

**“Old, White, and Male”:
Increasing Gender Diversity in Arbitration Panels**

I. Introduction

Over the past few decades, factors such as high attorney’s fees, overloaded court dockets, long wait times, and complicated legal formalities have made the United States court system into what many consider to be an inefficient and ineffective mechanism for resolving disputes. For those looking to settle their disputes in a quicker, less expensive, and possibly less adversarial manner, an alternative dispute resolution process such as arbitration can offer an appealing substitute for the traditional judicial process. Both individuals and corporations have recognized the benefits that arbitration can offer, and a substantial number of modern contracts contain clauses that require disputants to submit to arbitration instead of filing a lawsuit. Consequently, a growing number of would-be litigants are now turning to arbitrators instead of judges to resolve their disputes - in fact, according to a report published in 2008 by the Journal of Empirical Legal Studies, over 80% of all disputes are settled outside of court instead of through traditional litigation.¹

The increasing popularity of arbitration has, of course, also resulted in an increased need for neutrals to serve on arbitration panels. These neutrals come from a variety of backgrounds, but most have substantial legal or business experience, with the majority being retired judges or practicing attorneys.² Although some neutrals practice independently, most are chosen to arbitrate cases based on their membership in an alternative dispute resolution organization.³ When a disputant files a claim with the relevant organization, the organization typically provides a list of arbitrators from which the parties may choose. These lists contain many esteemed professionals, all of whom are presumably fully competent and capable of handling the disputes

¹ Mark Smalls, *It's Time to Focus on Diversity in ADR*, THE RECORDER, May 30, 2011, <http://www.jamsadr.com/files/Uploads/Documents/Articles/Smalls-Recorder-Time-to-Focus-2011-05-30.pdf>.

² See Charles J. Moxley Jr., *Selecting the Ideal Arbitrator*, DISPUTE RESOLUTION JOURNAL (August/October 2005) available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897.

³ These organizations include AAA (American Arbitration Association), JAMS (Judicial Arbitration and Mediation Services), and CPR (International Institute for Conflict Prevention and Resolution). For more information about the specifics of each organization, *see* <http://www.adr.org/aaa> (AAA); <http://www.jamsadr.com> (JAMS); <http://www.cpradr.org> (CPR).

before them. Unfortunately, however, one sect of society is consistently missing from these arbitrator lists: women.

Those involved in alternative dispute resolution processes, including corporate leaders, have openly complained about the lack of gender diversity in arbitrator selection lists, saying that they are repeatedly getting the “same short list of mediators and arbitrators to choose from, consisting mainly of older white males.”⁴ Even John Bickerman, the chair of the American Bar Association Section of Dispute Resolution, has made note of the problem, observing that “in terms of the big cases, we see the same names all the time, and they are the same very accomplished, well-established, high-profile white men that have been doing this for the past ten or fifteen years.”⁵ While these “high-profile white men” may be very effective arbitrators in most circumstances, they are not representative of society as a whole, and they cannot be expected to fully understand and effectively resolve disputes between individuals whose lives are not reflective of the traditional white male experience. Individuals who choose to arbitrate are a diverse group, and arbitration panels should be equally diverse, particularly in terms of gender.

This paper aims to address the lack of gender diversity amongst successful arbitrators, both by outlining the problem and by providing recommendations for solving it. Part II of this paper will address the current status of women in arbitration, by providing data regarding the number of women currently working in the legal and arbitration fields. Part III will explain some of the factors that contribute to the lack of successful female arbitrators, including implicit biases and what is often referred to as the “pipeline” problem. Part IV will discuss the importance of bringing more women to arbitration, and explain some of the benefits that can be obtained by including women on arbitration panels. This paper will conclude by briefly providing recommendations for steps that can be taken by arbitrators, disputants, and arbitration organizations in order to help ensure that future arbitration panels are just as diverse as the disputes that they resolve.

⁴ F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish Than First Thought*, 15 No. 3 DISP. RESOL. MAG. (2009) at 14.

⁵ F. Peter Phillips, *It Remains a White Male Game*, INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION (Nov. 27, 2006), available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/90/categoryId/86/It-Remains-A-White-Male-Game-NLJ.aspx>.

