Session CLE 503 | Diversity Deficit in the ADR World: What Are We Going to Do About It?

This panel takes on the diversity deficit in the world of ADR. Given globalization and changing demographics in our society, our highest stakes legal disputes increasingly involve parties from different cultural and/or language backgrounds. Diversity should thus be reflected in the make-up of those who are tasked with resolving such disputes. Further, if the general consensus is that we need more diverse attorneys and judges, the same is true with respect to mediators and arbitrators. Unfortunately, when parties consider a private mediator or an arbitrator, chances are that they will hire or nominate a senior white man.

Numerous sources have cited the problem as one of both supply and demand. On the supply side, even the most progressive ADR providers have difficulty providing diverse mediators or arbitrators. Diverse attorneys are also woefully underrepresented among the partnerships of major law firms. On the demand side, many practitioners claim that their clients wish to hire someone with sufficient “seniority,” which usually leads to a non-diverse mediator or arbitrator.

The panel will take a no-holds-barred view on the diversity challenges in the ADR world. Our panelists will discuss whether ADR is another “old boys club” (with many mediators making up to $40,000 per day and arbitrators charging in excess of $1,000 per hour) that needs to be re-examined, and how we can best achieve gender and ethnic diversity in this growing, and lucrative, practice area.

Moderator:
Hon. Jay C. Gandhi (Ret.) – JAMS Mediator and Arbitrator

Speakers:
India Johnson, President/CEO – American Arbitration Association-International Centre for Dispute Resolution (“AAA-ICDR”)
Lawrence Chew, Asst. General Counsel – Varian Medical Systems
Diana Luo, Managing Counsel – Walmart eCommerce
Cedric Chao, Founder – Chao ADR, PC
Mimi Lee, Managing Counsel, Litigation – Chevron Global Upstream and Gas
Diversity lacking among mediators, some attorneys say

Providers and their lawyer clients agree the industry needs to employ more minorities and women. The trouble is finding them.

By Saul Sugarman

When San Francisco attorney Harmeet K. Dhillon has to hire a mediator for a dispute, she says she often has trouble locating neutrals who will be culturally sensitive to the needs of some clients.

"I need to find someone who my clients feel won’t judge them for wearing a turban, having an accent, or coming from a different country," said Dhillon, a partner at Dhillon & Smith LLP who represents some clients from Asia. "There’s a severe dearth of mediators from minority backgrounds."

Dhillon said she’s had Asian clients whose cultural differences clash with neutrals who don’t have much international experience.

"Some Indian American transactions are done on a handshake, without a written contract, and large amounts of cash invested in a business can change hands on a handshake deal," she said. "A mediator can sometimes express disapproval or disbelief in that practice."

The bench has long faced criticism for failing to reflect the diversity of the communities it serves. Many attorneys, including Dhillon, say the options for mediators and arbitrators are little better, especially among some of the most popular providers like ADR Services Inc., JAMS Inc. and the American Arbitration Association. Observers say the problems are inherently linked since ADR providers largely tap the bench for their talent.
Judges are frequently white men, according to statistics provided by the state Administrative Office of the Courts. In 2010, the AOC reported that a little over 29 percent of the 1,631 state judges were women. Only about 22 percent indicated diversity in their background.

While providers are working to correct the issue in their ranks, lawyers say there's still a shortage of minority mediators.

"I would certainly say [diverse neutrals] are in very short supply," said Kathleen V. Fisher, a partner at Calvo Fisher & Jacob LLP. She said her firm frequently needs a culturally sensitive mediator or arbitrator when handling cases from its Guam office.

"It's hard to come up with enough individuals to have an actual choice," she said.

Although some high-profile companies like Wal-Mart Stores Inc. have begun to demand diversity among their outside counsel, firm attorneys say clients are not making the same push for the mediators who help them negotiate settlements. Indeed, attorneys say non-minority neutrals are not always a problem.

"Frankly, some of history's most famous and effective diplomats have resolved disputes from different nations, without being the same race, ethnicity or religion as their counterparts," said Daniel M. Kolkey, of Gibson, Dunn & Crutcher LLP.

Still, many attorneys say diversity is something they'd like to see more of in the neutral field.

