

AMERICAN BAR ASSOCIATION
SECTION OF DISPUTE RESOLUTION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1
2 RESOLVED, That the American Bar Association urges providers of domestic and
3 international dispute resolution to expand their rosters with minorities, women, persons
4 with disabilities, and persons of differing sexual orientations and gender identities
5 (“diverse neutrals”) and to encourage the selection of diverse neutrals; and
6
7 FURTHER RESOLVED, That the American Bar Association urges all users of domestic
8 and international legal and neutral services to select and use diverse neutrals.

Report

Background

The American Bar Association has set forth four Goals of equal weight and importance to supporting the ABA Mission. Goal III, adopted in 2008, is to “eliminate bias and enhance diversity,”¹ and is derived from and expanded on former Goal IX, which, as amended, was “to promote the full and equal participation in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” Goal III (and former Goal IX) recognizes that clients and the public are better served when organizations are diverse and inclusive at every level.² Goal III also recognizes the well-established business case for diversity and inclusion, and demonstrates that clients, the legal profession and society are best served when lawyers reflect the broader community in which they serve.³

It is well established that, despite significant efforts, the legal profession as a whole lags behind other professions regarding diversity and inclusion. As of 2012, African Americans and Hispanics comprised 16.5% of accountants and auditors, 18.9% of financial managers, 12.3% of physicians and surgeons, but only 8.4% of attorneys.⁴

¹ Goal III: Eliminate Bias and Enhance Diversity. Objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system. American Bar Association. “ABA Mission and Goals.” http://www.americanbar.org/about_the_aba/aba-mission-goals.html (April 14, 2016).

² Of course, definitions of diversity differ around the world and include categories such as religious diversity, age diversity, regional diversity, cultural diversity, and geographic diversity, as well as categories of underrepresented groups on a country-by-country basis. See White & Case, *2018 International Arbitration Survey* at 16-18. Without prejudice to any potentially positive impact on diversity and inclusion, this resolution seeks only to address diversity as set forth in Goal III, as amplified by former Goal IX.

³ See, e.g., Luis Diaz and Richard Meade, *What Gets Measured Gets Done: The Case for Uniform D&I Metrics in The Legal Procurement Process*, New Jersey State Bar Association Diversity Committee Newsletter, September 2015; Mark Roellig, James DeGraffenreid Jr., and Minehan Cathy, *Fixing What’s Broken: Strategies for Increasing Diversity in Law Firms*, ACC Docket, March 2015; Mark Roellig, *WHY Diversity and Inclusion Are Critical to the Success of Your Law Department* (paper presented at the PLI Corporate Counsel Institute, New York, New York, October 2012); and Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr, and Christopher A. Kwock, *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining and Advancing in the ADR Field*, 35 *Fordham Urb. L.J.* 119, 122 (2007).

⁴ Raising the Bar: An analysis of African American and Hispanic/Latino diversity in the legal profession, Microsoft Study, (2013). For an event broader view of diversity in many professions, see Demographic Summary, Elizabeth Chamblis, ILLP Review (2014) at 13 (“Aggregate minority representation [defined as African American, Asian American, Hispanic and Native American] among lawyers is significantly lower than minority representation in most other management and professional jobs. Based on Department of Labor statistics, minority representation among lawyers was 14.4% in 2013, compared to 27.8% among accountants and auditors, 38.2% among software developers, 24.3% among architects and engineers, 31.8% among physicians and surgeons, and 25.8% within the professional labor force as a whole.”) See also *The Diversity Crisis: What is Wrong with This Picture?*, American Lawyer, May 29, 2014.