II. Women in Arbitration Today: The Numbers

In order to analyze the current status of women in the arbitration field, it is necessary to first briefly address the rise of women in the legal field as a whole. Although males have historically dominated the legal profession, women have made great strides in the field over the past few decades. Modernly, women make up over half of all college students, about half of all law students, and nearly half of the total private sector work force in the United States.⁶ This success in the professional world has not been mirrored in world of arbitration, however. In 1985, arbitrators were over 90% male,⁷ and one would expect or at least hope that women would have advanced in the field since this statistic was released nearly three decades ago. In contrast, as one prominent arbitrator has noted:

The first thing anyone notices when they drop out of the legal profession and into the “neutral” business is the time warp. It’s not exactly an old folks’ home or an assisted living facility, but it is populated primarily with the people who were already practicing law when I entered the profession in 1980. These people were in their 30’s then. *Now they’re mostly over 60. They’re white. And they are male.*⁸

Unfortunately, this experience is reflective of the experience of most female arbitrators, or at least those that are fortunate enough to be able to find work in the field to begin with. While there are no “official” industry statistics regarding the number of women selected to arbitrate disputes, various studies and anecdotal evidence reveal that female arbitrators are selected to serve on arbitration panels at a rate that is dramatically lower than that of their male counterparts.⁹ Although there are many female professionals trained in alternative dispute

⁶ See Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISPUTE RESOLUTION MAGAZINE, Spring 2012, at 22. See also David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR is a Necessity*, ASSOCIATION OF CORPORATE COUNSEL (2013), available at <http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/815/Why-Bringing-Diversity-to-ADR-Is-a-Necessity-ACC.aspx>.

⁷ Nicole Buonocore, *Resurrecting A Dead Horse-Arbitrator Certification As A Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483 (1999) (“In 1985, the average arbitrator was 59.3 years old, 91.5% of all arbitrators were male, and 96.5% of all arbitrators were white.”).

⁸ Victoria Pynchon, *Diversity is Not a Toxic Topic*, 30 ALTERNATIVES, NO. 4, Apr. 2012, at 83 (emphasis added).

⁹ See, e.g., Smalls, *supra* note 1; see also Rothman, *supra* note 5.

resolution processes, in practice, these women are rarely appointed to a panel despite, as one scholar has noted, “equal, and in some circumstances better, credentials.”¹⁰ The so-called “glass-ceiling,” which allows men to move up the professional ladder while leaving equally talented women in low-level positions, is notorious amongst female arbitrators, and it has left many feeling that “[a]s with every other profession . . . a woman arbitrator has to be more talented and hardworking to accomplish the same degree of success as a male counterpart.”¹¹

These observations of gender inequality are supported by more than mere anecdotal evidence, however. In a survey conducted in 2002, 85% of arbitrators interviewed felt that their gender “affected their ability to become established as arbitrators,” and the validity of these respondents’ feelings is supported by a multitude of research.¹² Take, for example, a recent release from The Daily Journal, a California legal newspaper, which listed California’s “top neutrals.” Among the neutrals recognized, only 25% were women.¹³ The situation was even worse in one specific organization surveyed, JAMS, whose arbitrators were 80% male and whose list of “best neutrals” was only 12% female.¹⁴ Another major arbitration organization, the National Academy of Arbitrators, similarly reports that women make up only 15% of its roster.¹⁵ Even organizations that claim to have taken on diversity initiatives, such as the American Arbitration Association (AAA), have made little actual progress; the organization’s pledge to provide arbitrator selection lists that are at least 20% “diverse” has not been successful in increasing diversity amongst arbitrators, and AAA panels continue to be 70-80% white and male.¹⁶

¹⁰ Burt & Kaster, *supra* note 5.

¹¹ See Cynthia Alkon, *Women Labor Arbitrators: Women Members of the National Academy of Arbitrators Speak About the Barriers of Entry into the Field*, 6 APPALACHIAN J.L. 195, 196 (2007).

¹² *Id.*

¹³ Victoria Pynchon, *Do I Look Fat in This Profession? Escaping Gender Bias in ADR*, ABA SECTION OF LITIGATION (Mar. 6, 2013), <http://apps.americanbar.org/litigation/committees/womanadvocate/articles/winter2013-0313-do-i-look-fat.html>.

¹⁴ *Id.*

¹⁵ Alkon, *supra* note 10.