"It is very important to hire a mediator who is respectful of my client's experience and background, and who is comfortable working with a lead lawyer who is female," said Kelly M. Dermody, a partner at Lieff Cabraser Heimann & Bernstein LLP. "Unfortunately, I've learned I can't always assume this will be the experience even with some well regarded mediators."

Emi Gusukuma, an associate at HaasNajarian LLP in San Francisco, said she's had Asian clients who respond better to Asian mediators because those neutrals understand cultural nuances that may underlie a case.

But those neutrals are not always the easiest to find, she said.

Mark Smalls, chief marketing officer at JAMS, said diversifying the mediation field is "an industry challenge and one we're very much attuned to."

Smalls declined to give exact figures, but said minority JAMS neutrals are on par with the number of women and minorities who make partner at major law firms. According 2011 data from National Association for Law Placement, roughly 12 percent of partners in Los Angeles firms were minorities. In San Francisco, about 11.8 percent of partners at firms were minorities, according to NALP.

A representative from the American Arbitration Association didn't respond to requests for comment.
Minority bar associations like the Asian American Bar Association and California La Raza Lawyers Association are invested in fixing the diversity issue, but do not appear particularly active in their efforts. Sergio Feria, treasurer for La Raza’s San Diego chapter, said it’s hard to fix the problem when there is such a "small sliver" of diverse neutrals.

The applicant problem isn’t just with the bench, according to Lucie Barron, founder of ADR Services. She said it’s been tough to find diverse neutrals because attorneys typically have decades of experience before going into mediation. When those people began their careers, there were simply fewer minorities in the legal industry, she said. Today, the number of lawyers has significantly increased from what it was 40 years ago - according to the American Bar Association, there are 1.2 million attorneys in the United States, up from 326,000 in 1970. As the number of attorneys rises, the applicant pool is diversifying "fairly rapidly," Barron said.

"There are many more lawyers than there used to be," she said, noting her company has seen a significant uptick in hiring women neutrals. She added that, because of the proliferation of lawyers, "There are many people from different ethnicities to choose from."

For some, the evolution isn’t rapid enough.

Shirish Gupta, an Indian American neutral based in San Mateo, agreed that more minorities are joining the neutral field, but said he doesn’t necessarily feel part of the club when looking at the ethnic background of his peers.

"[Neutral providers] are in the process of diversifying their roster," he said. "But they’re by no means there."

Even if there were more diverse neutrals available, they might not be getting work, according to Deborah Rothman, a Los Angeles-based mediator and arbitrator. She said that cases with mandatory settlement conferences are typically sent to a specific neutral provider, which supplies attorneys a "strike list" of possible neutrals. Some providers like AAA and JAMS have made efforts to make sure women and minorities are on those lists, but even then, those neutrals aren’t chosen, Rothman said.

Jamon R. Hicks, president of the California Association of Black Lawyers, agreed with Rothman.

"I cannot recall when I suggested an African American mediator and that suggestion was approved by the defense," said Hicks, who is an attorney for The Cochran Firm in Los Angeles.

Smalls said that "having folks on the list is only part of the equation."

"It's important for us that they get selected by attorneys so that we can achieve gains," he said. "That’s why we’ve made presentations [to the legal community] on the importance of diversity."

Not everyone sees their background as a challenge to succeed in alternative dispute
resolution.

Feria, a solo practitioner in San Diego, said he is frequently tapped to mediate cases because of his ability to speak Spanish.

"Many lawyers are having difficulty finding mediators who speak in Spanish," said Feria, who primarily works as an attorney in elder abuse and malpractice cases, among others. Feria said he receives two or more calls monthly to mediate cases simply because lawyers can't find Spanish speakers.

"If you look at the ethnic background of lawyers in California, I think the shortage you're seeing is simply from that," Feria said. "Latinos are underrepresented, and I think time is the only thing that will cure that."

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Diversity in ADR: Time for Another Uncomfortable Conversation

It's time to put down the press release and get to work to spur transformational change in the industry once and for all.

By Marcie Dickson | August 10, 2020

Can I let you in on a little secret? We're not impressed with your corporate statement about diversity and inclusion. Especially if to this point your organization has perpetrated some of the core offenses around retention, lack of opportunities and access for people of color. It's deeply injurious and nothing short of corporate hypocrisy to profit off of exclusionary practices, then scramble to fix the optics and grab the proverbial mic when the cover is blown.