Women, members of racial and ethnic groups, members of LGBTQ groups, and attorneys with disabilities continue to be underrepresented in the legal profession. Data as a whole show some progress over time—as of December 2016, minorities represented 16% of law firm associates, partners and counsel and 35% of all law firm attorneys were female.⁵ However, data at more senior levels of the profession and for certain diverse groups present a bleaker picture. In the words of the 2017 Vault/MCCA Law Firm Diversity Report, even as firms have become more diverse and minority representation is at an all-time high, “the demographic shifts are both incremental and uneven” and “composition of the partnership ranks highlights the slow rate of change”:⁶

[E]ven though one in four law firm associates is a person of color, more than 90 percent of equity partners are white. Among women, the figures are especially stark: women of color represent 13 percent of associates but less than 3 percent of equity partners.”⁷

In support of implementing Goal III to eliminate bias and enhance diversity, in August 2016 the House of Delegates of the American Bar Association adopted Resolution 113 urging that “all providers of legal services, including law firms and corporations expand and create opportunities at all levels of responsibility for diverse attorneys,” and further urging “clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”

Summary

This Resolution addresses elimination of bias and enhancing diversity in Dispute Resolution—a segment of “legal”⁸ services that has been described as “arguably the least diverse corner of the profession.”⁹ As set forth below, the available data show that diversity within Dispute Resolution significantly lags the legal profession as a whole. Despite significant efforts on the part of institutional providers of dispute resolution services to increase the diversity of their rosters, see n. 11 *infra*, diverse neutrals remain underrepresented (the “roster issue”). The roster issue is compounded by the fact that qualified diverse neutrals are less likely to be selected due to the network-based and confidential nature of the profession, which in combination, results in selection of neutrals taking place in relative obscurity, enabling implicit bias to play a greater role in selection (the “selection problem”). This lack of transparency also undermines potential efforts to address the selection problem. By leaving recommendations and referrals

⁵ 2017 Vault/MCCA Law Firm Diversity Report at 4. <https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf>

⁶ *Id.* See Debra Cassens Weiss, *Law lags other professions in minority hiring; which group is most dramatically underrepresented?*, ABA Journal, December 11, 2013.

⁷ See Daniella Isaacson, *Diversity in Big Law Means More Than Gender*, Law.com, June 17, 2017 (“It is no secret that Big Law remains painfully stagnant.”)

⁸ Unlike other “legal” services, dispute resolution services are provided by both lawyers and non-lawyers.

⁹ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit in Diversity*, Law 360 (2016) at 4.

largely in the hands of outside counsel and established neutrals, it reduces the role that clients can play in addressing the problem by including Dispute Resolution in their larger efforts to improve diversity in the legal profession. In addition, the lack of transparency reduces public awareness of lack of diversity in Dispute Resolution, and thus also reduces the incentive of stakeholders such as outside counsel, institutional service providers and established neutrals to take proactive steps without client pressure. By raising awareness of the lack of diversity in Dispute Resolution, the proposed resolution will encourage all stakeholders to take action.

I. Data demonstrate that diversity within Dispute Resolution is significantly below that of the legal profession as a whole.

It is to be expected that diversity and inclusion issues faced by the legal profession as a whole would be largely reflected in subsets of the profession. Unfortunately, for the Dispute Resolution community of diverse mediators, arbitrators, and other dispute resolution practitioners (collectively, “diverse neutrals”), “ADR has been a stubborn enclave of homogeneity”¹⁰ and simply achieving the “incremental and uneven” advances achieved by the legal profession as a whole would be a great leap forward.¹¹ Despite significant efforts by organizations and individuals within the Dispute Resolution community to address the lack of diversity,¹² the Dispute Resolution profession lags significantly behind the legal profession as a whole.

A. Representation of diverse groups on the rosters of dispute resolution providers is significantly lower than representation of diverse groups in the legal profession as a whole.

