

Beware of Alternative Dispute Resolution: The "Touchy-Feely Trap"

By Noreen Connell, former NOW-NYS president

At First, it all seems so sensible...

Case 1: A retired couple goes to a Miami broker to invest their life savings in stocks. Before investing, they sign a purchase agreement and papers requiring that any dispute with the firm be settled by binding arbitration. "This allows us to lower our fees and saves you the cost of expensive lawyers," the broker tells them.

Five years later, they discover that the stocks they bought in "limited partnerships" are practically worthless, though their broker told them their investment was "risk free and high yielding." Then they learn that the arbitration firm is not the American Arbitration Association, but a firm controlled by the brokerage industry. Though the arbitrator finds for them, the award is meager. Worse, though they live in Miami, the arbitration is governed by New York State law which prohibits an award for punitive damages.

Case 2: A Long Island married couple of modest means decides to divorce. The husband suggests they get a divorce mediator to settle such issues as child custody and support, the division of property, and responsibility for their credit card debts. The wife agrees because she does not want their marital assets dissipated by legal fees in a bitter court battle.

At the sessions, the mediator, who is a woman, echoes the husband's complaints that the wife is "too angry and too suspicious" when he claims that he no longer has a pension and that he has lost the credit card records. The wife is told her complaints about not getting enough money to pay the mortgage since her husband moved out of the house are emotionally damaging to their son and that responsible parents choose joint custody.

After the divorce, saddled with paying most of the credit card bills and the expenses of caring for her son, the wife discovers that she has to pay taxes on the sale of the house, but her husband does not. Her spousal support (aka alimony) is taxable, but the low child support payments are not. She discovers that joint custody means that her husband veto her son's plans to go to summer camp. A lawyer she consults tells her she needs a retainer fee of \$5,000 to begin to try to overturn the "inexpensive" agreement. The total cost will run about \$15,000.

Case 3: After months of job hunting, an architect just out of college becomes a finalist for a job at a large, prestigious firm in New York City. In her third interview, she is offered a position, but she must sign a pre-employment agreement to settle any disputes between her and her employer by arbitration. She signs the document because the partners seem eager to hire a woman to replace the woman who just resigned. And she desperately wants a job.

Two years later, passed up for promotions and victimized by a hostile work environment where sexual harassment is rampant, she and two other women co-workers learn from an attorney that they may have signed away their rights to file employment discrimination complaints with the EEOC.

Case 4: The owner of a small but successful beauty parlor in California decides to modernize her property in a choice commercial location to attract more upscale clients. The loan agreement brought to her by the building contractor does not state that the bank requires arbitration of disputes, but she later learns that the bank has the right to change the terms and conditions of the loan without notifying her. When the contractor walks off the job halfway through and she is unable to make a payment, the bank seizes her building. The arbitration session seems perfunctory and later she learns that the bank makes many building and home seizures initiated through loans offered by contractors. An attorney tells her that she has no recourse because the arbitration is binding.

The ADR Twilight Zone

Alternative dispute resolution (ADR) covers a variety of methods such as arbitration, mediation, and conciliation to avoid going to court. The growing use of ADR to settle disputes is fueled by New Age and therapeutic rhetoric about resolving conflicts amicably and bolstered by multi-million

dollar industry press campaigns bemoaning a litigation explosion and abuses by lawyers. It is supported by claims of lower costs coupled with popular anger about the bias and expense of the court system and by budget cuts at all levels of government.

Mediation and arbitration firms, Congressional legislation, federal and state court rulings and practices, and international trade agreements such as NAFTA and GATT, continue to push into place a system that parallels the court system, but exists beyond the reach of legal protections many of us take for granted.

The result is something anthropologist Laura Nader calls “coercive harmony.” She warns that ADR threatens to reverse the gains of the feminist, civil rights, and consumer movements in this century. In California where ADR has been more thoroughly implemented, small business owners have discovered to their shock that their access to laws and the courts has been systematically blocked.