Now is not the time to issue a mea culpa and highlight your new CSR initiative or inclusion rider. Instead, create a sustainable strategy for your commitment to diversity, equity and inclusion and double down on efforts to align your actions with your rhetoric. And do this without fanfare.

Marcie Dickson is the Chief Marketing and Business Development Officer for Miles Mediation & Arbitration.
By now we’ve all heard that diversity is a business imperative. Organizations with equal representation and a range of perspectives are more profitable and better positioned to innovate, attract top talent, increase client satisfaction, take risks, and bounce back from disruptive forces.

Let’s take a look at the legal profession, where the lack of diversity is a long-standing issue. According to a study by National Association for Law Placement, at the partnership level, women make up 23.36% of law firm partners; Blacks make up 1.83% of law firm partners; and minorities overall make up 9.13% of partners. In the same study of over 1,000 major law firms, only 2.86% of attorneys were LGBTQ, and 0.52% were attorneys with disabilities. A recent ABA study released last week unveiled a more distressing tale: 70% of women of color have considered leaving the practice of law due to the lack of inclusion and opportunities for advancement.

What’s even more distressing are the numbers in the area of alternative dispute resolution. For reference, 17 out of the 412 neutrals at a top ADR provider with a panel of primarily judges are BIPOC (Black, Indigenous and people of color)—in other words 4%. According to a 2015 survey for the National Academy of Arbitrators Research and Education Fund (http://www.lerachapters.org/OJS/ojs-2.4.4-1/index.php/LERAMR/article/download/3101/3076), of more than 400 practicing employment arbitrators, 74% were male and 92% were non-Hispanic white. And in 2018, celebrity Jay-Z lambasted a national arbitration provider for its lack of diversity on a roster of arbitrators presented for his arbitration. He contended that only three of the 200+ arbitrators on the panel’s New York Large Complex Case Roster were Black arbitrators.

Historically, mediation, arbitration, and ADR services were considered an elite arena for white male retired judges. There is a reason for this. First, there was no incentive for institutional ADR providers to diversify their homogenous panels; second, there was zero accountability for said providers to alter their practices, until now; and third, there was no perceivable talent pool from which to hire diverse mediators and arbitrators.

When questioned why a national ADR provider has experienced issues increasing panel diversity, a senior executive responded that the organization is “looking at people who have reached partner-level status or are retiring from the bench.” But according to the executive, the number of women, people of color, and women of color that meet the panel's criteria is “statically small” and the “supply-side starts to become more narrow.”

On the contrary, there is a large pool of talented associates and nonjudges who possess the markers of good mediators and arbitrators, but never realize the opportunity because the market has not embraced them and large ADR panels have resisted the exhortation to create pipelines to recruit, train, and invest in talent.

To transform diversity, equity, and inclusion in ADR, we need to make appreciable efforts to recruit, train, and retain diverse neutrals on panels. Clients deserve and demand this level of service and selection because what good is an inclusion rider if an ADR panel does not reflect the demographics of the communities it purports to serve?

Supporting Diversity in ADR

- The lack of diversity for most providers may signal the need for a cultural shift in the organization. Consider training and intentional programs designed to foster an environment that celebrates and recognizes differences. Building a culture of inclusion will invariably attract talent who seek to join a forward-thinking firm.
- Recruitment, development, retention, and promotion are crucial components that require intentional efforts. Diversity-aligned recruiting means looking beyond the rigid checklist of what determines a potential neutral and searching for true talent in unconventional places.
Mentorship programs can help develop promising neutrals into rainmakers. ADR providers can create programs that provide greater access and learning opportunities for law school students and business professionals. The International Institute for Conflict Prevention & Resolution’s Diversity in ADR Task Force (https://www.cpradr.org/programs/committees/diversity-task-force-adr) offers an excellent example in its mentorship and apprentice program.

There is a business and categorical imperative for diversity in ADR. But there’s no imperative for cause marketing when an organization is woefully behind in the practice of diversity, equity, and inclusion. A more genuine approach is to focus on internal strategies for increasing panel diversity and celebrating these achievements—when obtained—through representation in marketing collateral and through creative storytelling that puts diverse candidates front and center.

