/heres-why-pandemic-is-increasing-mediation-and-arbitration-cases/> [<https://perma.cc/BP6S-SEVP>] (noting that Maricopa County Superior Court will steer litigants to arbitration for “smaller-dollar, simpler-issue or lower-risk matters”).

⁵ Allen Smith, *EEOC Expands Mediation Program During Coronavirus Pandemic*, SOC’Y FOR HUM. RES. MGMT. (July 7, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-eeoc-expands-mediation-program.aspx> (citing COVID-19 pandemic as primary reason for expansion of its mediation program).

⁶ *See* Nancy Illman Meyers, *Power (Im)Balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 U. TOL. L. REV. 853, 856 (1996).

Although it is too early to know the extent to which increased mediation will last beyond the pandemic, both courts and law firms have indicated that they plan to utilize mediation more frequently post-pandemic.⁷ Additionally, many would-be litigants are realizing the benefits of remote mediation.⁸ Compared to trial, mediation requires a smaller time investment, costs participants less, eliminates the need for travel, and allows parties to feel more relaxed in a comfortable, known environment.⁹

Mediation is therefore poised to become a popular alternative for would-be litigants moving forward. However, there is reason for hesitation. Mediation outcomes are rarely studied, making it difficult to assess if a shift toward mediation over trial will benefit participants.¹⁰ Critics warn that its informal approach exacerbates uneven bargaining power, resulting in worse outcomes for lower-powered individuals.¹¹ These scholars argue that the formalities of trial, which include judges bound by precedent and lawyers acting as advocates for both participants, better combat uneven bargaining power and ensure fairer outcomes.¹²

Behavioral economics provides a particularly useful lens to examine mediation's structure and its outcomes because it incorporates psychological insights into economic theory.¹³ People often engage in heuristics, or mental

⁷ Phillipa Beck & Zoe de Courcy Arbiser, *Further Evolution of Remote Mediation Expected Post-Pandemic*, PINSENT MASONS: OUT-LAW (May 24, 2021, 9:32 AM), <https://www.pinsentmasons.com/out-law/analysis/remote-mediation-post-pandemic> [<https://perma.cc/XDC6-5EGB>] (“A change in mindset about the way we approach dispute resolution methods will be one of the legacies of the Covid-19 pandemic, with remote mediation and other forms of [ADR] expected to be here to stay.”).

⁸ *See id.*

⁹ Read McCaffrey, *Why Mediation Has Become a Valuable Method of ADR During COVID-19*, DAILY BUS. REV. (Sept. 28, 2020, 11:47 AM), <https://www.law.com/dailybusinessreview/2020/09/28/why-mediation-has-become-a-valuable-method-of-adr-during-covid-19/>. Some of these benefits may correlate to the remote nature of mediation during the pandemic. *See id.* However, mediation's informal nature often means it is less expensive for participants and presents a more comfortable environment than trial. *Id.* (stating parties involved in online mediation, whether in their own offices or their home, will be more relaxed).

¹⁰ The term “participants” is used throughout this Note to identify would-be litigants who participate in a mediation.

¹¹ “Lower-powered individuals” is used in this Note to refer to the individual with less bargaining power in a negotiation. Notably, mediation participants compared to litigants achieve lower monetary outcomes. These differences in outcomes for lower-powered individuals are discussed more fully in Part II.

¹² *See, e.g.*, Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375 (finding that formal dispute resolution, such as trial, better deters prejudice than informal dispute resolution, such as mediation).

¹³ *See* Kathryn Zeiler, *Mistaken About Mistakes*, 48 EUR. J.L. & ECON. 9, 9-10 (2019) (noting behavioral economics “employ[s] insights from the field of psychology to modify assumptions” from neoclassical economic models of individual decision-making). Behavioral

shortcuts, which increase efficiency but can lead to inaccurate conclusions.¹⁴ One such heuristic, the availability heuristic, reflects the idea that people tend to be influenced by events that are the easiest to remember.¹⁵ For example, after a Southwest Airlines plane exploded midair, the company's ticket sales revenue declined over \$50 million because customers incorrectly assessed the probability the same event would occur again due to how memorable the previous explosion was.¹⁶ Because people utilize these mental shortcuts more frequently during emotionally charged times, mediation participants, who often enter mediation in the midst of an emotionally fraught process, are especially likely to fall victim to such biases and irrational thinking.¹⁷ Therefore, determining which biases and heuristics can occur in mediation is necessary for designing a system that counteracts them and provides fair outcomes for participants.¹⁸

Because few studies exist comparing mediation and trial outcomes, this Note focuses on divorce mediation, where several studies of cisgender, heterosexual couples have examined the difference in mediation and trial outcomes, as a

economics modifies the standard neoclassical economic models in two distinct ways: (1) it categorizes the systematic ways in which humans err, and (2) it assumes differences in standard preferences. *Id.* at 10.

¹⁴ *Why Do We Take Mental Shortcuts?*, DECISION LAB, <https://thedecisionlab.com/biases/heuristics/> [<https://perma.cc/JK5M-EAZT>] (last visited Jan. 28, 2022) (noting that heuristics “can facilitate problem-solving and probability judgments” and although they “can be effective for making immediate judgments . . . they often result in irrational or inaccurate conclusions”).

¹⁵ *Decision-Making Bias*, ECON. ONLINE (Jan. 17, 2020), https://www.economicsonline.co.uk/Behavioural_economics/Decision_making_bias.html [<https://perma.cc/UKB6-PKHZ>] (noting availability heuristic suggests that individuals are “influenced by recent or significant events that are the most easy to remember” or their easiest available memories).

¹⁶ See Paul Boyce, *Availability Heuristic Definition*, BOYCEWIRE (Oct. 20, 2020), <https://boycewire.com/availability-heuristic-definition-and-examples/> [<https://perma.cc/W8N2-AQ2T>] (noting Southwest's sales drastically declined after consumers inflated expectation of similar incident well beyond its actual likelihood).

¹⁷ See Harry L. Munsinger & Donald R. Philbin, Jr., *Why Can't They Settle? The Psychology of Relational Disputes*, 18 CARDOZO J. CONFLICT RESOL. 311, 360 (2017) (noting a “human tendency to regress to earlier stages of behavior under stress” including engaging in heuristics); Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1612 (2019) (noting that the affect heuristic results in people making decisions consistent with their emotions); *Why Do We Take Mental Shortcuts?*, *supra* note 14 (noting heuristics are used to “reduc[e] the mental effort needed to make a decision”).

¹⁸ Given mediation's benefit of idiosyncratic and creative outcomes as decided by the participants themselves, it is difficult to assess what constitutes fairer outcomes in a larger sense. However, fairer outcomes are more likely to arise when bargaining power is equal between two parties. See Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 287 (1999) (“Differences in negotiation outcome that have been perceived as gender-based may in fact have resulted from the parties' being differently situated.”).

vehicle to make general suggestions for mediation's structure.¹⁹ Moreover, because divorce mediation is an especially emotionally charged time for couples, heuristics and biases that are present in all mediations are likely to be more pronounced in divorce mediation.²⁰ For instance, many mediation participants engage in self-serving biases that cause them to overvalue their own assets; in a divorce mediation where couples are negotiating for finite resources, such biases may significantly decrease the chance of settling.²¹ Although, of course, not all divorcing couples are cisgender and heterosexual, many of the studies cited in this Note assume so. Because divorce mediation between such couples inherently involves participants of different genders, an examination of divorce mediation in this context allows for commentary on the impact gender may have on mediation outcomes compared to trial outcomes. This Note assumes for purposes of discussion that "women" refers to cisgender, heterosexual women and "men" refers to cisgender, heterosexual men.²²

Identifying potential biases and heuristics that may alter outcomes in divorce mediation is the first step to determining potential solutions. This Note offers seven modifications for improving mediation to expand the bargaining range between participants and protect lower-powered individuals from suffering worse outcomes in mediation. Some modifications are aimed at participants, such as encouraging participants to write down weaknesses to counteract self-serving biases, providing them with transparent information before mediation to remove uncertainty, and incorporating advocates into the mediation process to protect lower-powered individuals. Other suggestions are aimed at the mediator, such as identifying whether to use framing techniques, utilizing pre-mediation surveys to counteract mediators' biases and heuristics, and co-mediating in mixed-gender pairs to ensure neutrality. Each suggested solution may potentially interact with other biases and heuristics. Thus, any solution must be carefully designed and tested by mediation agencies prior to implementation to account for potential interactions.

Few scholars have analyzed mediation within the context of behavioral economics, and none have specifically examined how gender intersects with commonly found heuristics and biases within mediation.²³ This Note explores

¹⁹ Sections I.B and I.C discuss studies analyzing the benefits and disadvantages of mediation compared to trial.

²⁰ Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 *CARDOZO L. REV.* 391, 399-400 (2006) (discussing how people's estimates of satisfaction were affected by their environments).

²¹ *Id.* at 400-01 (discussing self-serving biases); see also Meyers, *supra* note 6, at 869 (discussing how divorce mediation involves negotiation for finite resources).

²² The current understanding of gender recognizes that it is fluid and may change over time. Sabra L. Katz-Wise, *Gender Fluidity: What It Means and Why Support Matters*, *HARV. HEALTH PUBL'G: HARV. HEALTH BLOG* (Dec. 3, 2020), <https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544> [<https://perma.cc/SZ4J-RDXW>].

²³ For a discussion of scholarship analyzing mediation, see *infra* Part II.

how participants, especially women, in divorce mediation may be harmed by heuristics and biases and proposes structural solutions to ensure better outcomes for all mediation participants. This Note proceeds in three parts. Part I explains the mechanics of mediation and an assessment of both its advantages and disadvantages. It also defines behavioral economics and explicates common heuristics and biases that are likely to be employed in a divorce mediation. Part II then identifies and examines how heuristics and biases affect divorce mediation outcomes for both participants and mediators. Finally, Part III suggests systematic changes to divorce mediation that will correct for common heuristics and biases of both mediators and participants to provide the best outcome for mediation participants.

I. UNDERSTANDING THE EFFECTS OF GENDER AND BEHAVIORAL ECONOMICS ON MEDIATION

A. *What Is Mediation?*

ADR consists of methods of resolving disputes without litigation, encompassing negotiation, mediation, and arbitration.²⁴ This Note focuses on mediation. Mediation itself encompasses many approaches and applications.²⁵ The most common and broad definition of mediation is an intervention strategy to provide would-be litigants with tailored solutions, improving relationships and allowing for less costly resolutions without ever entering a courtroom.²⁶ Mediation has been used to solve conflicts in almost every area of law, including small claims, environmental policy, health care, and commercial dealings, to name a few.²⁷

Depending on the mediator, mediation can be an evaluative process, involving strong guidance from a mediator, or a facilitative process, empowering parties to develop solutions.²⁸ Regardless of the process a mediator subscribes to, mediation is “where people with differing views sit down with an impartial third party to discuss issues they need help resolving” and “arrive at workable

²⁴ Sometimes the two terms “ADR” and “mediation” are used interchangeably, but more frequently, mediation is considered a specific form of ADR. See *Alternative Dispute Resolution*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/alternative_dispute_resolution [<https://perma.cc/765H-PN8X>] (last visited Jan. 28, 2022) (defining ADR as “any method of resolving disputes without litigation”).

²⁵ See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13-14 (1996).

²⁶ Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 844 n.1 (2004) (defining mediation as a process that calls for parties to collaborate with assistance of neutral facilitator to reach a settlement, where parties themselves are responsible for resolving dispute).

²⁷ Bernie Mayer, *Mediation: 50 Years of Creative Conflict*, 51 FAM. CT. REV. 34, 34 (2013).

²⁸ Riskin, *supra* note 25, at 24.

solutions.”²⁹ Mediation is also voluntary and confidential.³⁰ Generally, both parties share in the costs for a mediator.³¹ Further, mediation is typically much less expensive than litigation.³² If parties do not resolve their dispute through mediation, they maintain the option to proceed to trial and have their case decided by a judge.³³

Trials are often criticized for disadvantaging litigants because they lack flexibility and prioritize resolution of the dispute.³⁴ Mediation, on the other hand, emphasizes flexible and creative solutions uniquely designed to meet participants’ individual desires and needs.³⁵ Mediation is also distinct from trial in its structure. Mediators are not akin to judges; they do not make decisions or issue findings but rather guide both parties to workable solutions.³⁶ Nor is a mediator like a typical trial lawyer; they do not represent either party and instead provide a supportive atmosphere, clarify issues, expose areas of conflict, and identify options available to participants.³⁷ As such, mediation can counteract a

²⁹ *Mediation Services*, CMTY. DISP. SETTLEMENT CTR., <https://communitydispute.org/mediation> [<https://perma.cc/RF73-7M9V>] (last visited Jan. 28, 2022).

³⁰ *Id.*

³¹ *See, e.g., Legal Information: Nevada*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/nv/custody/mediation-custodyvisitation-cases/who-pays-mediation> [<https://perma.cc/4SFH-L45D>] (last updated Aug. 6, 2021) (looking at child custody mediation). Mediation costs may also be assessed on a sliding scale. *See id.*

³² Deborah R. Hensler, *In Search of “Good” Mediation: Rhetoric, Practice, and Empiricism*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 231, 246 (Joseph Sanders & V. Lee Hamilton eds., 2001); *see also The Advantages of Mediation Cases over Traditional Lawsuits*, FINDLAW, <https://www.findlaw.com/adr/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html> [<https://perma.cc/P6QP-MV9A>] (last updated June 20, 2016). The cost of mediation may be hourly or per session and thus can vary with the complexities of a particular case. *See* Jose Rivera, *Cost Benefits of Family Mediation*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/cost-benefits-of-family-mediation.html> [<https://perma.cc/RJZ3-5WUJ>] (last updated Nov. 6, 2019). However, because mediation typically takes less time than a litigated trial and both parties share in the cost of mediation, it is often less expensive than going to court where each party has to pay for their own lawyer. *See id.*

³³ *See, e.g., About Mediation*, MASS.GOV, <https://www.mass.gov/info-details/about-mediation> [<https://perma.cc/F95Y-V2UA>] (last visited Jan. 28, 2022).