Due to the confidentiality and privacy issues that are integral to most dispute resolution processes, data on the diversity of neutrals within Dispute Resolution are scarce. In fact, yearly statistics of the type collected for the legal profession as a whole are almost

¹⁰ *Id.*

¹¹ See *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR* <http://www.nysba.org/WomensTaskForceReport>. see also Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service* (March 20, 2017), CPR Website and New York Law Journal; Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law360 (2016); Beth Tren, Deborah Masucci, Timothy Lewis, *The Dismal State of Diversity: Mapping a Chart for Change*, DISP. RESOL. MAG., Fall 2014; Andrea Kupfer Schneider & Gina Viola Brown, *Gender Differences in Dispute Resolution Practice*, DISP. RESOL. MAG., Spring 2014; F. Peter Phillips, *Diversity in ADR. More Difficult to Accomplish than First Thought*, DISP. RESOL. MAG., Spring 2009.

¹² For over a decade, certain Dispute Resolution institutions and diverse neutrals, cognizant of the diversity issues, have worked to improve diversity in the profession. For example, in 2006, the International Institute of Conflict Prevention and Resolution (the “CPR Institute”) convened the National Task Force on Diversity in ADR and, in 2007, the Diversity Task Force, created an ADR Diversity Survey to assist corporations in holding their law firms accountable for improving diversity in Dispute Resolution. In 2013, CPR created a “Diversity Matters Pledge,” allowing companies and individuals to recognize the value of diversity and inclusion not only in their workforce, but also providers of services including arbitration and mediation. The American Arbitration Association established its Leon Higginbotham Fellowship in the early 2000’s to train and promote diverse neutrals, and requires its case managers to create neutral candidate lists for parties that are at least 20% diverse. See also nn. 14, 22 and 32, *infra*.

non-existent.¹³ The data that can be found consistently reveal that representation of women and members of racial and ethnic groups on rosters of neutrals is below that of the legal profession as a whole.

As of 2015, FINRA became the only dispute resolution service provider that gathers and publishes comprehensive demographic data regarding its roster on a year-over-year basis. FINRA has made a strong commitment to enhancing diversity on its roster.¹⁴ However, FINRA itself describes this process as “incremental,” in part because in 2015, its roster as a whole, based on responses by FINRA neutrals to an outside survey, was 75% male and 86% Caucasian.¹⁵ Less comprehensive data from other dispute resolution service providers show lower levels of diversity. JAMS, a nationwide provider of dispute resolution services, reports on its website that 22% of the neutrals on its roster are women and 9% are persons of color.¹⁶ The American Arbitration Association, another major ADR provider, reported that women and minorities comprised 25% of its roster in 2017.¹⁷ In a 2012 survey, the National Arbitration and Mediation (NAM), another nationwide ADR provider, found that its roster was 16% female and 14% nonwhite.¹⁸ In 2016, the New York-based CPR Institute reported that its roster of more than 550 neutrals worldwide was approximately 15% female and 14% nonwhite.¹⁹

Viewed in the context of the Vault/MCCA Law Firm Diversity Survey,²⁰ the roster data available from FINRA, JAMS, AAA, NAM and CPR indicate that gender and racial/ethnic diversity of institutional providers of dispute resolution services is likely to be less than one-half that of law firms.²¹

¹³ See, e.g., Andrea Schneider, *The Business of ADR—And Lack of Diversity*, indisputably.org, October 5, 2016 (“Statistics are hard to come by and most ADR organizations are reluctant to provide data on their panels.”)

¹⁴ As a result of FINRA’s efforts to increase the diversity of its roster, the FINRA survey results show that of the new arbitrators who joined the roster in 2016, 26% were members of racial and ethnic minorities (29% in 2015) and 33% were women (26% in 2015). Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA <https://www.finra.org/arbitration-and-mediation/diversity-and-finra-arbitrator-recruitment>.

¹⁵ *Id.*

¹⁶ <https://www.jamsadr.com/diversity/>.

¹⁷ AAA 2017 B2B Dispute Resolution Infographic.

¹⁸ Hancock at 12.

¹⁹ *Id.*

²⁰ Vault/MCCA Survey data indicate that 2.5 % of law firm attorneys are openly gay, lesbian, bisexual or transgender. Roster data for members of LGBTQ groups within Dispute Resolution is unavailable. According to the Vault/MCCA Survey, reliable data for attorneys with disabilities in the legal profession as a whole is unavailable and that is also the case for Dispute Resolution. See Benjamin G. Davis, *Diversity in International Arbitration*, Dispute Resolution Magazine (Winter 2014) (“there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration”). <https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf>.