There are myriad challenges to increasing diversity, equity and inclusion in ADR. Fortunately, the industry is comprised of courageous, creative conflict-resolution specialists who are trained to find solutions in even the most difficult of situations.

It’s time to put down the press release and get to work to spur transformational change in the industry once and for all.

Marcie Dickson is the chief marketing and business development officer for Miles Mediation & Arbitration. She is a guest host of “The Future of Resolution” podcast and co-host of the “Seeking Strategy” podcast. She wrote this commentary after reading the article “After Arbitrator Ousted Over Racist Email Forward, NRA Wants JAMS and Winston & Strawn to Foot the Bill (https://www.law.com/litigationdaily/2020/08/05/after-arbitrator-ousted-over-racist-email-forward-nra-wants-jams-and-winston-strawn-to-foot-the-bill/)” in the Litigation Daily.

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Diversity in ADR
More Difficult to Accomplish than First Thought
By F. Peter Phillips

Corporate purchasers of legal services have increasingly demanded greater diversity in the lawyers who are assigned to their work. As incidents spread of law firms being “fired” for failure to take these expectations seriously, law firms are responding, and legal ranks are becoming more diverse.

Alas, the same cannot be said for diversity in the provision of dispute resolution services, at least in the niche of complex commercial matters with significant amounts at issue. Again and again, corporate counsel lament that they are being given the same short lists of the same arbitrators and the same mediators (presumably older white men) from whom to choose.

In 2006, the CPR National Task Force for Diversity in ADR was formed. One of its first products was a series of questions that corporate law departments could pose to their outside firms, to measure the diversity in their law firms’ recommendations of mediators and arbitrators and make the clients’ expectations clear. This corporate-led task force concluded that the corporate client was the proper engine of change, and that the clients’ influence on their firms was the right place to start.

However, there is no early indication that major change is just around the corner.

Why is that so? If the corporate client—the ultimate purchaser of these services—wants a more diverse palette from which to select, why is there no response from the market of legal and ADR service providers? The demand is there, say these corporate leaders: Where is the supply!

The challenges to diversifying ADR practice are several and subtle. Indeed, the question begets other questions, and the answers are not self-evident.

Is There Really a Lack of Supply?
Some corporate counsel say that the answer is to increase the number of ADR professionals of color by offering training. But many women and minority ADR professionals will vociferously argue that there are already a great many very well-experienced and very highly qualified professional dispute resolution experts. It’s just that they don’t get hired. Indeed, this community of professionals is quite vocal that what is needed is not more training, or mentoring, or “shadowing” opportunities. In particular, what is not needed is the assumption that women and people of color need some sort of remediative assistance. What is needed, they say, is work.

Is There Really a Corporate Demand?
Many corporate law departments say they need no convincing that diversity in ADR is a business necessity. They say it is self-evident to any business that has a diverse customer base, has a diverse vendor list, or is

(continued on page 23)
Experience and reputation are, very reasonably, the touchstones of neutral selection in high-end cases, but work against a desire to introduce new and unfamiliar faces.

For every established and influential lawyer who advocates for diversity there is another established and influential lawyer who voices concern about maintaining “quality” if ethnicity or gender is a criterion for hiring ADR neutrals. That concern may arise from ignorance, or prejudice, or experience, or all three—but the question is still embedded in the ethos of the business legal community. Ethnicity or gender alone is clearly inappropriate criterion for selection of any arbitrator or a mediator. But ignoring those attributes will not yield the result that corporate law departments say they want to achieve.

Can Institutional Service Providers Meet a Demand for Minority Mediators and Arbitrators?

The American Arbitration Association told the CPR Task Force that it tries to determine the gender and ethnicity of all of its several thousand listed arbitrators and mediators, and has set a goal internally to ensure that each list that goes out to its customers for their selection includes at least 20 percent women or minorities.

The Financial Industry Regulatory Authority, by contrast, reported to the task force that it has gone to great expense to expunge any such information from the database from which it draws lists of candidates, in order to ensure that customers receive information solely on the basis of such professionally relevant considerations as geography, availability, skill, experience, and suitability.

Which is the right business model to serve the need for diversity that the corporate customers say they seek?