¹⁶ See William K. Slate, *Diversity at the American Arbitration Association*, 63 DISPUTE RESOLUTION JOURNAL (February 2008); see also Pynchon, *Diversity is Not a Toxic Topic*, *supra* note 7.

These statistics prove that women who hope to become successful arbitrators are severely disadvantaged by their gender, regardless of their experiences and capabilities. Unfortunately, for women looking to arbitrate complex, high profile disputes, the situation is even worse. For those few women who are actually selected to serve on arbitration panels, the cases fall mostly into traditionally “feminine” areas, such as employment or family law disputes.¹⁷ Female arbitrators report that it is incredibly difficult for them to be selected for cases such as large class actions or to chair high-profile arbitrations,¹⁸ and numbers released by various arbitration organizations support these claims.¹⁹ For example, according to a 2010 report from AAA, women were appointed in only 15% of cases involving large monetary claims, represented only 25% of the prestigious “National Roster,” and were selected only 13% of the time.²⁰ The prospects facing women who hope to arbitrate international commercial disputes are even more disheartening, as studies have found that women are selected to arbitrate such disputes about 6% of the time, at best.²¹ Investment treaty arbitrations involve similarly grim statistics- in one study of nearly 250 well known investment-treaty arbitrations, only about 6% of appointments were women, and the majority of these appointments were to the same two well-known women.²² As these data show, arbitration is still a “surprisingly closed area of law,” and as scholar Lucy Greenwood has so aptly summarized, “arbitration tribunals do not reflect the diversity of individuals in any real-world business demographic, and they look increasingly anachronistic in the modern world.”²³

III. Contributing Factors: Why Aren’t There More Successful Female Arbitrators?

¹⁷ See Rothman, *supra* note 5.

¹⁸ *Id.*

¹⁹ See, e.g., Carrie Menkel-Meadow, *Women in Dispute Resolution - Parties, Lawyers, and Dispute Resolvers: What Difference Does “Gender Difference” Make?*, 18 No. 3 DISP. RESOL. MAG. 4 (2012) (“Though the numbers of female arbitrators and mediators continues to grow, some areas, such as international commercial arbitration and the appointment of special masters/mediators for federal courts and mass and class action litigation, are notoriously known for their underrepresentation of women as dispute managers.”).

²⁰ See Rothman, *supra* note 5. Additionally, the AAA reports that in 2010 it conducted only 3 arbitrations in which the panel was comprised entirely of women. *Id.*

²¹ See Burt & Kaster, *supra* note 5.

²² Rothman, *supra* note 5; see also Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, 42 No. 2 INT’L LAW NEWS (Spring 2013).

²³ Greenwood, *supra* note 21.

The data discussed above paint a clear picture of the prevalence of gender inequality in modern arbitration panels. The next and perhaps more important step, however, is to consider why this gender disparity continues to persist despite the advancement of women in other areas of the legal profession. A majority of legal scholars agree that the causes of this severe gender disparity can be divided into two main categories: supply-side problems, often referred to as “pipeline” problems, and demand-side problems, consisting largely of implicit biases and gender stereotyping.²⁴ Essentially, these scholars contend that a relatively short supply of highly qualified women, combined with a relatively small demand for these women, results in the notorious lack of female arbitrators that we see today.²⁵

A. Supply-Side Problems: The “Pipeline”

On the supply side, many scholars blame what is referred to as a “pipeline problem” for keeping women out of the arbitration field.²⁶ The pipeline, in its most basic sense, refers to the chain of education, experiences, associations, and job positions that can ultimately lead to a career as an arbitrator. The pipeline is particularly disadvantageous to women, because women are underrepresented in the types of professional positions that often lead to being selected as an arbitrator, and thus are unable progress along the pipeline and into a career as a successful arbitrator.

Arguably the most important factor that is keeping women out of the pipeline to becoming successful arbitrators is the fact that women are far less likely than men to reach high ranks in the legal profession.²⁷ Although women make up about half of all graduating law students, these women on average do not go to achieve the same ranks as the men they graduate alongside of.²⁸ In fact, less than one third of women who enter the legal profession ever make it to the rank of partner, and they have “a far greater chance of occupying positions - like staff attorneys, counsel, and fixed-income equity partners – with diminished opportunity for advancement or participating in firm leadership.”²⁹ Mark Smalls, the vice president and chief marketing officer of JAMS, has summarize the problem succinctly, stating:

²⁴ *Id.*

²⁵ See Buonocore, *supra* note 6.

