

Alternatives

TO THE HIGH COST OF LITIGATION

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Neutrals

The ADR Inclusion Network: Addressing Diversity Collectively

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Addressing diversity in the dispute resolution field, as in many other contexts, has gained widespread attention in recent years. For example, see the Institute for Inclusion in the Legal Profession at www.theiilp.com, and the recent American Bar Association Resolution 105 aimed at increasing diversity in the dispute resolution field (available at <http://bit.ly/2INrMys>).

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Not only does embracing diversity make good business sense as research studies have shown, it also resonates with the values of good dispute resolution practices—especially where third parties, like mediators, are expected to be mindful of and attentive to the parties and the setting to ensure that their sessions are inclusive and respectful.

For the dispute resolution field, however, how best to harness the disparate, ad hoc, and varied efforts aimed at embracing diversity has been a continuing challenge.

This article will discuss the roots and evolution of a continuing initiative that has attempted to deliberately shine a spotlight on diversity and inclusion in the dispute resolution field within New York State.

In the contemporary discourse about diversity, Marvin E. Johnson, a Washington, D.C.-

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based JAMS Inc. neutral, and co-author Maria R. Volpe have noted that diversity has come to be used as “a very broad, catchall umbrella term that applies to many qualities and characteristics and is defined differently by different segments of society.” Marvin E. Johnson and Maria R. Volpe, “Roots of Diversity in Dispute Resolution: Some Preliminary Observations” 13/1 *ACResolution* 14 (Winter 2013) (available at <http://bit.ly/2UY9tbz>).

Inclusion is a more comprehensive term than diversity. It refers to not only paying attention to the representation of individuals from diverse backgrounds, but creating an inviting, fair, and respectful environment that will allow diversity efforts to succeed. See Vernā Meyers, “Diversity Is Being Invited to the Party; Inclusion Is Being Asked to Dance,” American Bar Association *GPSolo eReport* (June 28, 2017) (available at <http://bit.ly/2IL8TMD>).

In short, institutions and organizations need individuals who come from diverse backgrounds, but, just as important, they need to be deliberate about being inclusive in their efforts to welcome, recruit, and retain a diverse constituency.

The leadership of the initiative discussed in this article, the ADR Inclusion Network (see www.adrdiversity.org), chose to focus on enhancing both the diversity and inclusiveness of the dispute resolution field as its ultimate goal.

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International ADR

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mine whether expediency applied. As a result, arbitral institutions were invited to share their experience on the trigger events they relied upon to apply expedited proceedings.

The point in time for determining the application also will require careful consideration. Parties might not anticipate whether the simplified procedure should apply to their dispute when signing a contract. Consideration might be given to opt-in after a dispute arose even if it was acknowledged that parties might not be able to agree to further procedures as the dispute evolved. Thus, the necessity for referencing an

expedited procedure in a contract was raised.

It was acknowledged at the Working Group's 69th Session that parties' agreement should be the determining factor for the application of expedited arbitration, and that parties could include in their arbitration agreement threshold criteria. But the agreement should not be the only determining factor.

Thus, it was decided to consider mechanisms under which expedited arbitration applied even without the parties' agreement. Concerns were raised that neither the arbitral tribunal, the appointing authority, or an arbitral institution might be vested with powers to impose a decision on the parties.

It was generally agreed that the parties should be able to opt out of expedited arbitration. Many

factors could argue for non-expedited arbitration being more appropriate: additional claims, counterclaims, and the dispute's complexity. Yet it was suggested that only the parties should have the right to decide and not, among other entities, an administering institution.

It was said that if the process provided for enough flexibility, an opt-out into non-expedited arbitration was not necessary.

* * *

In Part 2 next month, the authors dive deeper into the potential forms the Uncitral reforms may take—An inclusive set of rules? An annex to the Uncitral Arbitration Rules?—and describe the role the CPR Institute took as an observer delegation at the Working Group II 69th Session.

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With no other entity focusing solely on increasing the diversity and inclusiveness of the dispute resolution field as a combined collective, the Network organizers made it their agenda to concentrate on how to be inclusive in providing colleagues from diverse backgrounds with recognition, support and opportunities and how to offer users a diverse pool of practitioners.