As our hypothetical cases show, what sounds like a good idea can, and often does, turn into a nightmare. The unsuspecting retired couple, the wife, the architect and the beauty parlor owner may be unaware of the larger issues at stake in ADR, but once in the mediation or arbitration process, they often discover the two serious flaws in what is essentially the “privatization of justice.”

First, the mediator or arbitrator may be profoundly biased and may lack knowledge of laws and expertise in the area of dispute. In 1987, the United States Supreme Court ruled that stockbrokers could force customers to relinquish their rights to go to court with their complaints. In 1991, the same court ruled that employees of brokers could also be forced to relinquish their rights to go to court with claims under the Title VII Civil Right act prohibiting employment discrimination. Both stockholders and employees discovered that the agreements they signed narrow their choices of arbitrators to the National Association of Securities Dealers and the New York Stock Exchange whose bills are paid by the brokerage houses.

Two independent studies by the Rand Corporation and the U.S. Government Accounting Office found that arbitrators tend to be white males over the age of 60 who are ex-employees of the brokerage houses. None of them have knowledge of employment discrimination laws. And (surprise) few of them find that discrimination against women, African-American, Latino/a, or older workers has occurred. In the rare cases where they do find discrimination or misconduct, awards to complainants are small. Small business owners in California — some forced into bankruptcy — have also found that many arbitrators know little commercial law and some have direct ties to the industry sitting across the table.

The same bias and lack of basic legal knowledge among divorce mediators is a common complaint of women calling NOW chapters across New York State to ask what can be done to change the terms of their support and property division agreements. One of the few studies of divorce agreements conducted with and without attorney participation (Ray, “Women and Children after Divorce,” 1987 Cornell University Library) found that mediated divorces resulted in much lower child support payments and many more joint custody arrangements.

Few, if any, state laws regulate who can be an arbitrator and mediator. Even when lawyers enter the field, they largely function with the oversight of a judge or other attorneys that is the norm in court proceedings. And, they are not compelled by state or federal laws to disclose any conflicts of interest they may have.

Second, the goal of ADR is to settle disputes, not to enforce laws, provide due process (including information about rights, discovery of facts, or appeal) or to assure fairness and justice. Clients of some large, sophisticated mediation firms in New York State now are asked to read and sign contract forms stating that they fully understand that the services they are purchasing do not include providing them with information about their legal rights or New York state law. At least, these firms are being up front about the type of services their clients are receiving.

Most people entering mediation and arbitration do not understand that they are entering a process profoundly different from that offered by the courts. The mediator’s goal is to get an agreement between two parties in a dispute. In the hypothetical case of the “low cost” divorce, telling a woman that she has the right to seek sole custody of children under New York State law, to ask for full disclosure of the husband’s real assets, and to ask a lawyer to review the financial terms of the agreement about who should pay the credit card debts is essentially not in the best interests of the mediator.

Behind the New Age rhetoric about how mediation avoids confrontation and conflict, the loss of control, and the high legal fees for an attorney lurks a darker reality. Mediation is an area with few formal rules where processes are set by an individual or panel of individuals who are charged with getting an agreement at any cost, even if basic fact finding and state and federal laws are ignored. Mediators and arbitrators reach quick agreements by disempowering the weaker party by withholding information about rights, basic laws, and due process procedures.

Now-NYS Confronts "Coercive Harmony"

Lillian Kozak, an accountant and Chair of the NOW-NYS Task Force on Domestic Relations Law and Gloria Jacobs an attorney, have heard hundreds of complaints from women (and some men) about divorce agreements entered into through mediation. As more couples entered into divorce mediation, they saw striking and disturbing similarities in women's complaints about the process.

The mediator, whether female or male, pressured for joint custody or children, reacted negatively to expression of anger by the wife and tended to be intimidated by the husband, failed to verify financial information, and crafted financial agreements that were disadvantageous to the wife. Often, mediation continued the emotional and financial dominance of the wife by the husband that had occurred in the marriage.

By the beginning of the 1990, activists working to end domestic violence began warning battered women not to enter into mediation. After reviewing numerous faulty mediated agreements Kozak and Jacobs began to advise women with any custody, support and financial issues to avoid mediation.