²⁶ See, e.g., Rothman, *supra* note 5; Phillips, *It Remains a White Male Game*, *supra* note 4.

²⁷ See Rothman, *supra* note 5.

²⁸ *Id.*

²⁹ *Id.*

The most attractive recruits to major ADR providers are former judges with substantial civil court experience or attorneys that have ascended to the senior (i.e., partner) level at major law firms. Women and minorities are underrepresented in both of these talent pools. The same forces that keep many women from reaching the partner level at law firms or attaining the general counsel title at corporations naturally reduce the pool of candidates that transition to a career as a mediator or arbitrator.³⁰

The lack of successful women at the top of the legal profession is not the only thing keeping women out of the arbitration pipeline, however. Male dominance in the arbitration profession and the lack of role models for would-be female arbitrators also reduces the number of women who make it in the profession. Because women only began entering the legal field in large numbers about thirty years ago, they have not been in the field as long as, and have not been able to establish themselves as well as, their male counterparts.³¹ As one law professor has explained, “[a]rbitration by its nature is a field where the parties need to have a lot of confidence in the arbitrators. An arbitrator needs to amass years of experience in order to be trusted and chosen by parties.”³² Since women do not have the well-established image or years of experience that many male arbitrators do, they are inevitably chosen far less often.

Additionally, as arbitrator Margaret Leibowitz has noted, “[a] lot of arbitrators are chosen through the ‘old boy network’ in which men have traditionally taken care of each other professionally.”³³ There is a strong network amongst male arbitrators, and, when given the choice, “male advocates choose male arbitrators.”³⁴ Unfortunately, there are few women who have been successful in the arbitration field and even fewer who have long-term experience in the field, and thus there is not an equally solid network for women to turn to for support. This lack of a strong support network discourages young women from making their way along the arbitration pipeline because, as mediator Deborah Rothman has explained, “when there are not

³⁰ Smalls, *supra* note 1.

³¹ See Buonocore, *supra* note 6.

³² See Dorissa Bolinski & David Singer, *Why Are So Few Women in the ADR Field?*, 48 ARB. J., (Sept. 1993) at 62.

³³ See *id.* at 61-62.

³⁴ *Id.*

enough seasoned, visible women arbitrators, younger women lack the role models and mentors to inspire, encourage and help them to succeed as commercial arbitrators.”³⁵

B. Demand-Side Problems: Implicit Bias and Gender Stereotyping

Although the pipeline problem is an important part of why women do not become successful arbitrators, it is not the only reason, and may not even be the most significant one. Women hoping to gain success in the arbitration field must also overcome barriers posed not by their lack of expertise or prestige, but simply by their status as female. Although most arbitrator selection processes are not patently discriminatory, they often result in discriminatory selections because of implicit biases and gender stereotyping. These factors cause individuals to make assumptions about an arbitrator based on the arbitrator’s gender, even if the individual does not consciously recognize his or her own biases, and this results in fewer women being selected to panels even when they may in fact be well qualified for such positions.

The presence of implicit bias and gender stereotyping in the arbitrator selection process can be shown both anecdotally and through a variety of studies that have been conducted on the topic. Of course, most lawyers, businessmen, and arbitrators would not consciously base their decisions on gender. However, it is overwhelmingly the case that the individuals who select arbitrators are male, as mentioned previously, and these men are most likely to choose an arbitrator who they believe “closely mirrors their own professional experience.”³⁶ This gives men a strong advantage in the selection process; even before the decision makers are aware of the actual backgrounds and expertise of the potential arbitrators, they have already given more favor to the male arbitrators, perhaps without even realizing it.³⁷ Many female arbitrators report experiencing these biases, and some claim that the prejudice in arbitrator selection is readily apparent.³⁸ Consider, for example, the experiences of Jean McKelvey, a female arbitrator with a gender-neutral first name. McKelvey reports that she has been selected to arbitrate cases more often than any of her female peers, but only because of her gender-neutral first name; the parties

³⁵ Rothman, *supra* note 5.