³⁴ Meyers, *supra* note 6, at 856.

³⁵ *Id.* Statistically, mediation produces a higher number of joint custody awards compared to litigation in the divorce context. *See* Lori Anne Shaw, *Divorce Mediation Outcome Research: A Meta-Analysis*, 27 *CONFLICT RESOL. Q.* 447, 451 (2010) (noting however that mediation and litigation did not achieve significantly different outcomes on amount of child support to be paid); Elizabeth Ellen Gordon, *What Role Does Gender Play in Mediation of Domestic Relations Cases?*, 86 *JUDICATURE* 134, 137 (2002) (noting mediation produces higher level of joint custody arrangements than any other process for resolving custody disputes).

³⁶ *Mediation Services*, *supra* note 29.

³⁷ Meyers, *supra* note 6, at 856.

trial's all-or-nothing outcome to the benefit of both parties.³⁸ Mediation allows parties to focus more on long-term relationships and thus may be particularly well suited to would-be litigants who seek a continuing relationship, such as divorcing couples with children.³⁹ Because would-be litigants often have the choice of ADR, such as mediation, or trial, this Note compares mediated outcomes to litigated outcomes to determine how mediation may affect their outcomes.

B. *Benefits of Mediation for Participants*

Mediation proponents tout its many benefits over litigation. For instance, mediation advocates assert that because divorce proceedings are likely to present idiosyncratic preferences, the parties themselves are best equipped to assess the value of agreements.⁴⁰ A judge may weigh assets such as a home relative to its estimated market value, whereas the spouse who performed the custom renovations may value the same home well above its market value. Mediation provides the opportunity for participants to render creative agreements according to their individual preferences, rather than legal precedent, and thus may increase the overall value of an agreement.⁴¹ Mediation participants also have more positive associations with the experience. In surveys, divorce mediation participants reported positive experiences in process satisfaction, outcome satisfaction, spousal relationship, and understanding children's needs.⁴² Mediation participants are also more likely to report that they find the process "fair" and that the outcomes are better for not just the individual but for all participants involved, compared to litigants.⁴³ Participants also reported that mediation helped them better understand their problems and provided adequate

³⁸ See Delgado et al., *supra* note 12, at 1367 ("ADR's flexibility and lack of rigid rules enable the parties to work toward a creative resolution of their dispute, one that neither party will perceive as a defeat.").

³⁹ See Shaw, *supra* note 35, at 448-49 (noting couples found mediation helped them better focus on their children's psychological needs and relationships).

⁴⁰ Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 114 (2008).

⁴¹ This is often referred to "expanding the pie" in a negotiation. As opposed to focusing on achieving the "largest slice of pie" for either participant, mediators are encouraged to think of negotiation as a nonzero-sum game, brainstorming options that "expand the pie" so both participants end with a larger "slice of the pie" than they would have originally. See *What Is Expanding the Pie in Negotiation?*, HARV. L. SCH.: PROGRAM ON NEGOT., <https://www.pon.harvard.edu/tag/expanding-the-pie/> [<https://perma.cc/8XEV-EPZT>] (last visited Jan. 28, 2022).

⁴² Shaw, *supra* note 35, at 448-49 (stating mediation participants were more satisfied than litigation participants because they could focus on children's needs and perceived equal influence over agreement, among other reasons).

⁴³ See Stipanowich, *supra* note 26, at 854 (noting one study found 81% of participants were satisfied with their ADR outcome and 98% of participants viewed third-party neutrals as fair).

information to assess deals.⁴⁴ Women participants, in particular, report higher satisfaction than men when assessing mediated outcomes, mediation process, and mediator skills and abilities.⁴⁵

Mediation also provides larger societal benefits. Mediation improves access to justice, especially for indigent populations who may not be able to afford an expensive trial.⁴⁶ Mediation may also increase people's willingness to engage in disputes, and thus resolve disputes, especially those who are offered nonbinding ADR as an option before trial.⁴⁷ In a corporate setting, mediation may generate superior incentives to participate in conflict resolution through greater accuracy, allowing participants to formulate more specific contracts.⁴⁸ Furthermore, Professor Deborah Hensler has suggested mediation can even change the way society views litigation.⁴⁹ Hensler theorizes that as mediation's popularity increases, it can alter future jurists' mindsets, causing them to embrace a new vision of the justice system where the main goal is to achieve social harmony.⁵⁰

In addition to relational and fairness assessments, mediation often saves participants money.⁵¹ Mediation can provide a cheaper substitute than trial while also increasing the probability that settlement will occur.⁵² Even if parties do not reach a settlement in mediation and proceed to trial, a previous mediation has the potential to decrease the costs of trial because both parties have gained additional information, increasing the efficiency of trial.⁵³

⁴⁴ Shaw, *supra* note 35, at 448-49 (finding participants report that mediation helped them better identify problems and provided both adequate information and fair understanding of property and financial information).

⁴⁵ Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know*, 70 SMU L. REV. 817, 833 (2017) (examining "the effects of attorney representation on the degree of satisfaction of Equal Employment Opportunity (EEO) mediation participants through a survey of participants").

⁴⁶ See Delgado et al., *supra* note 12, at 1366 (noting ADR further promotes access to indigent populations because its informality increases accessibility).

⁴⁷ Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 4 (1995).

⁴⁸ *Id.* at 2. These specific contracts could induce better performance in part because they may be more specifically tailored to the desires of both parties. *Id.*

⁴⁹ Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 122 DICK. L. REV. 349, 378-79 (2017).

⁵⁰ *Id.*

⁵¹ See Shaw, *supra* note 35, at 451 (finding mediation saves a modest amount of money).

⁵² Shavell, *supra* note 47, at 9.

⁵³ *Id.* (noting that ADR "may provide [parties] with information about the trial outcome and thus make settlement more likely"). However, as criticism stated in Section I.C notes, a mediation in addition to a trial can be more expensive for participants than trial alone. See Meyers, *supra* note 6, at 857 (noting that mediation's cost-saving benefits likely only accrue when parties mediate early and successfully).

C. *Disadvantages of Mediation for Participants*

Although mediation generates many potential benefits, some scholars argue that these benefits are overstated and outweighed by mediation's disadvantages. Several scholars challenge whether measurable characteristics of mediation's benefits, such as cost savings or higher awards, are statistically significant. For instance, Professor Thomas J. Stipanowich found no statistical significance in mediation participants' sense of fairness or costs when compared to litigation participants.⁵⁴ Indeed, when defendant participants were asked about their perception of procedural justice in trial, arbitration, settlement conferences, and bilateral negotiations, participants reported no higher sense of control or fairness in consensual processes, like mediation, compared to trial for a final decision.⁵⁵

Critics also challenge the proposition that mediation saves money, arguing this benefit is overemphasized and only occurs in specific circumstances.⁵⁶ In fact, mediation can increase total costs if participants fail to solve every aspect of a dispute and then later must return to court.⁵⁷ Indeed, very complicated relational problems may require many hours and multiple sessions to ensure both parties feels heard.⁵⁸

Advocates of mediation believe mediation not only encourages cooperation but can also result in better agreements.⁵⁹ However, critics argue that this is an unrealistic goal; mediations must involve a negotiation between two parties, and any negotiation is competitive by definition.⁶⁰ Divorce mediation in particular pits two individuals against each other who must compete for finite resources.⁶¹ As such, mediation, with its focus on collaborative and integrative agreements, can alter the true purpose of a divorce, distorting participants' incentives and creating an inefficient negotiation.⁶²

⁵⁴ Stipanowich, *supra* note 26, at 852 (finding in study of six districts that mediation participants had no statistically significant improvement in disposition, litigation costs, attorney fairness, or satisfaction with case management compared to litigants).

⁵⁵ See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 181. Although defendants stated they thought they had less control in settlement conferences, the typical defendant and a divorcing individual are not entirely analogous. For instance, defendants are typically dragged into court, whereas in divorce, at least one participant must initiate the divorce. *See id.* at 182.

⁵⁶ Meyers, *supra* note 6, at 857.

⁵⁷ *Id.*

⁵⁸ See Rivera, *supra* note 32.

⁵⁹ Meyers, *supra* note 6, at 869. Mediation proponents believe mediation can result in more win-win solutions than trial. *See id.*

⁶⁰ *Id.*

⁶¹ *Id.* Finite resources include money for alimony, time with children, and furniture, among others.

⁶² See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1558 (1991) (noting formal process of claiming rights can clarify roots of anger and empower individuals without societal power). Divorce mediation can distort participants'

Perhaps the largest criticism of mediation is that it can heighten prejudice, therefore harming lower-powered individuals.⁶³ Generally, theorists predict that informal procedures intensify disparities between parties more so than formal adjudications.⁶⁴ Mediation, a deformedalized process, can thus increase risks of class-based prejudice.⁶⁵ Trial, on the other hand, better combats this bias through its combination of internal and external restraints, such as *stare decisis*, *voir dire*, rules of civil procedure, and the judicial requirement to state findings and opinions.⁶⁶ Even surface references to formal laws or rules, which are present in every trial, can counteract decision-maker bias by reducing human propensity for prejudgment.⁶⁷ Furthermore, mediation, which does not require lawyers, can strip lower-powered individuals of one of the most important protections against prejudice: advocacy.⁶⁸ This criticism is exceptionally apt when focusing on divorce. Despite reports that women generally favor mediation,⁶⁹ women who enter divorce mediation may be worse off than if they utilized trial. The customary presence of lawyers in trial may protect women against the hegemonic forces that favor men in divorce settlements.⁷⁰ Moreover, many court rules in the divorce context, such as custody law requirements, favor women.⁷¹

incentives, encouraging them to focus on emotional issues, such as who was the more self-sacrificing parent to identify the individual who deserves more time with the children, rather than substantive outcomes (e.g., amount of money for alimony) leading to less beneficial outcomes. Meyers, *supra* note 6, at 869.

⁶³ Degaldo et al., *supra* note 12, at 1360-61 (recognizing that deformedalized procedures like ADR may increase inequality between parties with uneven bargaining power). This is despite the fact that one of mediation's stated goals is to increase access to justice for vulnerable populations. *See id.*

⁶⁴ Meyers, *supra* note 6, at 868-69 (noting that formal adjudication, such as trial, is better equipped to deter prejudice).

⁶⁵ Delgado et al., *supra* note 12, at 1360.

⁶⁶ *Id.* at 1368-69. For example, a judge's "simple act of applying rules reduces bias." *Id.* at 1368. Additionally, *stare decisis* is meant to produce consistent results in similar cases and is subject to appellate review to ensure such consistency. *Id.* The Code of Judicial Conduct also requires judicial disqualification when judges cannot guarantee impartiality. *Id.* at 1368-69. Juries additionally are subject to internal and external restraints. *Voir dire*, for instance, is intended to "discover and remove biased jurors." *Id.* at 1369. Juries are also instructed to not discuss cases with outsiders to prevent prejudicial influence. *Id.* at 1370.

⁶⁷ Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 769 (1996).

⁶⁸ Grillo, *supra* note 62, at 1597-1600.

⁶⁹ *See* Bachar & Hensler, *supra* note 45, at 833 (noting women generally report higher satisfaction than men in mediated outcomes compared to trial).

⁷⁰ *See id.* Section II.A discusses power imbalances.

⁷¹ Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 442-44, 443 n.3 (1992).

Another criticism of mediation is that it inherently assumes relatively equal bargaining power between parties.⁷² However, this is rarely the case.⁷³ For example, in cisgender, heterosexual couples, men may earn more than women, resulting in unbalanced pairs.⁷⁴ Women might also have less bargaining power than men during a divorce mediation, despite contributing more to taking care of the home and children because these actions are historically less valued than earning power.⁷⁵ Other factors such as status and risk preferences may also increase men's bargaining power relative to women.⁷⁶ If women do have less bargaining power, mediation likely will intensify these differences and pressure women to accept unfavorable settlement agreements.⁷⁷ However, this critique should be taken with some caution because its underlying assumption may result in causing the very problem it seeks to avoid: reinforcing stereotypes of supposedly "powerless" women.⁷⁸

⁷² Meyers, *supra* note 6, at 859.

⁷³ *Id.* ("[W]hile some disputants may be relatively equal, many are not. Divorce mediation, especially tends to bring to the bargaining table unbalanced pairs, typically a husband with a high degree of power, and a wife who possesses a relatively low degree of power." (footnote omitted)).

⁷⁴ *Id.* at 866. For instance, although the wage gap between couples is not as large as it once was in cohabitating cisgender, heterosexual couples, women still generally spend fewer hours in paid work and more time on household chores such as meal preparation and grocery shopping than men. See Katherine Schaeffer, *Among U.S. Couples, Women Do More Cooking and Grocery Shopping than Men*, PEW RSCH. CTR. (Sept. 24, 2019), <https://www.pewresearch.org/fact-tank/2019/09/24/among-u-s-couples-women-do-more-cooking-and-grocery-shopping-than-men/> [<https://perma.cc/YGS2-YR9Q>] (citing survey of married or cohabitating couples with one or more children where 80% of mothers reported themselves as primary meal prepper and grocery shopper). Moreover, women still earn on average only \$0.82 for every \$1 earned by men. *The State of the Gender Pay Gap in 2021*, Payscale, <https://www.payscale.com/data/gender-pay-gap> [<https://perma.cc/Y8AR-H3D5>] (last visited Jan. 28, 2022) (discussing opportunity pay gap, which takes ratio of median earnings of women to men without controlling for various compensable factors). Although uneven earnings do not appear only in heterosexual relationships, because this Note examines divorce only between cisgender, heterosexual couples, it refers only to power imbalances between men and women in the above discussion.

⁷⁵ See Meyers, *supra* note 6, at 868 (noting "individuals occupying female-dominated jobs expect lower pay than those holding male-dominated jobs"). Notably, these dynamics may be changing. See *id.* at 865 n.112 (acknowledging earning power of women, in the aggregate, has increased).