The Domestic Relations Law Task Force also became alarmed by efforts of ADR proponents to get the state court system to use these services, either as a voluntary referral in selected divorces or as a routine procedure for all domestic disputes.

The "Keep the Peace" project set up programs in many parts of the state linked to courts to lower their domestic relations case loads. All of the programs were introduced with New Age rhetoric about avoiding adversarial proceedings that hurt children and helping parents become more emotionally responsible. Less New Age, but definitely more New Politics, was the Peace Project's claims that these projects would lower court costs. Unstated, but a factor in the spread of these projects, is the general judicial disdain for domestic relations disputes.

So far, the Peace Project is following the same pattern as more voluntary mediation processes. A training film for divorcing parents that was previewed for Kozak told mothers that it was emotionally damaging to complain about missing support payments in front of the children, but no admonishment was made to husbands that it was emotionally damaging not to pay child support. Once again, the control of female anger seems to be a main objective, but male anger and prerogatives are tacitly supported.

At a Fund for Modern Courts forum on ADR, the Executive Director of the Rochester Center for Dispute Settlement proudly announced that 40% of the low-income women who entered mediation at the suggestion of the courts for resolution of child support claims entered into agreements for joint custody of their children. It is a surprising statistic since in most cases that fathers were disputing paternity or refusing to pay child support.

Since NOW-NYS had successfully defeated two major legislative attempts to impose joint custody even when one of the parents objected to the arrangement, it was clear to the NOW members participating in the forum that the Rochester program was implementing the goals of the fathers' rights movement even after their legislative attempts had failed.

The issue of mediation became critical in the spring of 1994 when Chief Justice Judith Kay formed a committee packed with ADR adherents to consider court mandated ADR for domestic relations disputes and even product liability claims. The New Age rhetoric was present, as Justice Kay, the first woman to hold the highest legal position in the state, told the *Albany Times Union* "We have to find a way to do things better, with less pain to all involved. I don't think hard-nosed litigation is the answer, always." To judges and bar groups, many with direct knowledge of poor mediation agreements, the New Politics rhetoric was at the forefront with long recitation of the declining resources of the state's court system.

NOW-NYS went into action. At the fall state conference of NOW-NYS, a resolution was passed unanimously to oppose court mandated ADR. Kozak, Jacobs and other NOW members, relentlessly spoke up at bar meetings on the subject, even when the speakers and panel moderators were primed to silence any mention of ADR pitfalls. Hearing[sic] were held by Justice Kay's Committee with little lead time and almost no notice.

At the annual New York State Bar Association Conference in New York City, the co-ordinator of Kay's Committee reported that the only communication in opposition to court-imposed mediation was from a "tiny group". Kozak rose from her seat to ask if the co-ordinator was referring to written objection from NOW-NYS, a statewide organization of 30,000 members. The speaker stammered as the audience laughed, but this attempt to belittle NOW and battered women's Con activists' objections marked the Committee members' public utterances.

Some ironic aspects to NOW's campaign against ADR have emerged. The first is that many of the ADR advocates who acted as a cheering section for the Committee along with fathers' rights activists at most of the meetings and forums were women who earn their living as mediators. Some embellished the New Age rhetoric with claims that mediation is a feminist process because "women don't deal with conflict well."

NOW members also discovered that even though mediation poses a threat to the earning power and livelihood of attorneys, many of them are getting fees as mediators and arbitrators. Not a few of them expressed the idea that if non-lawyers could be prohibited from being mediators and arbitrators, court imposed ADR might be a good idea. Then we discovered that groups of retired judges are forming mediation firms.

The most serious challenge and the greatest irony for both NOW-NYS and the Domestic Relations Law Task Force, however, is that the organization must shift from criticizing laws, the courts, and the legal profession for their biased treatment of women to fighting to retain women's access to the rule of laws, the courts and legal representation. Kozak and Jacobs tried to clarify the shift from criticism of the courts to a demand that women litigants not be removed from the courts by pointing out that better laws, case management, and regulation of the legal profession would solve many of the problems women encounter in divorce actions. Still, some confusion about the shift persisted. Then, the click came.