Some advocate the creation of a “pool” of high-quality female and minority mediators and arbitrators from which corporate counsel can make selections in appropriate cases. AAA, JAMS, CPR, the National Arbitration Forum, and other providers could offer access to this pool to corporate end-users seeking to engage such professionals. But considering these organizations’ past efforts to identify women and minorities who meet their standards, such a “pool” may end up including the same names that have already been identified.

There is also an ethical hurdle. Practically all statements of professional ethics for ADR provider organizations require those organizations to treat all neutrals equally, not to favor one over the other, and to be transparent in

Endnotes
2. Lorig Charkoudian, We Are How We Do, ACR Resolution, Winter 2006, at12.
3. Although the demographic options available on the questionnaires included other racial and ethnic groups, the vast majority of participants and mediators were either African American or white. We have therefore used the label “race” with regard to this measurement.
their dealings with their customers. It is an open question whether an ADR provider can ethically recommend a particular candidate on the basis of race or gender.

Do Women and Minorities Market Less Well than White Males?
It may sound silly on its face, but it's a fact of life: White men are better known in this business than their female or minority counterparts. Some might conclude that the nonwhite nonmales need some mentoring and boosting in their market strategies. The American Bar Association, the Center for Alternative Dispute Resolution in Maryland, and other organizations periodically hold training sessions for mediators on how to market their services to high-end case disputants and their counsel. Successful minority and female mediators are often included as instructors and exemplars in these trainings. But marketing alone does not create demand—it works only if you have something people want. And the most difficult obstacle of all may be that not enough people want it.

Is There Enough Mediation Work to Go Around?
It has been estimated that the annual median income of professional mediators is zero—that is, that at least half of the trained mediators in the United States earn nothing per year from mediation. Theorists in ADR teach that, before mediators concern themselves with cutting the pie, they should "grow" the pie, to make sure that each party's piece is bigger. All mediators regardless of gender or hue are grossly underutilized. Perhaps the solution lies in doing even more to increase the amount of commercial mediation available, on the chance that increasing the gross number of mediations will increase the amount of work available for all (including women and minorities).

In light of these uncertainties, maybe it's time to do what ADR professionals do so well: "Think out of the box." Consider the following examples.

Just Say Yes
What if arbitrators and mediators were chosen as always, but an arbitrator or mediator of color were "inserted" into the selection process? It could happen upon the initiative of any provider, party, counsel, or neutral. It's one way of giving underutilized neutrals the "track record" they need to command the attention of high-end disputants, and it might be a way to leverage the current system towards change.

Are the Courts a Silver Bullet?
Mediation that is either ordered by a court, or encouraged by a judge, continues to be one of the biggest sources of work for mediators. These courts could be supplied with information about minority and female mediators in their regions, and encouraged to bring them to the attention of litigants.

Should the Approach Be Sector by Sector?
Perhaps the access efforts to date have been too broad. Focus might better be placed on a particular corporate consumer of ADR—such as the insurance industry, which is the largest purchaser of legal services in the United States. A campaign might be designed in collaboration with a trade association to provide information, education, and direction to encourage the use of women and minority mediators and arbitrators within that industry. Trade associations could even recognize achievement in the area by an annual award or other gesture.

These challenges are legitimate and can sometimes confuse and even paralyze people who seek to create change in the diversity of ADR services. But it is clear that the dominance of white men in the field of mediation and arbitration of high-end commercial disputes cannot last—change will come. And, as is true with every other great achievement in ADR over the past 30 years, it will arise from the goodwill of the community, the pressure for more efficient business practices, the persistence of legal and corporate leadership, and the sure belief that we are working for an outcome that is historically inevitable. ♦
Governor Newsom signs Wieckowski arbitration bill giving California's workers, consumers a big win

October 13, 2019

SACRAMENTO - Delivering a big victory for California workers and consumers, Governor Gavin Newsom today signed SB 707, jointly authored by Senator Bob Wieckowski (D-Fremont) and Senate Majority Leader Bob Hertzberg (D-Van Nuys), to deter companies that have forced their customers and employees into arbitration from obstructing the process by refusing to pay the required arbitration fees.