⁷⁶ Bryan, *supra* note 71, at 457-60 (noting status can include income, education, occupational rank, and sex—factors that have historically favored men over women). Risk aversiveness also affects a mediating spouse's power. Gary Charness & Uri Gneezy, *Strong Evidence for Gender Differences in Risk Taking*, 83 J. ECON. BEHAV. & ORG. 50, 57 (2012) (finding women generally invested less across fifteen sets of experiments and concluding that women are more financially risk averse than men).

⁷⁷ Meyers, *supra* note 6, at 859.

⁷⁸ Madeleine B. Simborg & Joan B. Kelly, *Beware of Stereotypes in Mediation*, 17 FAM. ADVOC. 69, 69 (1994).

Other critiques of mediation focus not on the participant but on the mediator. A mediator may be self-interested, and their own agenda may interfere with the best interests of the participants.⁷⁹ For instance, a mediator may desire a high settlement rate to establish their professional reputation.⁸⁰ This mediator may therefore pressure parties to reach a settlement, regardless of what the best outcome is for the participants.⁸¹ However, this criticism could easily apply to trial as well. Some judges seek a tough reputation, and some attorneys prioritize consistently high settlements or wins.⁸² Mediators are also uniquely positioned to bias participants through “transference,” the process by which an individual’s feelings, thoughts, and wishes shift from one person to another.⁸³ For example, a mediator who appears disapproving when a wife asks a husband for alimony for a period of five years may empower a husband to regard his wife’s request as unreasonable. Although transference is doubtlessly a risk in mediation, it is unclear how this risk is larger or different from the role of a judge or an attorney at trial who could also “transfer” their sentiments to a litigant.⁸⁴

D. *What Is Behavioral Economics?*

Having analyzed the benefits and disadvantages of mediation, identifying common heuristics and biases within behavioral economics is the next step to understanding how these concepts may affect mediation outcomes. Behavioral economics is a subfield within economics, which combines findings from other social science fields to account for the fact that people do not always act in a rational fashion.⁸⁵ Behavioral economics concepts potentially provide a window into understanding how people assess situations and make decisions.⁸⁶ Below,

⁷⁹ Meyers, *supra* note 6, at 872.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Cf. Ronald Sullivan, *Critics Fault Selection of Judge in Jogger Case*, N.Y. TIMES, Aug. 7, 1989, at B4 (noting that Justice Galligan was known for his “reputation for handing down tough sentences,” had a “law-and-order image” and had not acquitted anyone in his court for the last two years).

⁸³ Meyers, *supra* note 6, at 875.

⁸⁴ For example, a zealous lawyer could encourage one party to ask a jury or judge for a higher settlement number than the party may have without representation. Alternatively, a disapproving judge could lead a participant to decrease their demands.

⁸⁵ See Zeiler, *supra* note 13, at 9-10 (“[B]ehavioral economists have employed insights from the field of psychology to modify assumptions to sharpen the [traditional neoclassical] models’ predictive power.”); see also Erik Angner & George Loewenstein, *Behavioral Economics*, in 13 HANDBOOK OF THE PHILOSOPHY OF SCIENCE: PHILOSOPHY OF ECONOMICS 641, 641-43 (Uskali Mäki ed., 2012) (describing emergence of behavioral economics as “*bona fide* subdiscipline of economics”); Richard H. Thaler, *Behavioral Economics: Past, Present, and Future*, 106 AM. ECON. REV. 1577, 1577-78 (2016) (explaining behavioral approach presents “opportunity to develop better models of economic behavior by incorporating insights from other social science disciplines”).

⁸⁶ Behavioral economics has become increasingly popular in part because of the observation that people’s behavior “does not comport with predictions derived from

this Note discusses several heuristics and biases that are likely to occur in divorce mediations.⁸⁷

The *representativeness* heuristic reflects that people often estimate probability using similarity to an existing stereotype.⁸⁸ Specifically, people tend to overestimate the likelihood that Object *A* belongs to Class *B* by examining how much *A* resembles objects in *B*.⁸⁹ Such an assessment ignores the probability of base rates.⁹⁰ For instance, because media often overrepresents Black men's involvement in crime, police who are looking for a suspect in a crime may stereotype and concentrate their investigation on only Black male suspects, regardless of how frequently Black men actually commit crimes.⁹¹ In a divorce mediation, a mediator may stereotype and assume each woman's primary goal must be to win maximum custody because mothers tend to prioritize custody of children.⁹²

The *availability* heuristic stands for the proposition that because people usually are unable to remember all of the information they receive, they often use mental shortcuts to estimate probabilities based on the most salient examples of an event they can recall.⁹³ This results in people overestimating the probability of very memorable events, such as plane crashes.⁹⁴ In trial and mediation settings, the availability heuristic explains why quantitative data from an expert is less persuasive to judges and juries than memorable anecdotal evidence.⁹⁵ For instance, even if a divorcing spouse was told the average

neoclassical economic models" that assume people act purely rationally. Zeiler, *supra* note 13, at 9.

⁸⁷ For a discussion of how these heuristics and biases may influence participants' decisions and outcomes in a divorce mediation, see *infra* Part II.

⁸⁸ Thornburg, *supra* note 17, at 1610-11.

⁸⁹ David M. Grether, *Testing Bayes Rule and the Representativeness Heuristic: Some Experimental Evidence*, 17 J. ECON. BEHAV. & ORG. 31, 32 (1992); see also *Representativeness Heuristic*, BEHAVIORALECONOMICS.COM, <https://www.behavioraleconomics.com/resources/mini-encyclopedia-of-be/representativeness-heuristic/> [<https://perma.cc/4RV8-46G3>] (last visited Jan. 28, 2022).

⁹⁰ See Grether, *supra* note 89, at 32; see also *Base Rate*, AM. PSYCH. ASS'N: APA DICTIONARY OF PSYCH., <https://dictionary.apa.org/base-rate> [<https://perma.cc/7B82-HBRJ>] (last visited Jan. 28, 2022) (defining base rate as "the naturally occurring frequency of a phenomenon in a population").

⁹¹ *Why Do We Use Similarity to Gauge Statistical Probability?*, DECISION LAB, <https://thedecisionlab.com/biases/representativeness-heuristic> [<https://perma.cc/53PS-6U3R>] (last visited Jan. 28, 2022) (citing example of overpolicing of Black men to demonstrate reliance on stereotypes that can "easily tip over into prejudice").

⁹² Several studies have found "that joint legal custody, usually with maternal residence, was the most common custody arrangement regardless of forum for reaching the decision." Gordon, *supra* note 35, at 137.

⁹³ See Levit, *supra* note 20, at 396.

⁹⁴ *Id.* at 391.

⁹⁵ Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 137-38 (1980).

settlement in a divorce was \$20,000, they might instead recall news headlines that Princess Diana received 90% of Prince Charles's net worth and hold out for a larger settlement at the bargaining table.⁹⁶

Framing is a heuristic that shows how something as simple as how a question or statement is phrased can alter people's responses.⁹⁷ In one study experimenters told two groups they had been diagnosed with cancer and presented them with two treatment options: surgery or radiation.⁹⁸ Experimenters told Group One that one year after surgery 32% died; reframing the same statistic, experimenters told Group Two that one year after surgery 68% survived.⁹⁹ The framing of this statement to Group One, which highlighted the negative risk of surgery, increased the percentage of people who chose radiation as a treatment option when compared to Group Two, despite the fact the two statements are mathematically equivalent.¹⁰⁰ Specific types of framing can exploit three related biases: (1) *contrast bias*, (2) the *compromise effect*, and (3) the *decoy effect*. *Contrast bias* reflects that if a person is given two options, but one is inferior, it increases the attractiveness of the better option.¹⁰¹ For example, people perceive themselves as more attractive after viewing pictures of unattractive people.¹⁰² The *compromise effect* reflects that if an extreme option is placed among other alternatives, most individuals will find the middle option most attractive.¹⁰³ Related to both concepts, the *decoy effect* reflects that if a third, less attractive option is added between two alternatives, it can modify a person's perception of the original two choices.¹⁰⁴ National Geographic ran an

⁹⁶ This is a hypothetical reference to Princess Diana and Prince Charles's divorce settlement to be used only for illustrative purposes. In reality, Princess Diana allegedly received \$22.5 million, in addition to a \$600,000 annual salary, in her divorce from Prince Charles, who is now worth \$100 million. Marissa Laliberte, *This Is How Much Money Princess Diana Reportedly Got in Her Divorce from Prince Charles*, READER'S DIGEST CAN. (Aug. 9, 2021), <https://www.readersdigest.ca/culture/princess-diana-divorce-money/> [https://perma.cc/QK84-BNRZ].

⁹⁷ Levit, *supra* note 20, at 397-98 ("How people respond to an issue depends on how it is presented or 'framed' to them: they may strongly prefer one of two functionally equivalent choices depending on the information that is offered.").

⁹⁸ *Id.* at 398.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Munsinger & Philbin, *supra* note 17, at 329.

¹⁰² See generally Bill Thornton & Jason K. Maurice, *Physical Attractiveness Contrast Effect and the Moderating Influence of Self-Consciousness*, 40 SEX ROLES 379 (1999) (noting perceptions of physical attractiveness are subject to contrast effect).

¹⁰³ Munsinger & Philbin, *supra* note 17, at 330.

¹⁰⁴ *Why Do We Feel More Strongly About One Option After a Third One Is Added?*, DECISION LAB, <https://thedecisionlab.com/biases/decoy-effect/> [https://perma.cc/WSP2-TNDQ] (last visited Jan. 28, 2022).

experiment to test this effect.¹⁰⁵ They offered two groups of consumers different popcorn sizes.¹⁰⁶ The first group was offered only two sizes, small and large, whereas the second group also had a third option, medium.¹⁰⁷ The prices remained constant across both groups: \$3 for the small, \$6.50 for the medium, and \$7 for the large.¹⁰⁸ Consumers in the first group most frequently bought the small popcorn, but consumers in the second group most often bought the large popcorn because the minimal price increase from the medium bucket made the large option appear cost advantageous.¹⁰⁹ However, consumers in the second group on average spent a greater sum than the first group.¹¹⁰ Thus, by framing and creating a third artificial option—medium popcorn—National Geographic changed consumers' purchasing decisions and increased their profits. These effects all show that what options are presented and how they are presented can affect people's perceptions of their options. In a divorce mediation, a mediator could make one option sound more desirable (e.g., joint custody), simply by placing it among a notably less desirable option (e.g., no custody).

Anchoring is a specific form of framing that "anchors" a person's expectations to a certain metric.¹¹¹ This can occur either quantitatively or qualitatively. For a quantitative example, consider the same mathematical question posed two different ways. When people were asked the result of $8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1$, the median answer was 2,250.¹¹² But when a separate group was asked the result of the mathematically equivalent $1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8$, the median result was much lower, only 512.¹¹³ These different answers are because people's expectations of the correct answer were anchored to the first number they heard.¹¹⁴ For instance, if a mediator begins a divorce mediation discussing typical alimony amounts, participants could focus on those numbers as anchors without considering the specifics unique to their situation. Anchoring may also occur qualitatively. People sometimes use their own

¹⁰⁵ National Geographic, *The Decoy Effect*, YOUTUBE (Nov. 13, 2015), <https://www.youtube.com/watch?v=33aaQdtD20k> (testing decoy effect using popcorn size experiment).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Saks & Kidd, *supra* note 95, at 140-41 ("When making certain types of judgments, people often start with an initial estimate and then make adjustments or revisions of these initial estimates. However, it is often the case that the adjustments depend heavily on initial values.").

¹¹² *Id.* at 141.

¹¹³ *Id.*

¹¹⁴ *Id.* Thus, people who heard a higher number first in the question were more likely to report a higher overall answer. *Id.*

emotions as an “anchor” to estimate others’ emotional states.¹¹⁵ This specific form of anchoring is called self-referencing.¹¹⁶

The *affect* heuristic represents the idea that people often make decisions consistent with their emotions.¹¹⁷ Emotions, in turn, can be influenced by a person’s environment.¹¹⁸ For instance, on rainy days people are more likely to assess life satisfaction more negatively than they do on sunny days.¹¹⁹ Although a mediator cannot control the weather, they can be aware that a divorce is likely an emotional experience and could influence participants’ decisions and evaluations.

In addition to heuristics, there are several biases that could influence a participant’s actions in a mediation. The biases of overconfidence, overoptimism and egocentrism are often grouped together as *self-serving biases* because all three lead a person to overvalue themselves in different ways.¹²⁰ *Overoptimism* occurs when one overestimates their capabilities.¹²¹ *Overconfidence* arises when people overestimate their ability to predict an outcome.¹²² Lastly, *egocentrism* causes people to overstate the role they have played in events.¹²³ In a divorce mediation, a negotiation for finite resources, a participant may be incentivized to overvalue their capabilities and thus overestimate the settlement they deserve.¹²⁴ Self-serving biases that lead participants to believe they are entitled to more than is fair create roadblocks in mediations by setting unrealistic expectations.¹²⁵

People tend to *favor their own group*, that is they prefer people who are a part of their same group.¹²⁶ These groups can be defined by gender, race, age, or even

¹¹⁵ Thornburg, *supra* note 17, at 1613 (“[P]eople use themselves as a kind of ‘anchor’ to estimate the intent and emotions of others and adjust from there depending on how similar or dissimilar from themselves the other person seems to be.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1612.

¹¹⁸ Levit, *supra* note 20, at 399-400 (explaining “affective responses arise incidentally from a person’s mood or circumstances”).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 400-01.

¹²¹ Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 Nw. U. L. REV. 1165, 1172 (2003). For instance, most people consider themselves to be “above average” drivers regardless of their driving record, even though it is mathematically impossible for a majority of people to be above an average. See Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 569 (2003).

¹²² Rachlinski, *supra* note 121, at 1172.

¹²³ *Id.* For example, most people overestimate how much they have contributed to a conversation. *Id.*

¹²⁴ When people are better off if something is true, they are more likely to perceive it as true. Farnsworth, *supra* note 121, at 569-70.