DIVERSIFYING ADR PROCESSES

More so than other contexts, it is particularly important for dispute resolution practitioners to pay attention to diversity, especially mediation, a process where the third party has the responsibility of engaging all the disputing parties who are at odds with each other.

Mediators are expected to pay special attention to how they present themselves to parties or how their words or actions may be perceived by the parties. The prescription for mediators' work is detailed in the Model Standards of Conduct for Mediators, which require that they "conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality." See Standard II. Impartiality. Sec. B. (Available at <http://bit.ly/2DACm84>).

Furthermore, mediators must refrain from acting "with partiality or prejudice based on

any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason." Id., at Sec. B1.

The Model Standards' guidance to mediators that they proceed cautiously and deliberately in their interactions with parties points to the importance of creating an inclusive environment for all. If adhered to, all parties should feel welcome, and be provided with an opportunity to open up and to participate with ease.

Additionally, the significance of who serves as convener of disputing parties is magnified by the fact that most dispute resolution processes occur behind closed doors with someone who may not be known to them. The invisibility of the mediator's work to anyone but the parties raises the importance of trust placed on the mediator to conduct a fair and supportive process.

Whether or not parties are given a choice to select their intervener depends on the context. Efforts to provide lists with names of third parties from diverse backgrounds and experiences have become the subject of much discussion and examination.

For example, recently, Jay-Z's arbitration case raised questions about the lack of diversity on a roster of arbitrators he received from the American Arbitration Association's New York Large Complex Case Roster. Only three of the 200 arbitrators were African American. Sopan Deb, Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo, *N.Y. Times* (Nov 28, 2018) (available at <https://nyti.ms/2ZIkMYU>); see also Jay-Z's petition to stay arbitration at <http://bit.ly/2PydRgp>.

Two major practices have produced this conversation: (1) The historic reliance on relationships, i.e. referrals to third parties with whom one is familiar, and (2) The effects of implicit, or unconscious, bias which lead individuals to make decisions based on unconscious attitudes toward others who are not like them. See Ohio State University Kirwan Institute for the Study of Race and Ethnicity (available at <http://bit.ly/2PCvv2t>).

The emphasis on choosing interveners who are known to users or their representatives led to the selection of handpicked providers, even when the roster lists may be diverse. As a result, it is understandable that there has been a lingering obliqueness about who serves as a dispute resolver in a field that relies on relationships and addresses complex psychological factors like unconscious bias. This is compounded by processes that are virtually unknown to users and others who have little or no knowledge about them.

There are other challenges facing the discourse about diversity and inclusion in the dispute resolution field. Well noted are the reliance on volunteerism and limited compensated opportunities; lack of career paths; lack of opportunities for practice, learning and attaining mentorship in order to gain the requisite experience, among others.

Even when there is a significant commitment to paying attention to diversity, given the dominance of solo practitioners and small programs, it is daunting for practitioners to do the necessary work to ensure inclusiveness since, often, they operate in silos and lack the necessary resources.

Additionally, dispute resolution organizations express difficulty in ensuring a diverse pool of dispute practitioners. These organizations also operate with their own criteria for placing practitioners on their rosters that creates another set of constraints and challenges, which makes it more difficult to ensure that the diverse practitioners on the roster will get chosen over the known practitioners who are called upon more frequently.

The result is that any efforts that are undertaken on both the individual and organizational fronts to promote diversity can go unnoticed, gain limited visibility, have little impact, apply disparate criteria or goals, or are insufficient in addressing the need for broad-based representation.

HARNESSING DISPARATE EFFORTS

While there is no shortage of lip service given to the importance of diversity and inclusion, connecting the countless efforts by practitioners, programs and organizations to achieve these goals has remained relatively ignored.

To explore how to work more collaboratively in leveraging the talents and resources of individuals who are interested in furthering diversity in the dispute resolution field in the New York City area, in 2017, co-author Sheila Sproule convened a group of leading local ADR practitioners and scholars to discuss the local state of affairs regarding ADR diversity.