In 1995, the New York City Chapter's Women in the Workforce committee realized that ADR had already been implemented for women working on Wall Street since the 1991 US [sic] Supreme court [sic] decision. They began to understand why incidents of sex discrimination against women in brokerage firms were so virulent and blatant.

High-performing and high-ranking women were called "bitch" and "slut" to their faces. A timid secretary's boss amused his co-workers by prodding her with a real bull whip, and introducing her to foreign customers as the prostitute assigned to their floor — all at the same time Anita Hill was testifying before the Senate Judiciary Committee.

Division Vice Presidents summoned their staffs to publicly announce that new openings would go to good looking, young males, not to old, tired hags with PMS (even though the hags had the best sales records). Before they could challenge such discrimination, women had to first sue to void the arbitration agreements they had signed as a condition of employment. Only the highest paid women executives, and then only those who no longer feared being black balled by the securities industry, could attempt [sic] such action.

Members of the Women in the Workforce Committee met with one such woman, Rita Reid, who a [sic] Vice President in the Investment Banking Division of Goldman Sacks. She spent \$450,000 in legal fees trying to regain access to the courts, but a state court ruled that the mandatory arbitration requirement was still in force.

The outcome of her ADR process is familiar. She appeared before a panel of elderly male ex-employees of brokerage firms who had little knowledge of employment laws. Pre-hearing depositions of crucial witnesses was unavailable. The panel declined to consider evidence from other former employees of a pattern of discriminatory promotion policies towards women at Goldman Sacks. Rita's record of earnings and excellent performance reviews (surpassing those of males who were promoted) seemed to carry less weight with the panel than after-the-fact evaluations of supervisors she was challenging.

The arbitration panel rejected Rita Reid's claim that the firm discriminated against her on account of gender.

Sort of a Happy Ending --But...

ADR is a growing threat to women's rights. This year, Judge Kay's Committee submitted recommendations to her that were publicly distributed. Our worst fears that the courts would adopt a practice of imposing mediation for all domestic relations and product liability disputes, did not materialize. But, the report recommended that the courts continue to experiment with various forms of ADR. Even before the report was published, state courts were clearly engaged in these experiments, not only with the "Peace Project" but also in the area of commercial disputes.

What is worrisome is that court imposed mediation does not require the enactment of law for implementation. It only requires a change in court procedures. The state court system could, at any time, begin imposing ADR. The federal court system and several state court systems have already either instituted procedures blocking access to the courts and requiring ADR if the issues in the legal dispute fall below a certain dollar amount or require pre-court appearance to determine if the dispute or aspects of it can be settled before the parties appear in court. Even administrative agencies, most notably the EEOC and the New York State Human Rights Division, have mediation programs.

Even more worrisome, members of NOW-NYC's Women in the Workforce committee, some of whom work in personnel areas, report that industry conferences now regularly feature workshops for employers on drafting pre-employment binding arbitration agreements. This was discussed at the 1995 NOW-NYS conference and a resolution was adopted that NOW chapters and members be more fully informed about ADR which is the reason this article has been written.

Still, it is clearly that with every passing year, as the New Age touchy-feely rhetoric continues to promote ADR, fewer and fewer women, members of ethnic, racial and religious minorities, and older workers will have protection of anti-discrimination laws. The urgent need to enforce these laws led to the creation of the National Organization for Women 30 years ago, but 10 years from now, how many workers will be left who will be able to file complaints with the EEOC or go into court.

In May of this year, after an eight year battle, NOW-NYS working with attorneys and other women's groups succeeded in getting state legislation passed that requires courts to consider domestic violence as a factor in determining child custody. How many New York women will be told of this law in mediation? If ADR continues to spread, the women's rights laws and reforms that NOW has helped secure over the last 30 years may turn into empty promises for most of us.

The clicks are still happening at NOW-NYS Council meetings. Anthropologist Laura Nader also draws parallels between ADR and dispute-resolution techniques used by colonial powers from the 15th to the 20th century to pacify native populations and to quiet rights movements. Not surprisingly Newt Gingrich's "Contract with America" legislative proposals are filled with mandatory ADR requirements in the areas of consumer protection, health services and the environment.