¹²⁵ See *id.* Reports have shown only those with clinical depression seem to have realistic self-perception, suggesting many mediation participants will engage in self-serving biases. See Rachlinski, *supra* note 121, at 1172.

¹²⁶ Munsinger & Philbin, *supra* note 17, at 315-16.

liking the same television shows. This instinct may justify herd behavior, or copying behavior, of other in-group members.¹²⁷ For instance, if all members of the popular group in high school wear pigtails, other school members will start to wear their hair in a similar fashion. People copy behavior of the “in-group” both because of societal pressure and an assumption that group members have access to knowledge they do not.¹²⁸ In a divorce mediation, it is possible a mediator would prefer the participant that is part of their same in-group, giving them more time to speak and more favorable options, aggrandizing that participant’s bargaining power.

E. *Intersection of Behavioral Economics and Gender*

Heuristics and biases are useful tools to analyze how mediation participants may make decisions. Identifying relevant heuristics and biases is the first step to determine how participants may be disadvantaged in mediation relative to trial. However, in the context of heterosexual divorces, where gender effects are certain to also take effect, it is only the first step. The next necessary step is to consider potential interactions between these concepts and gender.

People often follow gender rules blindly.¹²⁹ That is, they expect people to behave consistently with the stereotypes of their gender but are unable to articulate a reason for these expectations.¹³⁰ Even if gender differences are merely perceived to exist due to stereotypes, they influence how men and women negotiate because they form parties’ expectations of how each gender should behave.¹³¹ Some scholars have sought to quantify these differences, examining whether negotiation differences are inherent or societally based. Each study referenced below attempts to draw a general conclusion to explain its results, and as such, may not hold true for an individual. Nonetheless, these results are useful for analyzing general trends of how gender may affect the outcomes of divorce mediation.

Before delving into potential gender biases, it is helpful to consider how women and men negotiate to determine whether different outcomes are a result of inherent negotiating differences or biases and heuristics. For instance, some scholars have drawn the conclusion that women and men have different communication strategies in negotiations. Men are more likely to attempt to showcase their knowledge and skill; women tend to focus on establishing

¹²⁷ *Id.* at 328.

¹²⁸ *Id.*

¹²⁹ Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133, 175 (2010).

¹³⁰ *Id.* Professor Meredith Render equates rules of gender with rules of the English language, noting that we are “conversant” in both without explicit instruction. *See id.* at 134-35.

¹³¹ Michelle R. Evans, Note, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 145, 158 (2001).

connections and negotiating relationships.¹³² Men and women may also have different approaches to negotiation. Women are more apt to be empathetic and utilize social intuition more so than men.¹³³ Where women are likely to request, men generally prefer to command.¹³⁴ Furthermore, men are more likely to be overconfident than women in negotiations.¹³⁵ This difference in confidence alters the probabilities men and women assign to certain outcomes, their expectation of results, and perhaps even their bargaining power.

Several studies have examined how gender intersects with society's expected stereotypes. Professor Claude M. Steele tested the stereotype effect of gender on performance in math tests. Initially, he found that men outperformed women on a math exam.¹³⁶ However, when subjects were told prior to the exam that men and women scored equally well, score differences disappeared.¹³⁷ These results suggest that when women and men are assigned a task that is associated with a stereotype that benefits men, unless efforts are taken to counteract the existing stereotype, women may be hampered by an implicitly negative stereotype despite women maintaining the same inherent ability.¹³⁸ Other studies have found that women are likely to be less confident if they are assigned a traditionally "masculine" task.¹³⁹ These negative stereotypes do not appear to inhibit men to the same degree. Although men are likely to rate themselves higher than women when assessing their "masculine" abilities (e.g., math skills), they do not rate themselves differently (i.e., lesser than) when estimating their "feminine" abilities.¹⁴⁰

These studies suggest that if divorce proceedings intersect with areas where men are stereotypically aggrandized, women will suffer worse outcomes unless

¹³² *Id.* at 159.

¹³³ Andrea Schneider, *Negotiating While Female*, 70 SMU L. REV. 695, 711 (2017).

¹³⁴ Evans, *supra* note 131, at 158-59.

¹³⁵ Farber & Rickenberg, *supra* note 18, at 292. Society may also value perceived masculine skills more than perceived feminine skills. For instance, a 2017 study of the top characteristics most valued in men included honesty, financial success, and ambition. KIM PARKER, JULIANA HOROWITZ & RENEE STEPLER, PEW RSCH. CTR., ON GENDER DIFFERENCES, NO CONSENSUS ON NATURE VS. NURTURE 19 (2017), <https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/12/Gender-report-December-2017-FINAL.pdf> [<https://perma.cc/LX64-TEV7>]. The top characteristics most valued in women included physical attractiveness, empathy, and intelligence. *Id.* In the same study, 53% of participants said most people in our society look up to masculine men, but only 33% said society looks up to feminine women. *Id.* at 26.

¹³⁶ Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613, 620 (1997).

¹³⁷ *Id.*

¹³⁸ "Both experimental and field evidence document a widespread belief that women have lower ability than men in math." Pedro Bordalo, Katherine Coffman, Nicola Gennaioli & Andrei Shleifer, *Beliefs About Gender*, 109 AM. ECON. REV. 739, 742 (2019) (noting stereotypes in fields such as mathematics and sports tend to benefit men).

¹³⁹ Farber & Rickenberg, *supra* note 18, at 283 n.32.

¹⁴⁰ *Id.* at 291-92.

mediation is structured to correct for these negative stereotypes. Given the fact that women are more likely to be lower-powered individuals entering a divorce¹⁴¹ and that mediation detractors argue mediation harms individuals with less bargaining power,¹⁴² identifying heuristics and biases that may harm women in mediation is necessary to ensure women are not harmed simply for entering mediation instead of trial.

II. ASSESSING PROBLEMS IN MEDIATION THROUGH BEHAVIORAL ECONOMIC BIASES AND HEURISTICS

Mediation, particularly divorce proceedings, is typically an emotional and stressful situation.¹⁴³ Not coincidentally, when emotion clouds rationality, individuals are most likely to lean on heuristics, or “mental shortcuts,” and biases to assist in their thinking.¹⁴⁴ Therefore, divorce mediation is likely to cause heightened reliance on heuristics and biases, making it a useful vehicle to understand how gender and heuristics may hamper mediation generally. For instance, during a divorce mediation, both participants are more likely to be affected by the affect heuristic and make decisions influenced by their stressful environment.¹⁴⁵ If on rainy days people indicate lower life satisfaction than on sunny days, participants experiencing stress due to divorce proceedings may similarly report lower satisfaction.¹⁴⁶ Because mediation requires a convergent

¹⁴¹ See Bryan, *supra* note 71, at 457-60 (noting women may have less status and thus less bargaining power compared to men in mediation); Meyers, *supra* note 6, at 859 (noting “women are more likely than men to report that in mediation their ex-spouse pressured them into an agreement, that they never really felt comfortable expressing their feelings, that the mediation was tense and unpleasant, [and] that they felt angry during many of the sessions”).

¹⁴² See Delgado et al., *supra* note 12, at 1360 (arguing mediation as a deformed process may increase risk of class-based prejudice); Grillo, *supra* note 62, at 1597-1600 (noting mediation processes, which do not require lawyers, can strip lower-powered individuals of necessary protection and intensify bargaining power differences); Meyers, *supra* note 6, at 869 (arguing informal procedures exacerbate disparity between parties). This need is further bolstered by evidence that men, unlike women, are not harmed by negative stereotypes. See Farber & Rickenberg, *supra* note 18, at 291-92 (explaining that men’s confidence does not decline when tasked with rating their own “feminine” abilities).

¹⁴³ Divorce mediation, involving not only a negotiation for finite resources but also the dissolution of a relationship, is doubtlessly a particularly stressful situation for participants. See Meyers, *supra* note 6, at 869.

¹⁴⁴ *Id.*

¹⁴⁵ See Thornburg, *supra* note 17, at 1612 (noting emotions may guide individuals’ attitudes, beliefs, and even ultimate strategies).

¹⁴⁶ See Levit, *supra* note 20, at 399-400; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 68 (1990) (“The availability heuristic may lead the decisionmaker to weigh heavily current dissatisfaction in contrast to more positive aspects of the marriage, the partner, or the commitment to children.”).

assessment of what is fair, such dissatisfaction from both participants can narrow the range of acceptable outcomes and decrease the probability of a settlement.¹⁴⁷

Moreover, most people are unfamiliar with mediation.¹⁴⁸ Unlike trials, mediation is not consistently represented in the media or big-budget films.¹⁴⁹ Unknown situations intensify power imbalances and individuals' dependence on heuristics and biases.¹⁵⁰ People's reliance on heuristics is therefore more likely to be intensified in mediation than trial. For example, consider the availability heuristic, where people use memorable examples to estimate factors in unfamiliar situations.¹⁵¹ In the litigation context, a person who has never attended trial before may still recall details of a highly publicized event like the O.J. Simpson trial because it represents a salient memory or their favorite legal drama to estimate the basic structure of a trial. In the divorce mediation context, the most memorable events are likely to be very dramatic divorce settlements, such as MacKenzie Scott's settlement, for approximately 32% of Jeff Bezos's net worth despite accusations of the Amazon CEO's infidelity.¹⁵² A man and woman recalling this highly publicized divorce could find different features salient based on what most benefits them in a negotiation. A man may take away that a woman should receive less than a third of her husband's net worth, whereas a woman may take the Bezos settlement to signify wives deserve considerable settlements based on the high lump-sum awarded to Scott. Therefore, salient events may have a bigger impact on mediation participants

¹⁴⁷ Negotiation theory identifies the Zone of Possible Agreement ("ZOPA"), which "is the range in a negotiation in which two or more parties can find common ground." Marcela Merino, *Understanding ZOPA: The Zone of Possible Agreement*, HARV. BUS. SCH. ONLINE (Sept. 14, 2017), <https://online.hbs.edu/blog/post/understanding-zopa> [<https://perma.cc/J63U-HD7R>]. Therefore, one party's inaccurate assessment of their value can alter the ZOPA. See G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 54 (3d ed. 2018) (noting in successful negotiation, a party's request must be within the zone of other parties' interests). Assessments that are favorable only to one party, particularly in the case of divorce with finite resources, can therefore narrow the ZOPA. See Meyers, *supra* note 6, at 857 (noting divorce mediation involves a competition for finite resources such as alimony and custody of children).

¹⁴⁸ Grillo, *supra* note 62, at 1582.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Levit, *supra* note 20, at 396.

¹⁵² See Ahiza Garcia, *Jeff and MacKenzie Bezos' \$38 Billion Divorce Settlement Is Expected Soon*, CNN BUS. (July 1, 2019, 3:27 PM), <https://www.cnn.com/2019/07/01/tech/jeff-mackenzie-bezos-amazon-divorce-settlement> [<https://perma.cc/G7W7-E334>] (noting Jeff Bezos' net worth at the time of settlement was approximately \$118 billion); see also *Amazon Founder Bezos' Divorce Final with \$38 Billion Settlement: Report*, REUTERS (July 5, 2019, 8:57 PM), <https://www.reuters.com/article/us-people-bezos/amazon-founder-bezos-divorce-final-with-38-billion-settlement-report-idUSKCN1U1011> [<https://perma.cc/5V8S-BFF9>]. Dividing \$38 billion by \$118 billion yields approximately 32.2%.

than litigants, causing them to set unrealistic expectations and further narrow the bargaining range.

Because mediation, and particularly divorce mediation, presents a situation where participants are likely to utilize “mental shortcuts” that will frustrate accurate assessments of risk and bargaining power, applying behavioral economics concepts helps pinpoint the potential dangers that are likely to arise in mediation and affect final settlement outcomes. However, few studies exist that compare mediation and litigation outcomes. Existing studies typically compute estimates from small sample sizes. One study that examined thirty-eight separate efforts to empirically test whether mediation and arbitration resulted in systematic differences compared to trial ultimately found only contrary and inconclusive results.¹⁵³

Additionally, these studies often analyze divorce outcomes monetarily, which is an easily quantifiable measure that can be understood by wide audiences. Although monetary outcomes are an important measure for assessing outcomes, they may not best account for mediation’s benefits. Mediation proponents tout its ability to render creative solutions, which may rely less on monetary settlements.¹⁵⁴ Qualitative measures, like fairness, may better measure mediation’s benefits but are harder concepts to quantify and more subject to participants’ biases than monetary sums. For instance, parties are generally more satisfied when a judge or mediator matches their ethnicity.¹⁵⁵ A participant may thus rate the same monetary mediation outcome as less fair merely because the mediator is a different race than the participant.¹⁵⁶ Moreover, money can elicit bias. Some participants may see money as a tool that represents either prestige, class, acceptance, security, or power.¹⁵⁷

Studies assessing mediation outcomes may have further pitfalls. Many systems are designed to benefit and reinforce the current status quo and may

¹⁵³ Bachar & Hensler, *supra* note 45, at 836.

¹⁵⁴ See Meyers, *supra* note 6, at 856-58 (noting holistic advantages of mediation); Wilkinson-Ryan & Small, *supra* note 40, at 114 (stating one benefit of mediation is its allowance for idiosyncratic agreements that correspond to parties’ unique interests); see also ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 12 (2000) (“Through negotiation they may be able to capitalize on their different interests, resources, and capabilities and discover agreements that expand the pie.”). Moreover, “the truth is that differences are often more useful than similarities in helping parties reach a deal.” *Id.* at 14.

¹⁵⁵ Bachar & Hensler, *supra* note 45, at 832.

¹⁵⁶ See *id.* (emphasizing importance of demographics in mediation and negotiation outcomes).

¹⁵⁷ Munsinger & Philbin, *supra* note 17, at 354; see also Schneider, *supra* note 133, at 700 (noting a woman’s worth was traditionally “determined by her ability to maintain a domestic environment,” rather than by salary).

define success to the benefit of higher-powered individuals.¹⁵⁸ Furthermore, mediation programs are often small and meant to serve the needs of specific communities.¹⁵⁹ Outcomes may therefore be a result of different values.¹⁶⁰ For instance, if a community places a high value on communication, the best metric to assess a participant's sense of the outcome may be to record the number of minutes each party spoke. A study that measures only monetary outcomes in this community may not provide an accurate picture of that community's satisfaction. This Note, however, analyzes results only from behavioral economics studies to comment on general trends, which may not account for the unique values of every community.