The initial participants included co-author Maria R. Volpe and more than 40 New York dispute resolvers, who serve as directors of private and public dispute resolution organizations, academics, practitioners and leaders and members of bar association diversity committees. [*Editor's note:* former CPR Institute vice president Niki Borofsky participated in the group's formation; CPR publishes this newsletter with John Wiley. Borofsky's Network efforts are discussed further below.]

While all founding participants of the Network were committed to furthering diversity, they were widely scattered and disconnected from each other. They shared one common goal, however: to collectively try to address diversity and inclusion in dispute resolution throughout New York State and, as a result, elevate awareness with the gatekeepers and users of these services.

The co-founders decided to create a new entity to continue the dialogue, the ADR Inclusion Network, which would promote diversity and inclusion within the New York State dispute resolution field.

The Network's work is shaped by a steering committee, which provides "leadership,

A Diversity Manifesto

Why inclusion is essential: Mediation engages all disputing parties. The process literally requires an understanding of diverse parties to work.

Moving forward? "[H]ow best to harness the disparate, ad hoc, and varied efforts aimed at embracing diversity has been a continuing challenge."

The latest step: The ADR Inclusion Network in New York has broken down the issues for committees that address specifics. Here, two of the founders describe the details that are pushing real actions to get to diversity goals.

guidance, and/or resources relevant to the members' goals," but it is the members who make decisions on which actions to take, by consensus. See list of Network steering committee and founding members at www.adrdiversity.org.

Any interested entities, dispute resolution practitioners or individuals addressing diversity or inclusion in their own fields of practice or study have been invited to join one or more of the Network's four diverse subcommittees:

- a. EDUCATION SUBCOMMITTEE, which focuses on ways to educate providers and users on diversity, inclusion and implicit bias;
- b. INCREASING ACCESS SUBCOMMITTEE, which addresses ways to create opportunities for newer, less-experienced practitioners;
- c. SELECTION OPPORTUNITIES SUBCOMMITTEE, which addresses ways to enhance

and increase the selection of experienced diverse practitioners; and

- d. RESOURCES SUBCOMMITTEE, which gathers existing resources related to diversity, inclusion and implicit bias, as it relates to the dispute resolution and other fields.

Since the Network operates without a budget, staff or dedicated resources, it relies on members to undertake a variety of activities and initiatives. In order to communicate, the Network members created two means of exchanging information: a listserv to communicate in real time, and the website, linked above, to provide information about the Network, developed by co-author Maria R. Volpe and JAMS Inc.'s Niki Borofsky.

MISSION AND GOALS

Embodied in the Network's mission is "the fundamental concept that neutrals with a wide variety of cultural and life experiences—based upon characteristics such as gender, race, ethnicity, age, sexual orientation, and disability—enrich the alternative dispute resolution (ADR) process by bringing diverse perspectives to resolving disputes."

It continues by stating that, "These perspectives stem from a range of personal and professional backgrounds that, in practice, may better serve, instill confidence in, and create greater perceived fairness in the ADR processes offered by, for example, better reflecting the communities served by the neutrals or providing normatively better outcomes for the end-users of those ADR processes."

To that end, the Network's goals are:

1. increasing the awareness of, use, visibility, availability, and selection of diverse neutrals within New York State in all aspects of the ADR field, including on state and federal court rosters and private and community ADR providers and programs;
2. improving the inclusion and growth of prospective diverse neutrals within New York State, while maintaining a focus on increasing the use of existing diverse neutrals; and
3. functioning as a resource for New York State on the topic of ADR inclusion and diversity.

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The full charter, including the material above, is available at www.adrdiversity.org.

EMERGING AGENDA

The Network participants have been laying the groundwork to better understand and promote diversity. Their agenda has been to identify and learn from the challenges and successes in the New York State dispute resolution field and from each other. Additionally, they have been examining what dispute resolvers are doing in other states or contexts to address similar issues within their ranks.

Network members have been creative in sharing the group's work as part of panels at other events. The Network collaborated on a plenary panel discussion organized by the New York State Unified Court System for the 2017 Mediation Settlement Day kickoff event, titled "Diversity and Inclusion in Dispute Resolution, 2.0", taking steps to increase the use, visibility, availability, inclusion and growth of diverse mediators, in conjunction with the New York State Unified Court System and the other sponsors, FINRA Dispute Resolution and the NYC Bar Association's ADR Committee.