³⁶ Margaret L. Shaw & Kimberly Taylor, *Gender Diversity in ADR: The Role In-House Counsel Can Play*, INSIDECOUNSEL.COM (Mar. 6, 2012), <http://www.insidecounsel.com/2012/03/06/gender-diversity-in-dispute-resolution-the-role-in>.

³⁷ See *id.*

³⁸ See, e.g., Joseph D. Garrison, *Perceived Differences in Male and Female Mediators and Arbitrators*, DISP. RESOL. MAG., (Spring 2012) at 29, 30-31.

were always surprised when she walked into the arbitration room, and it was readily apparent that the parties had been expecting a man.³⁹

Along with anecdotal evidence, there is also a large body of research assessing the effects of implicit biases and gender stereotyping on various types of selection processes. Studies have shown that people tend to associate success with masculinity, and that “when failure is encountered, women tend to be blamed for the negative consequences, while male failure is likely to be attributed to factors beyond their control.”⁴⁰ Additionally, women must “show more competence and have more concrete evidence of success to be viewed as being as successful as a comparable male.”⁴¹ Part of the reason for this is that individuals have a strong inherent tendency to notice women’s mistakes and failures, and an equally strong tendency to notice men’s successes.⁴² This tendency is exemplified by a study of orchestra auditions, conducted by Harvard and Princeton Universities. The orchestra decision makers claimed that gender did not play a role in their selection process, and that performers were chosen exclusively based on quality.⁴³ However, when the decision makers were finally convinced to conduct blind auditions, where the performer and his or her gender could not be seen, a woman’s chance of moving past the first round of auditions increased by 50% and her chance of being chosen in the final rounds increased by 300%.⁴⁴ Clearly, gender was having a dramatic impact on performer selection despite the decision makers’ claims to the contrary, and it is likely that this same phenomenon exists in the arbitration industry.

Some individuals may be hesitant to accept the claim that this kind of implicit bias affects arbitrator-selection. Fortunately, there are a number of other studies that further prove the prevalence of implicit bias against female professionals, and demonstrate the effects that such bias has on decision-making. For example, in another Harvard study, MBA students were given packets describing two venture capitalists.⁴⁵ The venture capitalists were identical, except for

³⁹ *Id.*

⁴⁰ Buonocore, *supra* note 6.

⁴¹ Pynchon, *Diversity is Not a Toxic Topic*, *supra* note 7.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pynchon, *Do I Look Fat in This Profession*, *supra* note 12; Pynchon, *Diversity is Not a Toxic Topic*, *supra* note 7.

⁴⁵ Rothman, *supra* note 5.

their names: one was given a female name and the other a male name.⁴⁶ Although the student participants claimed they had no biases, they unanimously attributed more negativity to the female capitalist than the male capitalist.⁴⁷ For example, both men and women responded negatively to the female capitalist's apparent aggressiveness, yet none responded negatively to the exact same traits when applied to the male capitalist.⁴⁸ The results of this study are particularly problematic for women in the arbitration industry. Arbitrators must express confidence and may need to be aggressive in their decision making in order to be considered effective, yet women who do behave in such a way are likely to be viewed negatively by both men and women. These women are therefore less likely to be chosen to arbitrate, even though they are utilizing tactics that might be considered perfectly acceptable or even desirable if utilized by a male arbitrator.

This tendency to praise certain traits in men while criticizing the same traits in women is also proven by a number of other studies, which further support the claim that implicit biases keep women from becoming successful arbitrators. In one study, for example, students were asked to rate resumes and journal articles, and both male and female reviewers gave lower ratings to the papers when they were told that the author was female.⁴⁹ When the papers were assessed without knowledge of the author's gender, the number of selected papers written by women went up significantly.⁵⁰ This study supports the idea that biases, even subconscious ones, may have a stronger determinative effect for women than the actual quality of their work does. For the female arbitrator, these results mean that there is little likelihood of being appointed to a major panel, even if the female has done work that is equal in quality to that of a male arbitrator.

It is also often the case that a woman must have more experience, and may need more proof of this experience, than her male counterpart. This manifestation of implicit bias is exemplified by a study in which women were found to need significantly more publications than their male counterparts in order to be awarded a prestigious fellowship.⁵¹ A female arbitrator, then, is also likely to need more experience than a male to be considered equally qualified. In

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Greenwood, *supra* note 21.