So far, these measures have not passed, but a more serious danger to environmental laws has been enacted into law. Laura Nader's brother Ralph warned that the NAFTA and GATT treaties allow industry-determined arbitration panels that can invalidate state and national environmental laws, if the laws cause economic damage to an industry. In the case of the Canadian-American NAFTA agreement, an arbitration panel already has set aside one Canadian province's environmental protection law, passed by the provincial legislature. Access to the International Courts by the provincial government has been precluded.

One thing is clear to the NOW-NYS Council. We must educate our members about how ADR poses a threat to our rights as women and as citizens. The "litigation explosion" is a myth. The National Center for State Courts found that Americans are suing at about half the rate they did at the beginning of the 19th Century and that civil cases constitute only about 21% of the states' caseloads.

The Rand Corporation found that tort verdicts over the last 25 years have remained even with inflation and the GAO found that the total annual cost of the tort litigation is \$36 billion, not the \$300 billion figure cited by a former Vice President before the American Bar Association. As for strained court budgets, why not use some of the millions invested in prisons to assure citizens access to the courts and the laws that they have funded with their tax dollars? And lastly, when the touch[sic]-feely argument is made that women don't like conflict, how about asking if women like their rights?

Comments by Donald J. Gilbert follow.

1. Ms. Noreen Connell's article (Beware of Alternative Dispute Resolution: The "Touchy-Feely Trap") in the Summer 1996 issue of NOW-NYS Action Report (pg. 7 - 8) is seriously misleading.

2. The "cases" cited are all hypothetical as specified by the author.

a) Case 1: I believe this is a reference to serious charges brought against Prudential Securities which were, in fact settled in 1993 by a complete reimbursement to all those who invested in limited partnerships which were touted as low risk investments by their brokers who claimed that they, in turn, were misadvised by Prudential. The New York Times of August 2, 1996 reports that further legal challenge is being brought against Prudential charging the firm with "systematically engaged in efforts to reduce allowable damage awards by overstating tax benefits." the investors received either through tax deductions taken by investors or even when a tax obligation was deferred. The matter is currently in Federal court. The point I am making is that fraud is litigatable and not merely tossed aside as an arbitrated case where the beneficiaries receive meager awards.

b) Case 2: It is my understanding that all mediated settlements must be evaluated by a lawyer before being presented to a judge for final approval. This is the case in New Jersey. I would imagine it to be the same elsewhere. It is also the case that mediated settlements are unlike binding arbitration in that either the parties can reconvene to modify a mediation agreement or it can be brought to litigation. Furthermore if a mediator displays bias during a mediation it is entirely within the right of either party to ask for a different mediator.

Issues of custody can be decided in a court of law. I have personal knowledge of a judicial decision to award exclusive custody to a mother who was a drug addict who had served and subsequently served jail time again. The husband in this case was not a drug addict and was employed full time. Judicial decisions are no guarantee of fairness or fitness. Custody issues must of course evaluate fitness. When issues of spousal abuse surface (and they are more likely to surface in a caucus environment if the mediator has established a level of trust) then a trained mediator understands that an issue has been raised which **requires** the attention of the courts.

c) Case 3: Although not stated in this case, regarding a pre-employment contract to settle any disputes between the architect and her employer by arbitration, the problem most probably lies if

the contract requires *binding* arbitration. I believe that contracts mandating *binding* arbitration can amount to an abuse of legal rights when serious issues e.g. sexual harassment or discrimination are not dealt with seriously. This is not to assert that mediators cannot address these issues with an open mind and seek information and witnesses. Arbitrators have even wider latitude in fact finding by ordering disclosure. It is also the case that in an arbitration the complainant has a right to have an attorney present to advise the client of legal rights. It is also the case in many arbitrations that the complainant as well as the respondent has the right to choose an arbitrator in advance of the convening of an arbitration. In those cases where arbitrators or panels of arbitrators are chosen by the arbitration firm the right to challenge any or all the arbitrators is still at the option of the disputants.