Mediation Settlement Day is a nationwide, annual event that raises awareness about the process, highlights the resources available for parties in conflict, and promotes mediation use. See <http://bit.ly/2LaGGRx>. Panelists at the 2017 event included co-author Maria R. Volpe; Niki Borofsky; Fordham University School of Law Prof. John Feerick, who is the school's former dean and director of the Feerick Center for Social Justice; Rekha Rangachari, who is executive director of the New York International Arbitration Center; and Maurice Robinson, EEO Officer, Assistant Director, and Executive Agency Counsel of the New York City Housing Authority.

Three Network members participated at a CLE session on Diversity, Inclusion and Elimination of Bias in Arbitration and Mediation at the Practising Law Institute's Securities Arbitration 2018 program: Princeton, N.J., neutral Laura Kaster and NBC Universal Media LLC Vice President Beth Trent were presenters, and Ken Andrichik, who recently started his own consulting practice after many years as

senior vice president, chief counsel and mediation director at FINRA, moderated. The topics addressed the current state of diversity in the legal profession and ADR, the impact of implicit bias, how diversity can improve dispute resolution processes, and included proposed techniques for enhancing diversity. (Available at <http://bit.ly/2GSwuZR>.)

In addition, the Network has co-sponsored and developed the topics and questions for breakout sessions at New York Law School's 2018 and 2019 annual ADR and Diversity Symposium. This program is led by Network member F. Peter Phillips, an adjunct law professor and director of the Alternative Dispute Resolution Skills Program, at New York Law School. Other co-sponsors included ADR organizations led by founding Network members. See 2019 program at <http://bit.ly/2GTALwa>; see also "CPR News, What is Diversity? Really?" 37 *Alternatives* 34 (March 2019)(available at <http://bit.ly/2GRzC8a>).

At the New York State Council on Divorce Mediation's 2018 annual conference, this article's co-authors, along with fellow Network member Bathabile Mthombeni, University Ombudsman at Binghamton University, Binghamton, N.Y., gave a presentation addressing diversity, inclusion and implicit bias, and discussed the Network's efforts. See "Addressing Diversity, Inclusiveness, and Implicit Bias: Concerns Facing Mediators" (available at <http://bit.ly/2DPq9MX>).

At the 2018 Association for Conflict Resolution for Greater New York (ACR-GNY) annual conference, four Network members—Niki Borofsky; Maurice Robinson; and New York attorney-mediators Jonathan Latimer and M. Salman Ravala—were on a panel on diversity, inclusion and equity in ADR. Additionally, the Network was given a display table that provided another opportunity for members to share the Network's work with attendees. See "Practicing What We Preach: Tips to Facilitate Diversity, Inclusion and Equity in ADR" (available at <http://bit.ly/2IN9LjX>).

The Network co-sponsored last month's 2019 New York International Arbitration Center's NYIAC Talks session, the "2019 Diversity & Inclusion Symposium: The Collaborative Path Forward for Arbitral Institutions and Affinity Groups." It featured Network members Rekha Rangachari and Jeffrey Zaino, an American Arbitration Association vice president, and was conducted with the assistance of Network members Joanne Saint Louis and

Mansi Karol, who are both AAA ADR services directors. (See <http://bit.ly/2PAZ4By>).

The May 2019 event was co-sponsored by NYIAC, the ADR Inclusion Network, the American Arbitration Association's International Centre for Dispute Resolution; *Alternatives'* publisher, the International Institute for Conflict Prevention & Resolution; JAMS Inc., and the U.S. Council for International Business, a longtime advocate for businesses on open markets and regulation, and an affiliate of the U.S. Chamber of Commerce.

In addition to these events, the Network's members have been citing the group at a wide range of ADR events where they have given presentations. And, as the Network's existence becomes known, it is being invited to collaborate with other organizations seeking to shine the spotlight on diversity, inclusion, and equity.