⁵⁰ *Id.*

⁵¹ *Id.*

another study, reviewers asked to assess the quality of potential assistant professors “were four times more likely to ask for supporting evidence about the woman, such as a chance to see her teach or proof that she had won her grants on her own, than they were for the man.”⁵² Based on the results of this study, it appears that those who select arbitrators will be much more likely to question a female arbitrator’s credentials than to question a male’s, and will have more faith in the experiences and capabilities of the male arbitrator. These studies are all prime examples of the tendency to respond more positively to male professionals than to female professionals, and it is this type of implicit bias that often results in male arbitrators being chosen even over equally qualified female arbitrators.

IV. Why it Matters: What Women Bring to the (Arbitration) Table

As the previous sections have shown, gender inequality is extremely prevalent in arbitrator selection processes for a variety of reasons. Perhaps the most important question to ask, however, is not what the problem is, or even why the problem exists. The key element to consider is this: Why does it matter? While the lack of gender diversity in arbitration is obvious, the effects of this disparity are not initially as clear. When one takes a closer look, however, it becomes apparent that diversity, and particularly gender diversity, are essential to a fair and effective arbitration process.

A. The Benefits of Diversity Generally

Before considering the many benefits that female arbitrators can bring to the dispute resolution process, it is helpful to first address the benefits of diversity in general. Many scholars and laypeople alike have recognized the benefits that diversity can bring to modern workplaces, and the arbitration room is no exception. As mentioned previously, disputants who elect arbitration are an incredibly diverse group, and arbitrator diversity is essential to ensuring that these diverse clients are understood and treated fairly. As one professional has so aptly summarized, “[a]gencies should be diverse enough to understand and address what drives any dispute. Neutrals should vary in background, education, race, gender, age and culture; yet share the skill, experience and creativity to help their clients move forward.”⁵³

Arbitration is particularly ripe for diversity initiatives, and many of the benefits of diversity can have a direct impact on the arbitration process and its results. Because arbitration

⁵² *Id.*

⁵³ Burt & Kaster, *supra* note 5.

is often used as a substitute for the judicial process, ensuring that decision makers are representative of the diverse group of individuals before them is key to ensuring fairness and public justice, as well as ensuring that disputants will accept and abide by the arbitrators' decisions.⁵⁴ Having a group of arbitrators that is diverse "is essential for democratic representation of the parties in disputes" and helps to ensure that all of the parties have a fair chance at justice.⁵⁵ Consider, for example, a young Latino woman being forced to arbitrate an employment discrimination case against her boss, a white male, in front of a panel of three white male arbitrators. The imbalance of power caused by such a scenario, rather real or simply perceived, may affect the arbitrators' decision, and will definitely affect the woman's perception of that decision. A diverse group of arbitrators, in contrast, is more reflective of the parties who appear before it, and "provide[s] more credibility to the process in the eyes of the grievant."⁵⁶

In addition to ensuring that clients have a full and fair chance at justice, diversity also helps to provide clients with an opportunity to select an arbitrator that is specifically qualified for the task at hand. No employer with a diverse customer base would purposely hire employees from only one background or with only one set of qualifications, yet this is what individuals who select arbitrators do on a regular basis, and it often results in highly qualified individuals being left out of the arbitration process altogether.⁵⁷ A diverse group of arbitrators can bring a variety of different perspectives and problem-solving skills to the table, and can devise solutions that may not have been possible had the problem only been looked at from one perspective. As one prominent female neutral has succinctly summarized, "[i]t's not so much that we do a disservice to others when we choose individual[s] . . . based on the presumed attributes of their race or gender—it's that we deprive ourselves of the opportunity to find the best individual for the job."⁵⁸

B. The Benefits of Including Women on Arbitration Panels

While the benefits of diversity generally are more than sufficient to support a call for more female arbitrators, the benefits that women in particular can bring to the arbitration table

⁵⁴ See *id.*

⁵⁵ Carrie Menkel-Meadow, *Women in Dispute Resolution*, *supra* note 18.

⁵⁶ Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator Should be Doing to Achieve this Goal*, NYSBA JOURNAL (January 2013), at 33.

⁵⁷ See Phillips, *It Remains a White Male Game*, *supra* note 4.