d) Case 4: In the case of the building contractor who walks off the job leaving the beauty parlor owner with a bank loan whose loan rules the bank can change without notifying the client and allowing the bank to seize her building following a seemingly “perfunctory” but required *binding* arbitration is alarming if the beauty parlor owner didn’t have so many options open to her as described in Case 3. Further, it seems reasonable, from the scenario painted of information the owner later learns, that collusion between contractors and the bank is a likely and litigatable issue. Yet even here, were such evidence able to be gathered, an out of court settlement would seem to the bank’s advantage assuming that the litigant would not want to make the fraud public.

3. I am always put off by repeated use of slogans to make me believe the sloganeers point of view. I feel that way about “New Age rhetoric”. I’m never sure that I understand the ramifications of the put down. I understand that “rhetoric” is the use of written or spoken language to persuade, but what, precisely is New Age, and why is it bad?

4. International treaties or agreements between sovereign nations can only be reached by negotiating. Tenets of such agreements are, in most societies, debated by representative government. The thought that not every citizen of every country will agree with those tenets is more a certainty than a possibility. What sovereign powers try to do is negotiate around points where major constituencies are likely to object strongly. In the NAFTA agreement with Mexico controls were supposedly put into effect that would control environmental pollution by Mexico. Should such agreements be violated the “contract” could or would be suspended. The greater likelihood would be that the contract would be renegotiated with, perhaps, the U.S. funding pollution control. One must bear in mind that no international business contract is any better than its service to national self-interest. The only contract not subject to this caveat about international contracts is a peace treaty between a victorious and defeated nation or government. Yet even in this latter case overly harsh treatment of a defeated people can be unwise as all-too-recent history attests.

5. It is true that a mediator or arbitrator may be “profoundly biased” though people in that profession not only sign an oath before the disputants that they are not and will not be, but specifically train to function as neutrals. But is it not equally possible that judges may be as profoundly biased and they take no oath before disputants? Lawyers may be biased as well though they are, presumably, advocates for those who hire them. Still, lawyers may reject a case for any unstated reason and bias could certainly be one of them.

6. As one certified to arbitrate for the NASD I am under no pressure to find for either complainant or respondent. I am not a former employee of any brokerage firm and if I were and the dispute were to involve the firm I either worked or had worked for I am under **obligation** to notify the NASD that there would be the appearance of conflict of interests even though I might feel I could arbitrate neutrally. In all likelihood, since the NASD has my employment history, they never would assign me to such a case.

The NASD requires that attorneys or individuals file relevant data in advance of any hearing. Within the hearing environment as issues surface it would be possible, with the arbitrator’s consent, to adjourn a hearing in response to a request for further disclosure.

I confess to being a white male and, as it happens, I have survived passed 60 but surely Ms. Connell is not suggesting that membership in such a group is *prima facie* evidence of inevitable bias. In fact I have spent most of my working life in a multi-racial, multi-cultural environment frequently numerically dominated by women and I have never been accused of bias on the basis of either race, age, gender, religious or sexual preference. Of course my clients don’t know that but they are free to challenge me if they suspect that I could be biased.

7. In citing the Rand Corporation, frequently identified as a “Conservative Think Tank” it is unclear if they and the U.S. Government Accounting Office, cited as identifying white males over 60 as the tendency in arbitrators, are implicated with the subsequent sentence that states that “None of them have knowledge of employment discrimination laws.” None?!! Not one single over 60 white male have any knowledge of employment discrimination laws??!! Sounds like hyperbole to me. As for few of them (us) finding that discrimination against women, African-American, Latino/a or older workers has occurred lawyers faced with current anti-discrimination law find it difficult, though not impossible, to prove discrimination. It would be far more likely, with the less restrictive rules of evidence permitted in both arbitrations and mediations, to find that discrimination has occurred. Neither arbitration nor mediation is as devoid of safeguards as Ms. Connell asserts.