A. *How Women Participants Fare in Divorce Mediation*

Studies have reported conflicting findings on how women fare in mediation. Women generally report higher satisfaction than men in mediated outcomes compared to trial.¹⁶¹ However, women typically receive higher monetary outcomes in trial compared to mediation, whereas men generally receive higher monetary outcomes in mediation.¹⁶² This effect is likely heightened in divorce proceedings, where court protections tend to give women the benefit of the doubt over men.¹⁶³

Theoretical studies also suggest that women may be poorly served by mediation. As stated above, critics of mediation theorize that it benefits the party with more power, which in divorce mediation is generally the husband.¹⁶⁴ The average woman comes to the divorce table with less bargaining power than the average man when considering factors such as income, education, self-esteem,

¹⁵⁸ See Simborg & Kelly, *supra* note 78, at 70 (noting peaceful agreements do not necessarily equate to good outcomes by analogizing to powerful dictators that have “peace” with their occupied people).

¹⁵⁹ Stipanowich, *supra* note 26, at 846 (“ADR is becoming increasingly specialized and, like politics, ‘local’—a creature of an industry or practice area, a court jurisdiction or geographical region, a culture, community, relationship, or transaction. One of the abiding themes of the empirical studies cited . . . is that when it comes to mediation, or to arbitration, everything hinges on the details.”).

¹⁶⁰ *See id.*

¹⁶¹ Bachar & Hensler, *supra* note 45, at 833.

¹⁶² *Id.* at 829-30 (“[R]esearch indicates that women fare worse than men in arbitration . . .”).

¹⁶³ Bryan, *supra* note 71, at 441, 442-44, 442 n.2, 443 n.3.

¹⁶⁴ *See id.* at 457-60 (explaining factors like guilt for initiating divorce, diminished self-worth caused by rejection, and risk aversiveness may affect participants' power); Meyers, *supra* note 6, at 859 (“Cross-cultural studies indicate that mediation between people of unequal power tends to lead to agreements that reflect that inequality.”). This is bolstered by a study that found women and men of color fared worse when compared to White men in mediation. Bachar & Hensler, *supra* note 45, at 829-30 (noting women's worse outcomes in mediation compared to trial may be attributable to negotiation styles associated with each gender or mediator's explicit or implicit biases).

and social resources.¹⁶⁵ The idea that women have less bargaining power is further supported by surveys of litigants, where women report feeling more strongly than men that an attorney's presence is helpful, suggesting women perceive themselves as having less bargaining power relative to men.¹⁶⁶ Women may therefore fare worse than men in divorce mediation because the informal process of mediation exacerbates differences in bargaining power.¹⁶⁷

Women's bargaining power may be further hampered in mediation because of the representativeness heuristic. Specifically, men may be seen as more "representative" of a class of better negotiators. Because mediation involves considerable negotiation, the stereotype that men are "better" negotiators may unfairly increase men's bargaining power, disadvantaging women.¹⁶⁸ Studies have shown when women are in an environment where men have the stronger stereotype (e.g., men are better at math), women tend to perform consistent with the weaker stereotype (e.g., women are bad at math), despite the same inherent ability.¹⁶⁹ One study noted that although women could and did outperform men in negotiations, once women and men were made aware of the stereotype that women are not good negotiators, women performed worse relative to men.¹⁷⁰

¹⁶⁵ See Gordon, *supra* note 35, at 136. Men also traditionally have more mobility, financial knowledge, control over assets, and decision-making power than women, which contributes to increased power at the bargaining table. Simborg & Kelly, *supra* note 78, at 69. This does not indicate that women are inherently less powerful than men but rather suggests that many negotiations are structured to reinforce men's societal power.

¹⁶⁶ See Gordon, *supra* note 35, at 138 ("Litigants of both genders thought the presence of their attorney was helpful, but women felt more strongly about this."). Mediation does not require the presence of lawyers. See Grillo, *supra* note 62, at 1597-1600.

¹⁶⁷ See Delgado et al., *supra* note 12, at 1360 (describing how lack of formalities may increase class-based prejudice); Grillo, *supra* note 62, at 1597-1600 (arguing exclusion of lawyers from mediation hampers protection of clients' rights); Meyers, *supra* note 6, at 869 (noting how formalities of adversarial system can guard against prejudice).

¹⁶⁸ "Because many of the traits associated with effective negotiators are stereotypically masculine in nature, subtly activating the masculine stereotype tends to lead to outcomes that confirm the stereotype of male dominance at the bargaining table." Laura J. Kray, Jochen Reb, Adam D. Galinsky & Leigh Thompson, *Stereotype Reactance at the Bargaining Table: The Effect of Stereotype Activation and Power on Claiming and Creating Value*, 30 PERSONALITY & SOC. PSYCH. BULL. 399, 400 (2004) (citation omitted); see also Bachar & Hensler, *supra* note 45, at 829 ("Other research . . . suggests that gender bias in mediation outcomes may be explained by women's negotiating style."). Stereotypes do not indicate truth. Rather, stereotypes are mental representations that "entail savings on cognitive resources" and "simplify the representation of heterogeneous groups, sometimes causing errors in judgment." Pedro Bordalo, Katherine Coffman, Nicola Gennaioli & Andrei Shleifer, *Stereotypes*, 131 Q.J. ECON. 1753, 1755 (2016) (noting also that stereotypes are localized around the most distinctive group features).

¹⁶⁹ See Steele, *supra* note 136, 620 (finding women performed worse on math tests than men unless explicitly told men and women performed equally well on math tests).

¹⁷⁰ Wilkinson-Ryan & Small, *supra* note 40, at 111. This again suggests that women are not hampered by an inability to negotiate but rather a perceived societal stereotype. See, e.g., Kray et al., *supra* note 168, at 400 (finding that "[t]he male advantage can be reversed [in

The representativeness heuristic also accounts for additional stereotypes that aggrandize men's bargaining power. For example, men more frequently engage in dominance behaviors like interrupting, thus increasing their relative bargaining power and exemplifying the stereotype that men are more powerful and aggressive.¹⁷¹ Research also suggests that men perform better with task-specific goals, whereas women are more attuned to relational goals.¹⁷² Because mediation tends to be more task focused, this information could enable men to assume they are stereotypically better equipped to succeed in mediation and further boost their bargaining power.¹⁷³

Assessing what is representative of women negotiators requires discrimination. Economists define discrimination distinctly from common parlance. Specifically, economists have identified two types of discrimination: taste-based and statistical. Discrimination based on bias or prejudice is "taste-based," whereas discrimination based on observable characteristics is "statistical."¹⁷⁴ Thus, preferring male candidates over women can be either taste-based ("I just think men do better") or statistical ("Men measurably produce twice as much as women do in this role"). Various studies suggest that women do not have less inherent negotiation ability than men but are harmed by taste-based discrimination that nonetheless stereotypes them as worse negotiators.¹⁷⁵ Any test or negotiation, by its structure, inherently values some skillsets over others.¹⁷⁶ Therefore, to design a mediation that does not exacerbate bargaining power differences, this Note delves into existing research on the differences in

negotiation] when men and women are told that stereotypically feminine traits are important determinants of negotiation success").

¹⁷¹ Bryan, *supra* note 71, at 463-64.

¹⁷² Wilkinson-Ryan & Small, *supra* note 40, at 115-16.

¹⁷³ Bryan, *supra* note 71, at 460. Women also generally have stronger philosophical associations with mediation, considering it part of an ideological commitment to peace. LaFree & Rack, *supra* note 67, at 792. Men, on the other hand, are more likely to view mediation as a mechanism for efficiency. *Id.*

¹⁷⁴ See generally David H. Autor, *The Economics of Discrimination—Theory* (Nov. 24, 2003) (lecture note, MIT) (available at <https://economics.mit.edu/files/553> [<https://perma.cc/L4PJ-VHGH>]) (providing taste-based and statistical models of discrimination).

¹⁷⁵ See generally Wilkinson-Ryan & Small, *supra* note 40 (reviewing empirical literature on negotiation and how differences in bargaining behavior between men and women affect divorce agreements).

¹⁷⁶ See, e.g., William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 1044-45 (2004) (arguing LSAT and in-class law school exams reward test-taking speed, whereas take-home exams and papers that allow students more time to focus on reasoning may arguably better reflect the actual practice of law). See generally Malcolm Gladwell, *Revisionist History: Puzzle Rush*, PUSHKIN (June 20, 2019), <https://www.pushkin.fm/episode/puzzle-rush/> (comparing in-class and take-home exams to find that law school exams can be designed to either reward a "tortoise," a student who benefits from more time to consider a problem, or a "hare," a student who can recall information and write quickly).

how women and men negotiate to identify structural elements of negotiation that falsely aggrandize men's power. The discrimination women face in negotiation is complicated by the fact that women who negotiate aggressively have been found to suffer adverse consequences.¹⁷⁷ Furthermore, women may face societal pressure in negotiations. Women have been found to act less competitively in public settings.¹⁷⁸ Additionally, women's personal entitlement or self-evaluation is greater in private than in public settings.¹⁷⁹ Researchers conducted a study that offered participants a fixed amount of money to work on a task.¹⁸⁰ Participants were told to continue working until they felt they had earned the offered fee.¹⁸¹ The researchers found that women participants worked longer hours than men when they believed they were being monitored than when they believed no one was watching, whereas men worked the same amount of time regardless of monitoring.¹⁸² The fact that once the societal pressure of being watched by experimenters was removed women and men "negotiated" to the same level suggests that women's supposedly "weaker" negotiating behavior may be a result of societal pressure, rather than an innate inability to negotiate.¹⁸³

The idea that women and men will negotiate to similar levels once barriers are removed is further supported by a study in which women and men were asked to pay themselves for performing a task. Women, on average, paid themselves less and worked longer, despite the fact that their work was more accurate.¹⁸⁴ However, once participants were informed what previous participants paid themselves, gender differences disappeared.¹⁸⁵ That women paid themselves the same as men once receiving transparent information bolsters the conclusion that differences in monetary outcomes are not due to unequal negotiating ability between men and women.

A third study helps paint a fuller picture of why women may have a reputation of being less successful negotiators. In this study, participants were offered \$3

¹⁷⁷ Madeline E. Heilman, Aaron S. Wallen, Daniella Fuchs & Melinda M. Tamkins, *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCH. 416, 416 (2004). Heilman et al. conducted three experimental studies across 242 subjects and found that successful women are less liked than successful men when success is in a "male character" field and these negative reactions can affect women's career outcomes. *Id.* But see Schneider, *supra* note 133, at 704 (discussing and countering myth that women should not negotiate due to potential backlash).

¹⁷⁸ Wilkinson-Ryan & Small, *supra* note 40, at 117.

¹⁷⁹ *Id.*

¹⁸⁰ Brenda Major, Dean B. McFarlin & Diana Gagnon, *Overworked and Underpaid: On the Nature of Gender Differences in Personal Entitlement*, 47 J. PERSONALITY & SOC. PSYCH. 1399, 1406 (1984).

¹⁸¹ *Id.*

¹⁸² *Id.* at 1409.

¹⁸³ Here, the number of hours worked is used as a proxy to compare women's and men's negotiation skills.

¹⁸⁴ Major et al., *supra* note 180, at 1409.

¹⁸⁵ *Id.* at 1404.

and told they could *negotiate* for additional payment.¹⁸⁶ Eighty-three percent of men initiated negotiations for the full amount compared to 58% of women.¹⁸⁷ However, when the instructions changed and participants were told they could *ask* for a higher payment, 73% of women asked for, and received, the highest amount (\$10) but only 69% of men did so.¹⁸⁸ This study provides useful instruction on how to ensure women and men are on a more even playing field: simply make it explicit to women they can *ask* for more.¹⁸⁹ These findings may also affirm the power of stereotypes. Women's performance did not improve when they were told could *negotiate*, perhaps because women are stereotyped to be worse negotiators; however, the performance of women who were told they could *ask*, something not associated with a negative stereotype, improved.¹⁹⁰ This suggests that framing that highlights negative stereotypes could further hamper lower-powered individuals in negotiations.

These studies taken together suggest that women's ability to negotiate is equivalent to men's ability, but certain procedural structures can result in stereotyping effects that harm women.¹⁹¹ Thus any discrimination women face during a mediation is likely due to taste-based discrimination as opposed to statistical discrimination. These studies also highlight some specific structural elements of negotiation that may boost men's bargaining power relative to women, such as societal pressure and lack of transparent information.

B. *How Mediators Affect Divorce Mediation Outcomes*

How participants view one another is only one aspect of a mediation; how participants view mediators also influences the outcome of a mediation. Generally, participants view neutral third parties, like mediators, as more credible than opposing counsel, and they better receive information from third

¹⁸⁶ Deborah A. 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. PSYCH. 600, 607 (2007).

¹⁸⁷ *Id.* at 607-08.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 610-11 (“[I]nterventions that help women to relabel negotiation situations as opportunities to ask may help to increase women's propensity to ask to a level equal to that of men.”).

¹⁹⁰ Bachar & Hensler, *supra* note 45, at 829-30 (noting stereotype that men are better negotiators than women).

¹⁹¹ Although this Note does not focus on race, it is important to note that these results are further complicated when viewed through an intersectional lens. For instance, some studies have found that White women received larger monetary outcomes in mediation relative to women of color participants. LaFree & Rack, *supra* note 167, at 791. In fact, one White female lawyer declared she preferred mediation because she received “more” in mediation than trial. *Id.* As such, these gender effects may be heightened or otherwise complicated once race is also taken into account.

parties than attorneys.¹⁹² As a result, mediators are likely more effective communicators than lawyers. However, participants may find mediators less neutral than judges.¹⁹³ Mediators, by design, are intended to engender feelings of closeness and intimacy with clients.¹⁹⁴ Furthermore, mediation contains no record, unlike trial.¹⁹⁵ These factors, when compared to the formal setting of trial with a judge, may counteract any benefits of a mediator's perceived neutrality.