⁵⁸ Pynchon, *Diversity is Not a Toxic Topic*, *supra* note 7.

offer even more compelling reasons for increasing gender diversity. A large body of scholarly research has explored the effects of gender on individual and group decision making, and the results support the conclusion that including more female arbitrators on arbitration panels will result in a more fair and effective arbitration process.

As discussed previously, gender biases have a significant impact on arbitrator selection and potentially on arbitral decisions as well. The addition of more female arbitrators, then, is likely to result in more fair decisions that are not based on conscious or subconscious gender biases. This conclusion is supported by a number of studies that analyze the effects of arbitrator and grievant gender on arbitral decisions. In one such study of over 500 arbitration proceedings, male arbitrators were found to be 74% more likely to rule for female grievants than for male grievants.⁵⁹ The female arbitrators, on the other hand, treated both male and female grievants equally in all cases.⁶⁰ This supports the conclusion that female arbitrators possess less gender bias when it comes to arbitral decision-making, and thus that the addition of more female arbitrators could help to eliminate such bias.

Similarly, including more women on arbitration panels will help to reduce many of the problems associated with group decision-making or “group-think.” Research suggests that, when making decisions with a group, people tend to come to more extreme conclusions than they would have individually.⁶¹ A possible explanation for this anomaly is that individuals who make group decisions do not feel as individually responsible for the decision and are thus willing to make decisions that they may not have been comfortable making without the support of the other panel members.⁶² This group-think phenomenon becomes particularly dangerous when all members of an arbitration panel share similar traits and similar life experiences. Fortunately, however, studies have shown that including more female leaders can reduce the dangers inherent in group decision-making. For example, studies have shown that corporations with “gender-balanced leadership” are better governed and take less unnecessary risks than their male-

⁵⁹ See Brian Bemmels, *Gender Effects in Grievance Arbitration*, INDUSTRIAL RELATIONS: A JOURNAL OF ECONOMY AND SOCIETY VOL. 30 NO.1 (January 1991) at 150.

⁶⁰ *Id.*

⁶¹ See, e.g., Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 118-19 (1995).

⁶² *Id.*

dominated competitors.⁶³ Furthermore, companies with three or more women at senior management levels have been shown to score higher in areas such as work environment, motivation, and leadership.⁶⁴ Including more women on arbitration panels, then, is a necessity, as avoiding unnecessary risks and providing strong motivation and leadership are all key to conducting a successful arbitration.

In addition to their ability to reduce gender biases and group-think problems, women also possess a number of other gender specific traits that are highly compatible with arbitration. Numerous studies have been performed in order to analyze the differences in communication and decision- making styles between men and women, and the results show that women possess a number of characteristics that can function to enhance the arbitration process. Take, for example, a relatively recent study analyzing the effects of stress on the male and female performance.⁶⁵ The study found that while stress undermines empathetic abilities in men, including the abilities to recognize other people's emotions and perspectives and to detect deception,⁶⁶ it increases all of these abilities in women.⁶⁷ Additionally, stress caused the male subjects to become "more self-centered and less able to distinguish their own emotions and intentions from those of other people."⁶⁸ These results are particularly relevant to the arbitration process because an arbitration room is often a high-stress environment. Because stress can cause men to lose their empathetic abilities, it follows that stressed male arbitrators are likely to have a hard time relating to the claimants before them, and are thus more likely to come to a decision that does not satisfy the claimant. Since stress did not have an effect on empathetic abilities in women, it seems that including more women in high-stakes arbitrations could increase empathy and understanding amongst the parties and increase the chance of coming to a resolution that satisfies all of the parties and not just the arbitrators.

⁶³ Greenwood, *supra* note 21.

⁶⁴ *Id.*

⁶⁵ See *Male, Stressed, and Poorly Social*, SISSA MEDIALAB (Mar. 17, 2014), available at http://www.sissa.it/images/documents/form_e_documenti_linkati/2014-03-17_Stress_e_emaptia_silani/Stress_ed_empatia-eng.pdf.

⁶⁶ See Nora H. Murphy, Judith A. Hall & C. Randall Colvin, *Accurate Intelligence Assessments in Social Interactions: Mediators and Gender Effects*, 71 JOURNAL OF PERSONALITY 3 (June 2003).