“I applaud the Governor for signing this important bill that expands the rights of workers and consumers and cracks down on companies who shirk their responsibilities when people exercise their already-limited rights in arbitration,” said Wieckowski, a strong advocate for transparency and legislation to bring more balance into the arbitration process. “The companies write the arbitration clauses. Now, they are breaching their own written clauses to tip the scales of justice even more in their direction. SB 707 will stop these abuses and I am pleased that Governor Newsom is standing up for workers and consumers.”

Mandatory arbitration provisions are ubiquitous in America. They prevent workers and consumers whose rights have been violated from pursuing their claims in court. Instead, they must go through an arbitration process that overwhelmingly favors businesses. By withholding payment of arbitration fees, the businesses obstruct the process with the hope the claims will be abandoned.

SB 707 affirmatively gives consumers and employees a choice whether to instead proceed in court, continue the arbitration, or compel the business to pay up.
It also includes another important component that requires arbitration firms to provide demographic information. A 2015 survey of practicing employment arbitrators, found 74 percent of those surveyed were male and 92 percent were Caucasian. SB 707 seeks to obtain better data on the ethnicity, race, gender, gender identity, disability, sexual orientation, and veteran status of arbitrators. With more cases being adjudicated in arbitration, it is critical that the pool of private arbitrators better reflects the diverse backgrounds of the people who are bringing the claims, Wieckowski said.

It is Wieckowski’s fourth arbitration bill signed into law during his tenure in the Legislature.

“We applaud the Governor for signing SB 707 into law. This bill will allow consumers and employees to fully vindicate their rights should companies try to obstruct the arbitration process by refusing to pay their share of the arbitration fees,” said Mariko Yoshihara, policy director of the California Employment Lawyers Association (CELA). “SB 707 provides much-needed clarity in the event that a company’s non-payment of fees puts the proceeding in limbo.”

In addition to CELA, SB 707 is supported by the Consumers Attorneys of California, the California Labor Federation, the Service Employees International Union - California, UNITE HERE, United Food and Commercial Workers Western States Council, International Brotherhood of Teamsters, Utility Workers Union of America, International Association of Machinists and Aerospace Workers International, among many others.

Senator Wieckowski represents the 10th District, which includes southern Alameda County and parts of Santa Clara County.

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Why Bringing DIVERSITY to ADR Is a Necessity

By David H. Burt and Laura A. Kaster

The dramatic absence of diversity in the neutrals selected for alternative dispute resolution (ADR) proceedings has flown under the radar. The International Institute for Conflict Prevention and Resolution (CPR) recently developed its 2013 Diversity Commitment as one way to address this problem. By adopting this readily usable tool, corporations, organizations and their counsel can demonstrate their commitment to diversity in their selection of mediators and arbitrators. CPR hopes that corporations’ adoption of the Diversity Commitment will lead to a long-term paradigm shift.

30-SECOND SUMMARY
The lack of diversity in the demographics of the neutrals selected in alternative dispute resolution (ADR) proceedings is a serious issue. Neutrals in both arbitration and mediation serve a role that is often a substitute for (and sometimes annexed to) the judicial process. Therefore, it becomes an issue of fairness that the decision-makers or facilitators should be representative of the individuals, institutions and communities that come before them. ADR providers need to continue to recruit women and minorities to their panels. Neutrals need to distinguish their profiles so they can be identified by their gender, race or other significant demographic, and law firms should communicate to their associates and partners that they value service as mediators and arbitrators.
It is a known fact that cognitive diversity in groups improves decision-making and prediction. Indeed, differences in approach and points of view improve group decisions more than the capacity of the individuals who contribute to those decisions because of the ability to bring in different perspectives, interpretations, problem-solving approaches and decision models. The wisdom of crowds is derived from variation in points of view.\(^1\)

Both race and gender are proxies for differences in viewpoint, experience and approach.\(^2\) Diversity contributes a practical and important improvement to decision-making.

Significantly, neutrals in both arbitration and mediation serve a role that is often a substitute for (and sometimes annexed to) the judicial process. Therefore, it becomes an issue of fairness, public justice and public acceptance that the decision-makers or facilitators of private dispute resolution processes are representative of the individuals, institutions and communities that come before them.

