

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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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.

gathered about whom parties consider to select as neutrals and who is actually appointed. The results made it clear that both people of color and women are woefully underrepresented as the dispute resolvers in commercial arbitration and mediation.

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

ACC EXTRAS ON... Diversity and inclusion in the legal profession

ACC Docket

Lawyers as a Catalyst for Change in Early Issue Business Conflict Management (July 2012). www.acc.com/docket/conflict-manage_jul/aug12

Growing Diversity and Inclusion (July 2011). www.acc.com/docket/diversity-inclusion_jul11

InfoPAKSM

So, Your Corporation Has Been Sued? What to Do in the First 30 Days (Aug. 2012). www.acc.com/infopaks/sued_30days_aug12

Presentation

Give Your Diversity Policy Some Teeth (Oct. 2012). www.acc.com/div-pol_oct12

Quick Reference

Give Your Diversity Policy Some Teeth—Consolidated Bibliography (Oct. 2012). www.acc.com/quickref/div-pol_oct12

Leading Practices Profile

Leading Practices in Law Department Diversity and Inclusion Initiatives: Company Best Practices (Jan. 2013). www.acc.com/lpp/diversity_jan13

ACC Extras

ACC Alliance partner WeComply’s “Workplace Diversity” online training course covers legal workplace protections that all employees need to be aware of. The course emphasizes the importance of treating everyone with respect and dignity and demonstrates how embracing diversity can be a sound business strategy. Find out more at www.wecomply.com/diy.

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neutrals, it deserves our attention. And even if an effort to improve the supply side should be undertaken, that effort should not be permitted to postpone or deflect the action that is currently needed to improve the face of ADR dispute resolvers.

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

- 1 See James Surowiecki, *The Wisdom of Crowds* (Random House 2004) and Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies*, (Princeton 2007).
- 2 Scott E. Page, *The Hidden Factor: Why Thinking Differently Is Your Greatest Asset* (The Teaching Company 2012).
- 3 www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.
- 4 See Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, Arbitration International Vol. 4 (Kluwer 2012); see also Barbara A. Mentz, *Women in Law and Arbitration: Running in Place or Sliding Backward*, New York Dispute Resolution Lawyer Vol.5 No.1 (NYSBA Dispute Resolution Spring 2012).
- 5 www.cpradr.org/Committees/IndustryCommittees/NationalTaskForceonDiversityinADR.aspx.
- 6 www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf, 11 (quoting Marybeth Hearld, *Deceptive Appearances: Judges, Cognitive Biases and Dress Codes*, 41 U.S.F. L. Rev. 299, 301-2 (2007)).
- 7 See <http://imimmediation.org/imim-international-corporate-users-adr-survey-summary>.
- 8 www.cpradr.org/Committees/IndustryCommittees/NationalTaskForceonDiversityinADR/CPRCommitmentonDiversity.aspx.