Mediators' appearance of neutrality is particularly dangerous given that mediators may be subject to some of the same heuristics and biases as participants. Mediators can influence outcomes based on their treatment of participants. For instance, how a mediator chooses to frame questions can shift participants' sense of fairness. If a mediator highlights the negative risk to a husband of having to pay alimony for an extended period of time if he seeks joint custody, it could increase the husband's likelihood of forfeiting his request for custody.¹⁹⁶ Alternatively, if the mediator frames two options to a wife (e.g., mediation could result in either (1) no custody and no alimony or (2) joint custody and partial alimony) the mediator may have increased the attractiveness of the superior option (i.e., Option 2) through contrast bias.¹⁹⁷ Additionally, a mediator may implicitly favor one participant if the mediator perceives that participant to be part of the same group.¹⁹⁸ For instance, a male mediator may defer more to the male participant and allow him more time to speak relative to the female participant.

Participants may also favor certain mediators based on their biases, affecting participants' assessment of outcomes. Indeed, regardless of the participant's gender, mediation participants prefer male mediators and report fairer

¹⁹² Munsinger & Philbin, *supra* note 17, at 323. Parties typically view mediators as having no conflict of interest and lacking any bias. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 79-80 (2010). Neutrality may also be influenced by the mediator's gender. For instance, male mediators are more often overconfident and more likely than female mediators to attempt to alter parties' positions and make suggestions. Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFLICT RESOL. Q. 23, 26 (2010). Therefore, participants may see male mediators as less neutral than female mediators. *See id.*

¹⁹³ *See* Grillo, *supra* note 62, at 1589.

¹⁹⁴ *Id.* (noting mediators sit close to clients, speak directly to them, and sometimes meet individually with each party in the course of mediation).

¹⁹⁵ *Id.*

¹⁹⁶ *See* Levit, *supra* note 20, at 397-98 (finding participants in mock study were more likely to choose radiation as treatment option when the negative risk of surgery was highlighted).

¹⁹⁷ *See* Munsinger & Philbin, *supra* note 17, at 329 (explaining that if a person is given two options, one of which is inferior, the attractiveness of second option increases).

¹⁹⁸ Izumi, *supra* note 192, at 93 (noting that of more than two-million people who have taken the Implicit Association Test, 88% of White test takers have a preference for White people over Black people). Some studies have also found mediators exhibit an Anglo-protective bias, favoring White participants and allowing people of color participants to accept disadvantaged outcomes. *Id.* at 106.

outcomes.¹⁹⁹ This preference may arise because participants see men as more representative of an authority figure, like a judge.²⁰⁰ Additionally, most negotiation theory is based on rational analysis.²⁰¹ Thus, male mediators' tendency to focus more on legalistic arguments, compared with female mediators' tendency to focus on relational arguments, may cause participants to assume men are more representative of good negotiators.²⁰² In reality, there is little reported difference in negotiating ability of women and men but a definitive difference in the perception of gendered behavior within negotiation.²⁰³

Although participants may prefer male mediators to female mediators, a closer examination of outcomes reveals participants may not actually be better served by male mediators. One study found that women of color claimants who participated in mediation were more likely to secure higher monetary outcomes with male mediators.²⁰⁴ This seems to confirm the stereotype that men are better mediators than women.²⁰⁵ However, once participant preferences are considered, a different picture emerges. The study that found people of color claimants received less money with female mediators also found that these claimants defined their goals not based on money but based on their strong family, relational, and community orientation.²⁰⁶ For these people of color participants, female mediators may have better served their goals, focusing on what their client desired: more relational outcomes.²⁰⁷ These findings also further reflect the limitations of focusing on monetary amounts in assessing outcomes, as such metrics may artificially favor male mediators and fail to account for participant preferences.²⁰⁸

¹⁹⁹ Gordon, *supra* note 35, at 140 (finding participants preferred male mediators to female mediators when asked about metrics such as fairness, pressure, and competence).

²⁰⁰ *Id.* at 142.

²⁰¹ Bachar & Hensler, *supra* note 45, at 833.

²⁰² *See id.* (noting male mediators tend to be more unemotional and reserved whereas female mediators tend to be more emotional); *see also* Charkoudian & Wayne, *supra* note 192, at 25 (noting certain studies found women tend to communicate more to establish intimacy, whereas men tend to communicate more to establish independence). The representative heuristic showcases that individuals often estimate the likelihood a person exhibits a certain characteristic based on the presence of other characteristics. *See* Thornburg, *supra* note 17, at 1610-11. Applied here, individuals are more likely to assume any individual man is a better negotiator because men are seen as representative of a class of better negotiators. *See id.*

²⁰³ Charkoudian & Wayne, *supra* note 192, at 25.

²⁰⁴ LaFree & Rack, *supra* note 67, at 791.

²⁰⁵ Bachar & Hensler, *supra* note 45, at 829-30 (noting stereotype that men are better negotiators than women). Presumably, men who are better negotiators can use their skills to ensure participants receive better settlements (e.g., more money) compared to women mediators.

²⁰⁶ LaFree & Rack, *supra* note 67, at 790.

²⁰⁷ *See id.*

²⁰⁸ Experimenters should ensure they are measuring outcomes that highlight the skills both female and male mediators may bring to a mediation. *See* Charkoudian & Wayne, *supra* note

Participants' assessments of satisfaction may also depend on the gender mix between mediator and participants.²⁰⁹ Lorig Charkoudian and Ellen Kabcenell Wayne found that if no mediator of the same gender was present for either participant (e.g., a woman mediator and two men participants), there was no change in the participants' sense of fairness of a mediation, regardless of the mediator's gender.²¹⁰ However, if the other participant and mediator were both of the opposite gender (e.g., a man participant against a woman participant in a mediation led by a woman mediator), participants reported less effective communication.²¹¹ These participants were more likely to report the mediator was listening judgmentally and taking sides.²¹² Therefore, participants may perceive a mediation as less fair just because a mediator is the same gender as the participant across the table. These findings are especially relevant to the heterosexual divorce context where participants in mediation will be of different genders. Thus, at least one participant is likely to feel a mediation is less fair simply due to the gender mix of mediator and participants.²¹³

III. PROPOSED CHANGES TO MEDIATION TO IMPROVE PARTICIPANT OUTCOMES AND SATISFACTION

Mediation is an informal, flexible process. This allows participants to assess the best outcomes for themselves as opposed to receiving an order from a judge who is bound by legal precedent. This is touted as its main benefit, but the ambiguity of the process also means participants employ untrustworthy heuristics and biases such as the affect and availability heuristics to make decisions, increasing power imbalances and hindering lower-powered individuals' outcomes compared to trial. Women especially suffer because of participants' overreliance on the representativeness heuristic, which associates women with having poor negotiation skills despite evidence to the contrary.²¹⁴ Moreover, mediators can be complicit in increasing bargaining power imbalances through careless framing and favoring participants that resemble the mediator. This Note has examined divorce mediation's structure from the perspective of mediators and participants to identify heuristics and biases from

192, at 26 (discussing difference in mediator behaviors, perspectives, and communication styles between men and women).

²⁰⁹ See *id.* at 27.

²¹⁰ *Id.* at 40.

²¹¹ *Id.*

²¹² *Id.* at 44.

²¹³ Some studies have found that mixed-gender groups can implicitly activate gender stereotypes. See, e.g., Wilkinson-Ryan & Small, *supra* note 40, at 120 (citing Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCH. 942, 948 (2001)). Thus, a typical heterosexual divorce mediation is more likely to exhibit meaningful gender stereotypes from which we can draw conclusions more generally about mediation.

²¹⁴ See, e.g., Shaw, *supra* note 35, at 448 (finding women reported less satisfaction with both mediation process and outcomes compared to trial).

both that may exacerbate bargaining power differences between mix gendered participants. Now, this Note proposes explicit changes to mediation generally to equalize bargaining power and improve both participants' understanding of their bargaining power to lead to fairer outcomes.²¹⁵

The difficulty of designing any solution to combat heuristics and biases is that multiple biases can interact with one another, complicating the potential for an ideal solution.²¹⁶ For instance, biases may offset one another. Someone who is overconfident may overestimate future rewards resulting in greater effort and thus ultimately greater rewards.²¹⁷ Biases are also often correlated with one another.²¹⁸ Consider designing a policy to disincentivize smoking. People often suffer optimism bias, in this case believing they are the exception to poor health statistics of smokers.²¹⁹ To negate this, policy makers provide frightening narratives of smokers' health, hoping to take advantage of the availability heuristic.²²⁰ However, reports show smokers already believe cigarette smoking is more dangerous than statistics reflect, reducing the efficacy of policy makers' efforts.²²¹ An ideal solution to discourage smoking thus needs to allow for the amount individuals overestimate their probability of being unaffected by smoking due to optimism bias, counterbalanced with smokers' belief that cigarette smoking is more dangerous than it is, and account for how the availability heuristic may weigh against these probabilities.²²² Below, I set out a

²¹⁵ Assessing outcomes in mediation by any singular metric, such as monetary outcomes, defeats mediation's benefit of allowing participants to uniquely assess the value of a mediated outcome. Nonetheless, heuristics and biases can affect participants' assessments of outcomes and thus narrow the bargaining range. See Merino, *supra* note 147 (discussing ZOPA). Thus, accounting for potential heuristics and biases hopefully removes these inaccurate assessments and allows for overall fairer outcomes.

²¹⁶ Mario J. Rizzo & Glen Whitman, *The Unsolved Hayekian Knowledge Problem in Behavioral Economics*, BEHAV. PUB. POL'Y, 2021, at 1, 6.

²¹⁷ *Id.* Typically, theorists would predict overconfidence would cause a person to underperform because of their increased certainty in an ideal outcome. However, if this also causes a person to overestimate the potential reward of their action, this could in fact motivate a person to exert additional effort. *Id.*

²¹⁸ *Id.*

²¹⁹ Mario J. Rizzo, *The Four Pillars of Behavioral Paternalism*, in NUDGE THEORY IN ACTION: BEHAVIORAL DESIGN IN POLICY AND MARKETS 37, 51 (Sherzod Abdukadirov ed., 2016). Similarly, 65% of Americans believe they are of above average intelligence, despite the mathematical impossibility. Patrick R. Heck, Daniel J. Simons & Christopher F. Chabris, *65% of Americans Believe They Are Above Average in Intelligence: Results of Two Nationally Representative Surveys*, 13 PLOS ONE 1, 3 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6029792/pdf/pone.0200103.pdf> [<https://perma.cc/28BQ-86UA>].

²²⁰ Rizzo, *supra* note 219, at 51. According to the availability heuristic, people often estimate probabilities of an event based on the most salient examples of such an event that they can recall. Levit, *supra* note 20, at 391.

²²¹ Rizzo, *supra* note 219, at 51.

²²² *Id.*

list of recommendations that allow mediation to maintain its creativity and informality but potentially better address the dependence on dangerous heuristics and biases that harm participants with less bargaining power. However, given the nature of heuristics and biases, any proffered solutions for counteracting specific biases and heuristics in mediation may interact with additional biases in ways that are difficult to quantify. Thus, some proposed changes may be readily applied to mediation, but other proposed changes have potential interactions with other heuristics and biases that will require further study before implementation. I thus highlight possible heuristics and biases that would need to be taken into account in designing an ultimate solution for each offered solution.

Requiring pre-mediation surveys where participants write down weaknesses: In emotionally charged experiences, such as mediations generally and particularly divorce mediations, participants who lean on heuristics and biases are more likely to inaccurately calculate risks.²²³ Because most people engage in self-serving biases, a participant may overvalue their assets and hold faulty assessments of a fair settlement, narrowing the potential bargaining range between parties and decreasing the probability of reaching an agreeable outcome.²²⁴ Writing down one's own weaknesses before a mediation can counteract self-serving biases that lead participants to overestimate their bargaining power.²²⁵ One study found that having parties write down their weaknesses negated parties' tendencies to engage in self-serving biases and led to parties settling more quickly.²²⁶ Requiring mediation participants to do the same could lead to fairer outcomes by removing the roadblock of participant's inaccurate and self-favoring risk assessment.

However, writing down weaknesses could also reinforce negative stereotypes. This could particularly harm women. Experimental evidence suggests women believe they are weaker negotiators and will behave consistent with the weaker stereotype unless there is structural change, such as providing transparent information.²²⁷ Thus, writing down weaknesses could solidify

²²³ Levit, *supra* note 20, at 395-96.

²²⁴ *Id.* at 400-01. For instance, people tend to be overly optimistic, overestimating their capabilities and overstating the role they have played in events. Either bias could cause a divorce participant to overestimate how much is "fair" in a divorce settlement and underestimate how much is "fair" for the other party to receive. Such inaccurate estimates in each party's own favor would narrow the ZOPA. See Merino, *supra* note 147 (defining ZOPA and discussing how to best negotiate using ZOPA).

²²⁵ These weaknesses may range from, "I am often too quick to agree to another party's perspective," to "I interrupt to speak before listening," or even, "I hate conflict."

²²⁶ See Farnsworth, *supra* note 121, at 581 ("[P]arties given the debiasing instruction tended to settle their cases more quickly than the parties left to their own devices.").