⁶⁷ *Id.*

⁶⁸ *Id.*

Other studies have resulted in similar findings, and further support the idea that common female characteristics are beneficial to the arbitration process. For example, one study analyzing the group decision-making habits of men and women found that women were far more concerned with uncertainty, doubts, and group dynamics than their male counterparts.⁶⁹ Additionally, women placed more value on time and money, and were more concerned about the consequences that their decisions would have on others.⁷⁰ This is of the utmost importance in arbitration, as factors like saving time, saving money, and avoiding unnecessary negative consequences are some of the biggest reasons why individuals choose to turn to arbitration to begin with. Adding more women to arbitration panels will help to ensure that these important factors are taken into consideration in every decision that is made, and will thus function to increase both arbitrator and client satisfaction.

V. Conclusion: A Look Forward

As the previous sections have shown, gender inequality is the norm in modern arbitration panels, and the disparity is causing both arbitrators and clients alike to miss out on many of the important benefits that female arbitrators have to offer. Although the path to gender equality is not perfectly clear, there are a number of efforts that can and should be made to help bring more women, with their own unique experiences and skill sets, to the arbitration room.

First, arbitration organizations and law firms should encourage strong diversity initiatives within their organizations. Many corporations as well as law firms have implemented strong diversity initiatives for choosing counsel,⁷¹ and these initiatives should be extended to the neutral selection process as well, particularly now that arbitration is being used even more often than the traditional judicial process. Although some efforts have already been made, including the American Bar Association's Diversity Forum and CPR's National Task Force on Diversity,⁷² these efforts have not been sufficient to increase diversity levels, and more work is definitely

⁶⁹ Maria L. Sanz de Acedo Lizarraga, Maria T. Sanz de Acedo Baquedano & Maria Cardelle-Elawar, *Factors that Affect Decision Making: Gender and Age Differences*, INT'L JOURNAL OF PSYCHOLOGY AND PSYCHOLOGICAL THERAPY (2007), available at <http://www.ijpsy.com/volumen7/num3/176/factors-that-affect-decision-making-gender-EN.pdf>.

⁷⁰ *Id.*

⁷¹ See Margaret L. Shaw & Kimberly Taylor, *supra* note 33; see also Clyde Scott & Elizabeth Shfadoan, *The Effect of Gender on Arbitration Decisions*, JOURNAL OF LABOR RESEARCH Vol.10 No.4 (Fall 1989) at 429.

⁷² See F. Peter Phillips, *Diversity in ADR*, *supra* note 3.

needed. Law firms should also make a conscious effort to integrate women into the business and commercial elements of their business, as this will help more female attorneys to move along the pipeline to becoming successful arbitrators.⁷³

There are also a number of steps that women in the profession, and those hoping to enter the profession, can take to help increase gender diversity. Studies show that women tend to hide their intelligence, lower their expectations, and underestimate their own abilities, while men are much more likely to express self-confidence and to promote themselves.⁷⁴ There are many women who are just as qualified to arbitrate as their male counterparts are, and in order to be competitive, these women need to make efforts to express greater confidence and promote their own skills. Women cannot stand in the background, or they may never be recognized. As Former U.S. Secretary of State Madeleine Albright has explained, to compete with men, “women may have to work just a little bit harder. There’s plenty of room for mediocre men, but no room for mediocre women.”⁷⁵

Additionally, women who currently work in alternative dispute resolution, and especially those who have been successful in the field of arbitration, should make efforts to encourage other women to enter the arbitration field and should openly support the women who do make such efforts. The few women who have succeeded in the male-dominated profession often feel that they have achieved their success by being “one of the guys” and are reluctant to support other women for fear of being grouped together with them.⁷⁶ Women should stop trying to convince male decision makers that they are not like other women because this directly discourages the decision makers from selecting other women, by reinforcing the stereotype that women are not as effective arbitrators as men. Instead, women should emphasize the unique skill sets that they and other women possess, and avidly recommend other qualified females when possible.

If the aforementioned steps are taken, it is likely that over time there will be an increase in the number of women serving on arbitration panels, and a commiserate increase in grievant satisfaction with the arbitration process. Arbitration panels should be reflective of the societies they serve, and gender is no exception. A diverse group of arbitrators is essential for serving a

⁷³ Rothman, *supra* note 5.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

diverse group of clients, and one can only hope that as the modern workplace becomes more gender-diverse, so too will the arbitration room.