Finally, the Network members are generating information sheets on how best to advance diversity and inclusion in the dispute resolution field. Co-author Sheila Sproule has launched a Best Practices Series. The first tip-sheet will focus on how to make events more diverse and inclusive. All will be posted on the Network's website for easy access.

HIGHLIGHTING THE BENEFITS

Network member Theodore Cheng, a New York neutral, has developed an information sheet for parties in dispute resolution who choose their dispute resolver. Theodore K. Cheng, "The ADR Mosaic: Moving the Conversation Beyond Raising Awareness of Diversity." New York State Bar Association, *Diversity & the Bar* magazine (Fall 2018) (available at <http://bit.ly/2L7fBP4>).

The concept, conceived by his colleague, New York attorney-mediator Stephen Gilbert, at a College of Commercial Arbitrators event while they were together on a diversity and ADR panel, is designed as a one-page handout for parties and their counsel to highlight "the benefits of having a diverse panel of arbitrators."

Informally named the "mindbug sheet", after the term coined by Harvard University Prof. Mahzarin R. Banaji and University of Washington Prof. Anthony G. Greenwald (see Mahzarin R. Banaji, and Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People*. (New York: Delacorte Press, 2013)), Cheng brought the concept to the Network so

that all dispute resolvers could benefit from it and customize it to their “particular provider, court program, or end-user.”

As Cheng notes, the handout ends with this reminder: “Who serves on your panel is one of the most important decisions you will make in your arbitration.”

Within the Network, its listserv and meetings have provided opportunities for members to share notable and time-sensitive developments related to diversity such as the American Bar Association’s adoption of Resolution 105 aimed at increasing diversity in dispute resolution (linked in the first paragraph above); the release of new publications on diversity; efforts by ADR organizations to survey how their users select their dispute resolution practitioners; future diversity and inclusion programs, workshops, events members are involved in or are aware of; other dispute resolution programs’ diversity commitments (see, e.g., the diversity statement from the New York Southern District federal court’s mediation program, headed by Director Rebecca Price, at <http://bit.ly/2UQGzKE>; and the New York Eastern District federal court’s mediation panel application form at <http://bit.ly/2vsULz6>, overseen by ADR Administrator Robyn Wein-

stein); new and recent efforts like JAMS dispute resolution clauses’ diversity inclusion language (available at <http://bit.ly/2GPKDKW>), the CPR Institute’s diversity pledge (available at <http://bit.ly/2UNQArC>), and the American Arbitration Association’s commitment to providing arbitrator lists to parties with at least 20% diverse panelists where party qualifications are met (available at <http://bit.ly/2vsRqzX>).

The CPR Institute also has added a diversity statement to the neutrals’ nomination letter that it sends to parties considering candidates for their ADR matter. The statement in full appears at <http://bit.ly/2PNrw3n>.

The Network’s agenda continues to emerge as its participants explore ways to increase diversity and inclusion in the dispute resolution field. Among the Network’s pending efforts are a diverse speakers’ bureau housed on the Network’s website that would provide a list of talented professionals who are ready, willing and able to speak on the vast variety of dispute resolution processes and to help ensure that program panels are as inclusive as possible; an “ADR Diversity Day” event; a calendar of diversity and inclusion as well as implicit bias events in New York; and a potential “Shadowing Club”

sign-up sheet that allows newer practitioners to gain experience and knowledge, accompanied by a mentorship confidentiality agreement.

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While diversity has historically been addressed in a variety of ways among dispute resolvers—see Marvin E. Johnson and Maria R. Volpe, “Roots of Diversity in Dispute Resolution: Some Preliminary Observations,” *ACResolution*, above—the immediate value of having a collective group of individuals who are knowledgeable about and committed to diversity like those of the ADR Inclusion Network is that there is a wealth of concentrated knowledge that can be shared on instant notice.

Collectively, the Network participants have been building on lessons learned from past efforts and generating ideas for new activities. The hope is that their combined efforts can demonstrate how to walk the talk about diversity and inclusion so that disputing parties, neutrals and ADR organizations can all reap the benefits of diversity and inclusiveness.

The Network aims to amass and model the best practices of diversity and inclusiveness relevant for the dispute resolution field. 



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