²²⁷ See Bachar & Hensler, *supra* note 45, at 829-30 ("In our view, research on objective outcomes of mediation suggests that both women and minority males fare worse than white males."); Steele, *supra* note 136, at 620 (finding women performed worse on math tests than men unless explicitly told men and women scored equally well, likely due to the internalized

stereotypes of women's supposedly bad negotiation skills, hampering their ability to secure fair outcomes in mediation. Pre-mediation surveys could also cause participants to engage in anchoring.²²⁸ Final decisions are often biased toward an initial value, so questions requiring a participant to formulate numbers prior to a mediation may be especially likely to anchor a participant's expectations.²²⁹ Even if an anchor is randomly generated and uninformative, studies show it still affects people's predictions of final decisions.²³⁰ Anchoring may go beyond numerical values. One study found that participants anchored to both objective and subjective indicators.²³¹ Some scholars have suggested transparent information and forewarning can help counteract anchoring, but the results are mixed on their success.²³² Moreover, additional transparent information can worsen the problem it seeks to cure. Some studies have found that self-generated anchors are especially pernicious if they are confirmed later with research.²³³

Therefore, any pre-mediation survey would need to be carefully crafted to minimize these potential negative interactions. Mediation agencies could conduct experiments to measure differences in outcomes due to different survey questions.²³⁴ This would allow mediation agencies to parse out how heuristics and biases intersect for each set of survey questions. However, such an experiment is costly in time and resources and would require large sample sizes

stereotype that women are supposedly worse at math than men); Wilkinson-Ryan & Small, *supra* note 40, at 111 (finding transparent information helped alleviate negotiating differences between women and men).

²²⁸ Anchoring occurs when people utilize recently provided information to guide them in estimating additional values. Susan Godlonton, Manuel A. Hernandez & Mike Murphy, *Anchoring Bias in Recall Data: Evidence from Central America*, 100 AM. J. AGRIC. ECON. 479, 479 (2017) (defining anchoring bias as one where "individuals use some easily-observed prior or recently-provided information to guide them in estimating a value under uncertainty").

²²⁹ Adrian Furnham & Hua Chu Boo, *A Literature Review of the Anchoring Effect*, 40 J. SOCIO-ECON. 35, 35 (2011).

²³⁰ *Id.* at 38 (citing studies that found anchor values can be created by spinning wheel of fortune, throwing set of dice, and that even amount spent at restaurant can be influenced by restaurant's name). This suggests that even if a participant randomly selected numbers to fill out a survey, they may nonetheless be anchored by their answer. *See id.*

²³¹ Godlonton et al., *supra* note 228, at 479-80 (assessing whether respondents in 2013 survey used values reported in 2013 to anchor their recall of survey responses in 2012 for both objective indicators, such as income, wages, and working hours, and subjective indicators, such as happiness, health, stress, and well-being).

²³² *See* Furnham & Boo, *supra* note 229, at 39-40 (weighing effectiveness of forewarnings and incentives against anchoring effects).

²³³ *Id.* at 37-38.

²³⁴ These experiments could be structured in a variety of ways but would likely contain a control group and an experimental group. *See, e.g.,* Steele, *supra* note 136, at 620 (conducting experiment that compared results of math tests administered to control group with no instruction and math tests administered to experimental group with instructions).

to draw adequate conclusions.²³⁵ Moreover, measuring biases through statistics can itself invoke biases.²³⁶ Lastly, as informative as such a study may be, if participants of such experiments are actual divorcing couples, they may suffer worse monetary and legal outcomes for the sake of future participants' clarity.

Providing more information before mediation: Mediation itself is an unknown process for many participants, which inherently increases participants' reliance on heuristics and biases, intensifying bargaining power differences.²³⁷ Mediation agencies should therefore move to provide participants with additional information and statistics as part of the pre-mediation process.²³⁸ This policy would alleviate participants' uncertainty about an unknown process and help ensure people do not rely on irrational heuristics to assess probability or fairness.

However, statistics that reduce participants' lack of knowledge risk anchoring participants' expectations and narrowing the potential bargaining range.²³⁹ Any

²³⁵ See generally Sourav Chatterjee & Persi Diaconis, *The Sample Size Required in Importance Sampling*, 28 ANNALS APPLIED PROBABILITY 1099 (2018) (noting importance of sample size in accurate estimations).

²³⁶ See generally Nicola Persico, *Racial Profiling? Detecting Bias Using Statistical Evidence*, 1 ANN. REV. ECON. 229 (2009) (reviewing variety of methods to measure discrimination).

²³⁷ See Wilkinson-Ryan & Small, *supra* note 40, at 125-26.

²³⁸ Mediation services are provided both through court programs and private programs. Compare *Alternative Dispute Resolution*, MASS.GOV, <https://www.mass.gov/alternative-dispute-resolution> [<https://perma.cc/W6A5-2XN6>] (last visited Jan. 28, 2022) (explaining ADR services offered by the Massachusetts Trial Court), with *Our Story*, MEDIATION GRP., <https://www.themediationgroup.org/our-story> [<https://perma.cc/5W2T-G4JW>] (last visited Jan. 28, 2022) (explaining story behind a private mediation firm). I use the term "mediation agency" throughout this Note to describe either private mediation firms or government-run programs. To provide useful metrics, a mediation agency or entity would need to have access to a large sample of data so as to not mislead participants. This may be one reason why mediation agencies have not yet begun to collect or distribute this data. In the future, the government could potentially collect and regulate this data. Likely government agencies have not done so yet because mediation traditionally has not been heavily regulated. Indeed, as of 2013, more than twenty states do not have comprehensive statewide standards for mediators. N. VA. MEDIATION SERV., STATE-BY-STATE GUIDE TO COURT MEDIATOR QUALIFICATION STANDARDS 3 (2013), <https://nvmsus.files.wordpress.com/2014/11/us-mediation-certification-standards.pdf> [<https://perma.cc/TC88-CT7K>] (noting "28 of 50 states have comprehensive statewide standards for any mediators who wish to be recognized by the courts (e.g., certified, included on court rosters) as qualified to mediate"). This may be changing as state governments continue to rely more on mediation after the pandemic. See, e.g., Rearick, *supra* note 3 ("No longer is it simply accepted that settlement or mediation won't be explored until after years of discovery, enormous cost outlays and only on the eve of trial. Now attorneys come prepared—at the preliminary conference—to discuss alternative ways to resolve their case.").

²³⁹ See Saks & Kidd, *supra* note 95, at 142 (noting that anchoring can cause individuals to make systematic errors and even underestimate the likelihood of failure); see also *supra* note 147 and accompanying text (noting inaccurate assessments of individuals' assets can reduce zone of potential agreement and decrease likelihood of reaching settlement).

statistics must therefore be carefully presented to participants. General statistics, such as the average amount of alimony paid in each mediation, would be especially dangerous to provide to participants.²⁴⁰ A participant might take such a statistic as a guarantee and not account for specifics of their situation. Including further details and cross sections of the data may help mitigate the risk of anchoring to an inapposite situation. For instance, within divorce mediation, if alimony payments are broken down by age group and income bracket, this information becomes less likely to inaccurately anchor participants' expectations. However, providing such statistics is not without risks. Such information may trigger self-serving biases in participants such as overconfidence.²⁴¹ Armed with various statistics, participants can cherry-pick to confirm their biases of their own self-worth, leading them to significantly overvalue themselves.²⁴² Including a disclaimer explaining anchoring to participants is unlikely to prevent participants from engaging in anchoring.²⁴³

To circumvent the risk of anchoring participants to definitive numbers, mediation agencies could also provide statistics on less quantitative but equally important measures such as participants' sense of fairness, satisfaction with the procedure, and benefits to the divorcing couple's relationship. This ensures participants receive important information to make mediation a less ambiguous process but lessens the risk either participant will fixate on one specific number. To collect this information, mediation agencies could require participants to take post-mediation surveys to finalize their settlements. However, at least one study has suggested that participants may anchor to subjective indicators.²⁴⁴ Moreover, these subjective indicators themselves are susceptible to participants' biases and not entirely trustworthy.²⁴⁵ Additionally, participants may not meaningfully absorb statistics. Participants may utilize the availability heuristic, locking into a salient memory, such as a celebrity divorce, as their benchmark for reasonableness regardless of provided statistics.²⁴⁶

Although transparent information is useful for combatting participants' reliance on certain heuristics and biases as well as negotiation differences

²⁴⁰ See Saks & Kidd, *supra* note 95, at 140 (discussing power initial values have over individuals' final estimates).

²⁴¹ Self-serving biases, such as overoptimism, overconfidence, and egocentrism, all suggest that people overvalue themselves. See Levit, *supra* note 20, at 400-01.

²⁴² Most people already overvalue themselves. See *id.* at 401. ("People generally overestimate their own abilities (overconfidence) and are unrealistic when predicting outcomes in their own favor (overoptimism).").

²⁴³ See Furnham & Boo, *supra* note 229, at 39-40.

²⁴⁴ See Godlonton et al., *supra* note 228, at 479-80.

²⁴⁵ See Charkoudian & Wayne, *supra* note 192, at 40-44 (finding participants were more likely to report mediator was less fair if mediator and opposing participant were both of opposite gender of reporting participant); Gordon, *supra* note 35, at 140, 142 (finding participants felt male mediators were more fair, likely because they were more akin to authority figures such as judges).

²⁴⁶ Levit, *supra* note 20, at 391.

between men and women, it is accompanied by several risks.²⁴⁷ Therefore, any potential information that mediation agencies provide to participants must be carefully considered in terms of any foreseeable interactions, including those identified, it could have to aggravate other dangerous heuristics and biases.

Using open-ended questions: Mediators, who are viewed as neutral by mediation participants and direct the mediation, are in a unique position to influence participant outcomes. Mediators should therefore use open-ended questions to increase their neutrality. Instead of beginning a divorce mediation with, “Who contributes the most financially?” or “Who spends the most time caring for the children?,” mediators should begin with neutral, general questions such as, “What brings you to mediation today?” or “What are you hoping to get from this mediation?” Mediators should also be careful not to frame extreme options in their questioning, which could alter a participant’s sense of a potential bargaining range.²⁴⁸ Open-ended questions reduce the risk that a mediator’s questions could reinforce certain negative stereotypes in both divorce mediation and mediation generally, curbing a lower-powered participant’s bargaining power. Additionally, mediators should be neutral in their body language to avoid influencing participants’ sense of fairness.²⁴⁹ Smiling when one participant is speaking and frowning while another is talking may convey that the mediator prefers one participant, increasing that participant’s relative bargaining power. Asking open-ended questions that do not engage in specific framing and utilizing similar body language toward both participants lessens the odds that the mediator artificially increases one participant’s bargaining power or subconsciously modifies a participant’s preferences.²⁵⁰ This technique is most useful at the beginning of a mediation as a mediator gathers information and during any topics that invoke stereotypes or values. Thus, a divorce mediator should never ask a participant value-specific questions such as, “Would you prefer joint custody or extended alimony?” but instead should ask more open-ended questions such as, “What are your most important goals in this mediation?”

²⁴⁷ Some studies have indicated transparent information can reduce bargaining power differentials, benefiting participants. *See, e.g.,* Major et al., *supra* note 180, at 1404 (finding once all participants were informed what previous participants earned, gender differences in salary disappeared).

²⁴⁸ *See* Munsinger & Philbin, *supra* note 17, at 330 (explaining compromise effect, which “occurs when an extreme option is placed among the other alternatives”); *Why Do We Feel More Strongly About One Option After a Third One Is Added?*, *supra* note 104 (detailing National Geographic experiment finding that people bought more large popcorn once a third option of medium popcorn was introduced).

²⁴⁹ *See* Izumi, *supra* note 192, at 125 (“All subtleties of a mediator’s mode of communication, including tone of voice, speed of speech, demeanor, eye contact, facial expressions, body language, and physical signals and gestures, are important for attending to external neutrality.”).

²⁵⁰ *See* Munsinger & Philbin, *supra* note 17, at 318-19.

Use framing actively to combat power imbalances: Despite the dangers of framing, framing can also be a valuable tool to combat power imbalances if used purposefully and judiciously. A passive mediator is more likely to produce results that favor the participant with more power.²⁵¹ Mediators should use framing to ensure both participants have an equal opportunity to speak in addition to offsetting negative stereotypes. For instance, within divorce mediation, a mediator who neglects to frame for power imbalances between a man and woman may exacerbate the lower bargaining power of the lower-powered individual and cause them to suffer worse outcomes.

Mediators must ensure that mediation's processes, such as the time both participants speak and the options presented to the parties, are equal. One study found that in an auction setting, participants made comparable offers to women and men at the end of the auction, but auctioneers took more time to present an equal offer to women.²⁵² In a mediation with both parties present, such a biased process could reframe parties to expect that a woman should receive less because she was offered less than a man at the beginning of the mediation. Therefore, if a mediator does present an option to either participant, a necessary step in reaching a final settlement, the mediator must actively ensure they are offering relatively equal options to both parties and providing both parties equal speaking time throughout the process, not simply at the end of the mediation.

Mediators should also proactively assess power imbalances and reframe questioning once such imbalances are detected. Lower-powered individuals are more inclined to use polite speech and less likely to criticize, disagree, or attempt to negotiate.²⁵³ Mediators should therefore ensure participants are given an equal opportunity to speak by asking an equal number of similar questions to each participant. However, mediators may be required to take an additional step to counteract potential power imbalances. Even if participants are asked an equal number of questions, a lower-powered individual may respond for significantly less time than the higher-powered individual. For instance, women have been found to negotiate to the same level as men once they are asked additional questions, suggesting mediators should be equipped to ask more questions of women to ensure an equal playing field.²⁵⁴ If a mediator detects imbalances in speaking time, they should be prepared to restructure the mediation to ask the

²⁵¹ In divorce mediations the higher-powered individual is typically the man. Meyers, *supra* note 6, at 859 (noting mediation typically involves uneven pairs, including men who earn more than women); Simborg & Kelly, *supra* note 78, at 70.

²⁵² Eve F. Fabre, Mickael Causse, Francesca Pesciarelli & Cristina Cacciari, *The Responders' Gender Stereotypes Modulate the Strategic Decision-Making of Proposers Playing the Ultimatum Game*, FRONTIERS PSYCH., Jan. 2016, at 1, 3.

²⁵³ Wilkinson-Ryan & Small, *supra* note 40, at 121.

