

TUESDAY

WEDNESDAY

THURSDAY

FRIDAY

TODAY

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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.



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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 to 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.

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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

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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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