²¹ It has been suggested that Dispute Resolution suffers from a “chronological lag” and “reflects a legal industry not as it looks today, but as it appeared a decade or more ago.” See Hancock at 6. However, law school and law firm diversity data show greater diversity than that seen in Dispute Resolution for

B. Qualified diverse neutrals are less likely to be selected.

The challenges faced by diverse neutrals go beyond significant underrepresentation on rosters. Available data demonstrate that, even when they succeed in being added to rosters, qualified women and members of racial and ethnic groups are selected to serve as neutrals at levels below their representation in the profession. For example, in its 2015 Key Statistics, the AAA reported that 26% of arbitration cases had a diverse arbitrator.²² Low as that number is, if you look behind the aggregate numbers to the distribution of cases for which diverse neutrals are selected, the problem is actually worse:

[A]vailable statistics mask the true extent of the problem. Even if providers have a diverse roster of people to choose from, what matters is who ultimately wins the work from attorneys and clients. Many sources agreed that, within the realm of business disputes, there is a small pool of ‘repeat players’ who are predominantly white and male.²³

In July 2017, a report by the Commercial & Federal Litigation Section of the New York State Bar Association noted, in particular, the low rate of selection of female neutrals for high-value cases:

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, ‘the more high-

decades. Data from the ABA Commission on Women in the Profession shows, for example, that women have comprised close to 50% of JDs awarded for well over a decade. https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017_authcheckdam.pdf. Meanwhile, the Vault/MCCA data cited previously also shows extreme disparity that has lasted for well over a decade. <https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf>.

²² Berwin Leighton Paisner, *Diversity in International Arbitration: Are We Getting There?* (Feb. 2017). Data from the international arbitration arena supports this conclusion as well. International Chamber of Commerce (“ICC”) statistics for 2015 indicate that women represented 10% of all appointments and confirmations. ICC data on arbitral appointments for 2016 shows that, as of November 2016, only 20% of arbitrators appointed were women. London Court of International Arbitration (“LCIA”) statistics show that, in 2015, the number of female candidates selected by the LCIA was 28.2% (compared to 19.8% in 2014). Statistics from the Chartered Institute of Arbitrators indicate that, of the 222 arbitrators qualified to be on the panel from which presidential appointments are made, only 16 (7%) are women. As the overwhelming number of men appointed are Caucasian, there are few statistics on minority ethnic and racial representation on international tribunals. http://www.blplaw.com/media/download/FINAL-Arbitration_Survey_Report.pdf. In recognition of the under-representation of women on international arbitral tribunals, members of the international arbitration community drew up an “Equal representation in Arbitration” pledge (“the Pledge”) to take action. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity. This Pledge has been signed by the Section on Dispute Resolution, as well as the Section of International Law and the Section of Litigation. <http://www.arbitrationpledge.com/about-the-pledge>.

²³ Hancock at 8.

stakes the case, the lower the odds that a woman would be involved.’ [Citation omitted.] Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men. [Citation omitted.] Another survey estimated that women arbitrators were involved in just 4% of cases involving one billion dollars or more.” [Citation omitted.]²⁴

The 2014 survey by the ABA’s Section on Dispute Resolution is particularly revealing. Data from that survey show an inverse relationship between the amount of money in dispute and the proportion of women selected as a neutral.²⁵ The survey also shows that selection rates for male neutrals are exceptionally high (and, conversely, low for female neutrals) for corporate and commercial matters (82% male) and class actions (79% male).²⁶ In contrast, only 42% of neutrals involved in cases that were primarily nonmonetary were male.²⁷

This selection problem has at least two major ripple effects. First, it exacerbates the roster issue because it is difficult to increase the diversity of rosters when potential recruits are aware that they are less likely to be selected, particularly for the higher paying cases. It simply may not be economically rational to invest in the requisite training and developing the experience to become a neutral in the face of reduced opportunity to build an economically viable practice. Second, low levels of diversity in neutral selection “show the profession falling significantly short of federal courts,”²⁸ which can call into question the legitimacy of the private justice process:

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.²⁹

²⁴ *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*, July 2017, at 10.