There is wide public support for diversity in the judiciary, and there has been attention paid to the slow pace of improvement. The Brennan Center for Justice published a report on diversity in the judiciary in 2010, noting that, today, white males are overrepresented on state appellate benches by a margin of nearly two to one. Almost every other demographic group is underrepresented when compared to their share of the nation’s population. There is also evidence that the number of black male judges is actually decreasing. (One study found that there were proportionately fewer black male state appellate judges in 1999 than there were in 1985.) There are still fewer female judges than male, despite the fact that the majority of today’s law students are female, as are approximately half of all recent law degree recipients.\(^3\)

The ADR field is far less diverse and representative of our world. The first woman United States Supreme Court Justice, Sandra Day O’Connor, was appointed in 1981. Currently, there are three women Supreme Court justices, and two of the nine justices are people of color. Justice Sonia Sotomayor is the third person of color and the fourth woman appointed to serve on the US Supreme Court in its 223-year history. Nearly 30 percent of state court judges are women. Although there can be no dispute that these numbers need to be improved, they are vastly better than those that reflect the reality of ADR.

In today’s multinational corporate world, the lack of diversity in ADR is palpable. Statistical information showing that women and minorities are not frequently appointed in ADR may be surprising to global corporations that have long ago accepted that diverse groups make better decisions. Many in-house counsel are inclusive in their business and hiring practices, but while diversity mandates for hiring outside law firms are commonplace, corporations often leave the choice and selection of neutrals to outside counsel, without considering or imposing diversity requirements. It is time to focus on how to correct this lapse.

The appointment of women and minorities in ADR proceedings is dramatically lower than the appointment of women and minorities in the judiciary. Although, for well over a decade, women have comprised 50 percent or more of graduating law school classes, in commercial arbitration, women were selected as neutrals, at best, in six percent of commercial matters.\(^4\) The participation of racial minorities is not statistically available but is known to be far lower.

The appointment process may well be the key to improving diversity in the field of ADR. The Brennan Center for Justice Report reported that appointive systems for selection of judges tend toward class-based exclusivity or racial and gender homogeneity. The method used to select mediators and arbitrators also involves the ultimate “appointment” by outside lawyers and inside counsel, thus potentially perpetuating the same homogeneity. In some respects, a double screen may impede the appointments of diverse mediators and arbitrators because ADR Providers and the courts first place candidates on the list. Then, outside lawyers and inside counsel weigh in. What can be done to promote change?

In 2006, CPR created a Task Force on Diversity in Alternative Dispute Resolution; its work to date has demonstrated that the vast majority of ADR neutrals candidates have not been sufficiently diverse.\(^5\) The goal of the group is to change the complexion and gender of private decision-makers in arbitration and facilitators in mediation. Information has been

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The authors would like to thank Deborah Masucci for her contributions to this article.
There are now a large number of women who have senior and significant roles in the profession, and who are also trained and experienced in ADR. In practice, there has not been a commensurate increase in appointment of women and minorities as dispute resolvers despite equal and, in some circumstances, better credentials.

Low participation rates cannot be attributed to a "pipeline" issue, at least with respect to women. Since the 1970s, a large and increasing percentage of women and minorities have made up law school classes, had Supreme Court and Courts of Appeals Clerkships, and become partners in law firms and judges in the state and federal courts. There is diverse new talent in the ADR pipeline. There are now a large number of women who have senior and significant roles in the profession, and who are also trained and experienced in ADR. In practice, there has not been a commensurate increase in appointment of women and minorities as dispute resolvers despite equal and, in some circumstances, better credentials.

This may be a problem of unconscious or implicit bias. The Brennan Center report recommended that judicial appointing bodies needed to grapple fully with implicit bias:

Recent research indicates that the task of dismantling sex and race discrimination in the workplace is more complicated than originally thought because the way we discriminate is complicated. Principles of psychology and sociology have enlightened us as to what we actually do, rather than what we think we are doing, want to do, or claim to be doing. . . . Our stereotyping mechanism is not easily turned off, even when we want to pull the plug on it, as in the case of gender biases. Merely voicing support for gender equality is not transformative — our brain's deeply engrained habits do not respond on cue. To exacerbate the situation, we often labor under misleadingly optimistic notions of our decision-making capacity that hide these methodical mistakes. Therefore, we need to become aware of our stereotyping mechanism, be motivated to correct it, and have sufficient control over our responses to correct them.6

Earlier this year, the International Mediation Institute conducted a survey of in-house dispute resolution counsel to determine their views about what criteria is important regarding the selection of mediators and arbitrators. Past experience with arbitrators and mediators was seen as vital to selection decisions.7 If past experience is vital, how do we get women and minorities appointed so experience can be reported?