8. Florida, as of this writing, is the only state that requires an arbitrator or mediator to be a lawyer. But, as Ms. Connell points out, they are not compelled by state or federal laws to disclose any conflicts of interests. In New York and New Jersey, the two states of which I have personal experience, disclosure of conflict of interest is not only mandatory but any party to a dispute that can demonstrate conflict of interest on the part of the arbitrator or mediator has grounds for litigation.

9. It is true that the goal of ADR is to settle disputes. Disputes most amenable to ADR are those where it is desirable to preserve an ongoing relationship. If one party has cheated another and it can be proved, but it is in the best interests of both parties to reach a settlement, then ADR has a properly respected place. The application of “law” can be divisive. Ms. Connell is, as pointed out, in error about discovery of facts. Appeal of an arbitrated decision must be based on some fault that can be laid at the feet of the arbitrator, appeal of a mediated decision can, with no finding of fault, be litigated. Mediation is simply the best way to settle disputes that involve ongoing relationships. A settlement arranged by the disputing parties is likely to be far more satisfying to all parties than one decided by a judge or lawyers where the outcome is not assured and not necessarily satisfying to any party. Further, in arbitrations and mediations disputing parties get to speak to each other rather than through a hired advocate who as a hired adversary may muddy the waters of possible settlement.

10. The mediator’s goal is not to “get an agreement” but to facilitate a settlement. This is not always possible. If parties refuse to negotiate and efforts on the mediator’s part of help them find common ground fails, then parties are free to litigate. Joint custody or sole custody issues are not going to be solved in a formulaic way and what would Ms. Connell suggest when neither parent wants custody? A properly mediated agreement will address issues of financial disclosure, property, debt and custody and this agreement will pass the mandatory scrutiny of the courts. I cannot, for the life of me, understand what Ms. Connell means by such a settlement not being in the best interests of the mediator. The mediated settlement is reviewed by a lawyer and a judge would sign a decree of divorce. The mediator is certainly interested in seeing that the agreement reached is not only satisfactory to a divorcing couple but will pass muster under legal scrutiny. The gains to be achieved through mediation is that lawyers are not setting one spouse against another any more than what brought them to divorce. Bitterness and rancor make easy tinder for lawyers to drag out divorce litigation for years and at costs that most any divorced person can attest to as outrageous. It would hardly be uncommon for your readers to know of a legally contested divorce that ended up, unwittingly, but financially in favor of the lawyers.

11. It is not the function or training of mediators to pressure parties, react negatively to expressed anger unless it would be to prevent acting out, or overtly to be dominated by any party in a dispute based on gender or perceived power imbalance. It is essential that a trained mediator ask for full financial disclosure in divorce mediation and in the absence of such being forthcoming or suspect for the mediator to recuse him or herself.

12. If the Peace Project allowed Lillian Kozak to “preview a training film for divorcing parents” then it would seem clear that it was seeking input from her. If fault or imbalance was found I would trust that it was corrected.

13. If 40% of low-income women who entered mediation at the suggestion of the courts for resolution of child support claims and who entered into joint custody agreements it is indeed surprising that in most cases the fathers were disputing paternity or refusing to pay child support. Certainly while the child was in the father’s custody he would be supporting the child and if he was disputing paternity why would he even consider custody.

14. I am not familiar with the specifics of Rita Reid's charges against Goldman Sacks. I can certainly sympathize with her having to pay \$450,000 in legal fees. I don't know if her lawyer was present at the arbitration hearing, if he/she challenged any of those elderly males (several peremptory challenges are available) or if her lawyer presented relevant employment law to the panel as would be, or would have been, a clearly useful deposition.

15. ADR is not a threat to women's rights. There may need to be some clarification or amplification of what issues *binding* arbitration can and cannot address. Binding arbitration must also address the issue of foot dragging in which, for example, a company postpones hearings until the complainant dies. In many of the issues raised in Noreen Connell's article sufficient safeguards are in place to guarantee fairness on the part of arbitrators and mediators and remember, mediated settlements could be litigated, though a reopening of a mediated hearing might prove faster, cheaper and more likely to produce better or more satisfactory resolutions of problems.