²⁵⁴ Small et al., *supra* note 186, at 607 (finding when participants were explicitly told they could ask for higher payment, women and men negotiated to the same payment amounts).

participant who speaks less frequently additional follow-up questions to ensure an equal amount of speaking time between participants.²⁵⁵

However, this strategy depends on a mediator's ability to accurately assess power imbalances.²⁵⁶ A mediator who inaccurately attempts to correct for a power balance may overcorrect, emphasizing the higher-powered individual's already high bargaining power and significantly harming the lower-powered participant. Additionally, power is not always stagnant in a mediation—it can ebb and flow as the mediation evolves, further complicating the mediator's ability to assess power imbalances.²⁵⁷ Mediation can be designed to mitigate this risk, as discussed below with co-mediation, but cannot guarantee it is entirely removed.²⁵⁸

Although mediators should not frame in a way that reinforces stereotypes, mediators should actively frame to counteract negative stereotypes. Mixed-gender groups can implicitly activate gender stereotypes.²⁵⁹ Framing issues in reference to gender differences has the potential to correct for power imbalances, but invoking harmful gender stereotypes may worsen those imbalances.²⁶⁰ Instead, mediators should focus on framing that puts both participants on equal footing. In divorce mediation, a mediator should frame questions that highlight both participants' roles as parents rather than as husband and wife.²⁶¹ This allows a mediator to equalize bargaining power without the risk of exacerbating imbalances. Additionally, mediators may try to empower both parties by

²⁵⁵ There can be many indicators of who has more power in a mediation. One mediator notes that generally the spouse who looks more frequently to their partner is less powerful. Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227, 233 (1992). However, this same mediator also notes that power imbalances are difficult to assess with a specific list of behaviors because power is situational. *Id.* For instance, the participant who proposes a division of assets may seem to have more power, but if the other participant says no, that may in fact suggest that the other participant is the one with more power. *Id.*

²⁵⁶ Defining or recognizing power is a complex and difficult task. See Ilan G. Gewurz, *(Re)Designing Mediation to Address the Nuances of Power Imbalance*, 19 CONFLICT RESOL. Q. 135, 137-38 (2001). Power can be a result of one's gender, personality, self-esteem, income, knowledge, status, or education among other qualities. Neumann, *supra* note 255, at 229. Moreover, power is only effective when it is used. *Id.*

²⁵⁷ Gewurz, *supra* note 256, at 136-37.

²⁵⁸ Specifically, co-mediation is a tool used in mediation that allows co-mediators to hold one another accountable. Interview with Mie Morikubo, Mediator, in Bos., Mass. (Sept. 7, 2021). Morikubo is the winner of the Carol B. Liebman Mediation Prize.

²⁵⁹ Some studies have found that mixed-gender groups can implicitly activate gender stereotypes. See, e.g., Wilkinson-Ryan & Small, *supra* note 40, at 120 (citing Kray et al., *supra* note 213, at 948).

²⁶⁰ *Id.* at 111; Kray et al., *supra* note 168, at 408 (finding "that both men and women are sensitive to the content of an activated stereotype and adjust their behaviors accordingly").

²⁶¹ Indeed, one study found that when a mediator framed a divorcing couple's role explicitly as parents, as opposed to husband and wife, many of the gender power dynamics dissipated. See Bachar & Hensler, *supra* note 45, at 831.

highlighting how stereotypes that benefit each party are present in the mediation. For instance, in a divorce mediation between a cisgender, heterosexual couple, a mediator may increase participants' confidence and equalize bargaining power by highlighting that mediation incorporates both task-oriented and relational goals.²⁶²

Adding targeted formalities to the mediation process: Another way to benefit lower-powered individual participants is to formalize mediation by requiring the presence of advocates.²⁶³ Here, the benefits of additional formalities need to be weighed carefully against disadvantages. Too many formalities will cause the benefit that mediation lacks rigid rules, allowing for customization to idiosyncratic preferences to disappear; too little will cause power imbalances to continue to obstruct outcomes.²⁶⁴ Formalization will also likely increase costs, reducing one of mediation's benefits.²⁶⁵ Creating more substantive pre-mediation processes and post-mediation surveys, as discussed above, is one way to formalize mediation. Currently, mediation does not require the presence of lawyers but does permit such presence.²⁶⁶ However, an informed advocate need not be a lawyer. Each participant could be appointed an individual mediator or experienced negotiator in addition to the mediator leading the mediation. Inclusion of an advocate equalizes bargaining power, benefiting lower-powered individuals. Indeed, women have reported feeling more strongly than men that an attorney's presence is helpful at mediation.²⁶⁷ Moreover, an advocate who is experienced in a particular field of mediation can provide information to a participant to correct for unrealistic expectations. Because participants are more likely to employ heuristics and biases when a situation is unfamiliar, providing

²⁶² Studies suggest that men stereotypically perform better with task-specific goals, whereas women perform better with relational goals. Wilkinson-Ryan & Small, *supra* note 40, at 115-16. Therefore, by emphasizing both aspects of mediation, the mediator has highlighted a stereotype that benefits each participant as opposed to only one. However, this approach still has similar caveats to other proactive framing tools. Specifically, a mediator who incorrectly identifies power imbalances may serve to heighten them instead of diminish them.

²⁶³ Gordon, *supra* note 35, at 138-39.

²⁶⁴ Stipanowich, *supra* note 26, at 848.

²⁶⁵ Shavell, *supra* note 47, at 9 (noting one of the benefits of mediation "is that it may constitute a cheap substitute for trial"). However, increasing formalities likely will result in increasing the number of people involved in one mediation (such as hiring advocates in addition to a mediator) and the time necessary to complete a mediation. As many participants pay for mediation at an hourly rate, this could increase the costs for participants. *See, e.g., Agreement to Participate in Mediation*, MWI, <https://www.mwi.org/agreement-to-participate-josh-hourly/> [<https://perma.cc/898L-BFAB>] (last visited Jan. 28, 2022) (charging an hourly fee of \$450 per mediation services).

²⁶⁶ *See, e.g., Do I Need a Mediation Lawyer for My Mediation Session?*, FINDLAW, <https://www.findlaw.com/adr/legal-help-and-resources/do-i-need-a-mediation-lawyer-for-my-mediation-session.html> [<https://perma.cc/L5BY-XJ5Z>] (last updated June 20, 2016) ("[M]ost mediation situations do not require the parties to obtain their own legal counsel.").

²⁶⁷ Gordon, *supra* note 35, at 138.

an expert that can realistically modify participants reference points allows participants to enter mediation with a more accurate sense of their bargaining range.²⁶⁸ Thus, including advocates can empower participants and provide them with more accurate information to assess their bargaining position.

However, in addition to concerns of cost and removing informality, advocates, like mediators and participants themselves, are also subject to their own biases and heuristics.²⁶⁹ For instance, a male advocate may provide advice focused on achieving the highest monetary outcome for their client, even if the client most desires nonmonetary outcomes.²⁷⁰

Requiring pre-mediation surveys for mediators: Mediators, like participants, are subject to biases and heuristics. However, mediators are uniquely positioned to influence participants.²⁷¹ Therefore, mediation agencies should require mediators to complete pre-mediation surveys to clarify their goals.²⁷² Surveys that force mediators to explicitly articulate specific objectives can combat heuristics and biases such as the tendency for mediators to favor their own group.²⁷³ However, pre-mediation surveys for mediators raise similar concerns as those for participants. Surveys can cause mediators to anchor onto goals that do not correspond to participants' objectives.²⁷⁴ Mediators may also become overconfident in their assessment of participants' goals in a divorce mediation.²⁷⁵ Additionally, pre-mediation surveys could diminish mediation's benefit of allowing participants to assess their unique preferences, making the mediator akin to a judge assessing value according to their own predetermined

²⁶⁸ Leo Bisson, *Decision-Making at Mediation: Psychological Factors Influencing Outcomes*, VT. BAR J., Summer 2019, at 36, 36.

²⁶⁹ For instance, advocates may favor their own in-group. A female advocate assigned to a man may believe the woman is entitled to a larger alimony and provide advice consistent with that opinion to the detriment of her assigned client. *See* Izumi, *supra* note 192, at 137.

²⁷⁰ Gordon, *supra* note 35, at 141 (citing study that found male mediators secure higher monetary outcomes for clients than female mediators). *But see* LaFree & Rack, *supra* note 67, at 789-90 (finding female mediators secured less monetary outcomes for clients, but clients were less interested in monetary outcomes and more interested in relational outcomes, suggesting female mediators may have better served clients' desires).

²⁷¹ *See* Grillo, *supra* note 62, at 1589; Meyers, *supra* note 6, at 875 (noting mediators are uniquely positioned to influence participants through transference, process by which one person transfers their preferences to another).

²⁷² Goals could include identifying each participant's most important objective or even ensuring a fair mediation or equal speaking time between participants.

²⁷³ *See* Izumi, *supra* note 192, at 144-45 (describing study that found "that people can control or eliminate the effect of stereotypes on their judgments if they have the intention to do so and their cognitive resources are not over-constrained" and the benefits of goal-intention in situations that may involve implicit bias).

²⁷⁴ *See* Godlonton et al., *supra* note 228, at 479-80 (finding survey respondents anchored to both objective and subjective indicators).

²⁷⁵ *See* Levit, *supra* note 20, at 400-01 (discussing self-serving biases that cause people to overvalue themselves).

metric.²⁷⁶ Thus, a pre-mediation survey for mediators would need to be carefully constructed to account for these potential interactions with other biases and heuristics.

Utilizing co-mediation to counteract mediator bias: Mediation agencies should also require co-mediation with mixed groups to counteract mediators' bias.²⁷⁷ Co-mediation has multiple benefits. First, it removes the likelihood a mediator will succumb to acting consistently with their own perceived stereotypes. One study found that when men were partnered with women in a negotiation their sense of success was linked to whether they were on the "right" side, but if they were paired with men, their sense of success was tied to gamesmanship.²⁷⁸ Mediators, like participants, can also be influenced by what they believe is representative of their co-mediator. As such, it benefits mediators to have another representative in the mediation who is not a part of their own group. Second, co-mediation acts as a commitment device because co-mediators can hold one another accountable for behaving neutrally.²⁷⁹ Indeed, co-mediators have been found to help remove biases.²⁸⁰ Third, co-mediation in mixed pairs ensures both participants in a divorce mediation do not assume a mediator is favoring the other participant. Specifically, participants reported feeling that a mediator was less fair when they matched the gender of the opposing participant.²⁸¹ Thus, co-mediation in mixed-gender groups ensures neither participant artificially assesses the fairness of their outcome simply because of a mismatch of gender between the participant and the mediator. Co-mediation is also not without its costs. It can increase the time both participants

²⁷⁶ See Wilkinson-Ryan & Small, *supra* note 40, at 114 (stating benefit of mediation is that it allows advocates to assess value of potential agreement according to their individual preferences).

²⁷⁷ Mixed groups could include mediators with a mix of gender, race, or age.

²⁷⁸ Farber & Rickenberg, *supra* note 18, at 300-01.

²⁷⁹ Izumi, *supra* note 192, at 136 (noting co-mediation allows for explicit discussions of neutrality and opportunity to engage in active reflection of potential biases that may be affecting mediation). Trained mediators often utilize transparent and proactive communication. Interview with Mie Morikubo, *supra* note 258. Mediators also can call for mediator caucuses, where mediators strategize absent the presence of either participant. *Id.*

²⁸⁰ See Leslie Ann Cornfeld, *Are Two Heads Better than One? An Examination of the Effectiveness of Co-Mediation: Calling for a New Mediation Technique*, 23 CONCILIATION CTS. REV. 55, 55-56 (1985) (noting benefits of co-mediation include avoiding impasses, promoting perceptions of impartiality, and creating more equitable settlements); see also Audrey J. Lee, *Implicit Bias in Mediation: Strategies for Mediators to Engage Constructively with "Incoming" Implicit Bias*, 25 HARV. NEGOT. L. REV. 167, 181-82 (2020) (noting diverse co-mediators embracing counter-stereotypical images provides effective strategy to reduce implicit bias).

²⁸¹ See Charkoudian & Wayne, *supra* note 192, at 40 ("Participants in the *other gender match only* condition (when there was no mediator who shared the participant's gender, but there was a mediator with the same gender as the opposing participant) were significantly less likely to feel that there was effective communication in the mediation.").

spend in mediation and thus raise the cost of mediation.²⁸² Nevertheless, it may be a fruitful method to hold mediators accountable for their own potential biases and heuristics.

CONCLUSION

After the COVID-19 pandemic, mediation is set to become a growing part of the legal landscape. Although there are many benefits to mediation, mediation must be carefully structured to counteract known heuristics and biases that obstruct participants' ability to reach the best outcomes. Divorce mediation, where studies so far have focused primarily on cisgender, heterosexual pairs, provides a unique lens for how gender may affect mediation outcomes. Using these studies as a basis, I have put forth seven concrete suggestions to modify mediation's structure generally moving forward.

Some of these suggestions are focused specifically on participants. For instance, pre-mediation surveys that require writing down weaknesses to counteract self-serving biases and mediation statistics offered before a mediation to remove ambiguity, if properly constructed, will aid participants in accurately valuing their assets, increasing the bargaining range and thus the probability of agreement between participants. Other suggestions focus on the mediator. Mediators should use open-ended questions and pre-mediation surveys to clarify their goals to ensure mediators themselves are not exacerbating power differences. Targeted formalities, such as providing advocates for both participants, may also aid lower-powered individuals and decrease power imbalances. Because power imbalances will doubtlessly exist in any mediating pair, mediators should also actively assess power imbalances and use positive stereotypes to equalize bargaining power. Lastly, mediators should engage in co-mediation and caucus to account for one another's potential biases and heuristics.

These modifications are not without their own risks. However, if these suggestions are implemented with awareness of potential interactions with other heuristics and biases, mediation may be able to decrease the likelihood participants depend on inaccurate heuristics and biases. This will increase the bargaining range between participants and ensure that participants with lower bargaining power can reap the benefits of mediation without risking worse outcomes relative to trial.

²⁸² Indeed, if co-mediators incorporate breaks to check in through individual caucuses, they can ensure biases and heuristics are being taken into account during the mediation itself. However, this may further extend the time necessary to reach agreement, and thus increase the total cost of a mediation.