Everyone has a stake in taking steps to improve the possibilities. First, ADR providers need to continue to recruit women and minorities to their panels. Second, neutrals need to distinguish their profiles so they can be identified by their gender, race or other significant demographic. Third, law firms should communicate to their associates and partners that they value service as mediators and arbitrators. By taking this step, associates and partners can gain the experience that may lead them to consider a career in ADR.

Whether the problem is the product of implicit bias, inability to determine who is qualified or lack of focus by those who recommend and appoint...
While businesses naturally focus on the bottom line, disputes aren’t only about positions; they are also about people. Who we are, where we’ve been and what we need strongly affect what’s an acceptable solution to our conflict. ACC’s newest Alliance Partner, the Agency for Dispute Resolution, is diverse enough to understand and address what drives any dispute. Their neutrals vary in background, education, race, gender, age and culture; yet share the skill, experience and creativity to help their clients move forward.

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The CPR Task Force on Diversity is attacking the problem on multiple fronts. One of the outcomes is its 2013 CPR Pledge. Under the caption “Diversity Matters,” CPR has offered up a new commitment and will publish all signatories (members and nonmembers of CPR) who sign on. The CPR Diversity Pledge provides that companies who adopt the pledge recognize the value of diversity and inclusion not only in their workforce but also in providers of services, including mediation and arbitration. The CPR Pledge includes the following:

Just as we see great value in diversity and inclusion among those who represent our company, we see equal value in diversity and inclusion among those who mediate and arbitrate our matters. Therefore, we actively support the inclusion of diverse mediators and arbitrators in matters to which our company is a party.

To implement our commitment to diversity and inclusion in the selection of neutrals, we ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose to us. Our company will do the same in lists it provides.8

We must begin somewhere, and with the commitment to change, to monitor and to include, we may help to diversify the face of ADR. ACC

NOTES
Hi Elana,

On behalf of Quyen, please see below for our statement for Elimination of Bias/Diversity credit. Please also find attached our CLE materials for this panel and let us know of any questions. Thank you.

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This panel addresses the learning goals of educating lawyers about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or in the administration of justice, as well as the barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and other diverse individuals both in the public and private sector of the legal profession and in the practice of law, by focusing on the importance of diversity and inclusion in a space that matters to the legal profession as more and more disputes are being resolved via mediation and arbitration.

Commercial disputes involve parties all over the country and globe. Diversity should thus be reflected in the make-up of those who are tasked with resolving such disputes. Unfortunately, clients and experienced private practitioners know that when they consider a private mediator or an arbitrator, a diverse neutral typically isn’t an option. On the supply side, even the most progressive organizations are having issues supplying clients with mediators or arbitrators who are diverse and women. Further compounding the problem, only two percent of law firm partners are African American, four percent are Asian, and two percent are Hispanic, according to a 2018 National Association for Law Placement diversity study. On the demand side, many private practitioners will explain that their clients will want to hire someone with sufficient “seniority,” which usually leads to a non-diverse and male arbitrator or mediator.

This panel will take a no-holds-barred view on the diversity challenges in the ADR world. Our panelists will discuss the issues raised above, whether ADR needs to be re-examined, and how we can best achieve racial and ethnic diversity in this growing, and lucrative, practice area.

Our objective is for our participants to (1) gain a better appreciation of the depth of the diversity deficit in the ADR world, (2) understand the reasons for such deficit, and (3) be aware about the various initiatives and practical ways to improve diversity in the hiring of mediators and nominating of domestic and international arbitrators.

Our panel offers wide-ranging perspectives, including in-house counsel of Varian Medical Systems, Walmart, and Chevron, as well as a private arbitrator, JAMS mediator/arbitrator, and President and CEO of the AAA-ICDR. We will also invite the audience to ask questions during the panelists’ discussions, and allocate time for an extensive Q&A session. Together, we will examine how we can achieve equal representation of women, minorities and other diverse individuals in mediation, arbitration and other dispute prevention and resolution processes.

Stephanie Le
Staff Attorney