²⁵ See Gina Viola Brown and Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice*, Report on the ABA Section of Dispute Resolution Practice Survey, (January 31, 2014), at Chart 17.

²⁶ Hancock at 5 (“Diversity is especially paltry in high-stakes disputes where neutrals can command rates topping \$25,000 a day.”)

²⁷ Brown and Schneider at 14-16.

²⁸ Hancock at 7; See also Laura Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, Corporate Disputes (January-March 2015) (“[S]tate and federal courts, which are still struggling to improve, have close to 30 percent women (although fewer minority) judges.”)

²⁹ David H. Burt and Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity*, ACC Docket (October 2013) at 41. See also *ADR Conversations – Increased Diversity in ADR Essential to Keep Up With Evolving Global Marketplace*, JAMS Dispute Resolution Alert Winter 2012, at 4 (“When a dispute is resolved in the court system, the jury and the judge available to resolve the dispute are diverse. The private justice system that provides mediation and arbitration services must be just as, if not more, diverse if it is to maintain credibility.”); see also Volpe at 122 (“Studies show that individuals involved in dispute resolution processes feel more comfortable when they share some aspect of their identity with those guiding the process.”) See also *What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long- Term Outcomes*, Maryland Judiciary Administrative Office of the Courts, Court Operations. (2016). *What Works in District Court Day of Trial Mediation:*

For these reasons, the individual and societal impacts of the low level of diversity in Dispute Resolution cannot be remedied by addressing the roster issue alone.³⁰ Simply put, despite the underrepresentation of diverse neutrals on provider rosters, qualified diverse neutrals are practicing today and can be easily identified.³¹ To improve diversity in Dispute Resolution, it is essential to create an environment in which we can address the drivers behind the low levels of selection of diverse neutrals.³²

II. A network-based culture, reinforced by implicit bias and cloaked in confidentiality, reduces selection of diverse neutrals.

Commentators have identified two issues in particular that appear to be primary drivers of low levels of selection of diverse neutrals for cases. First, the practical reality is that Dispute Resolution is largely a network-based profession in that: (1) many neutrals are

Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes. Annapolis, MD: Author (“Having at least one ADR practitioner in the session who matches the race of the responding participant was positively associated with participants reporting that they listened and understood each other in the ADR session and jointly controlled the outcome and an increase in a sense of self-efficacy (ability to talk and make a difference) and an increase in the sense that the court cares from before to after the ADR session. Here it is important to note that participants were never asked about their opinion on the role of race or the ADR practitioner’s race. Participants were asked their race, ADR practitioners were asked their race, and based on these answers, a variable was created identifying if there was a match. This was included in the analysis and was found to be significant in these two areas, even after holding constant for other factors in the case, including ADR practitioner strategies.”); Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. Rev. 721, 750-52 (2017)(a person is less likely to view a mediation as fair if everyone else in the room is a different demographic—and especially if all of the others share the same demographic.)

³⁰ See Beth Trent, Deborah Masucci, and Timothy Lewis, *The Dismal State of Diversity: Mapping a Chart for Change*, DISP. RESOL. MAG., Fall 2014, at 21; Marvin E. Johnson & Maria R. Volpe, *The Color of Money: Compensation Opportunities and Barriers*, DISP. RESOL. MAG., Summer 2017, at 14; Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429 (2015); Benjamin G. Davis, *Diversity in International Arbitration*, DISP. RESOL. MAG., Winter 2014, at 13, 13; Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., Spring 2012, at 22; Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, DISP. RESOL. MAG., Spring 2009, at 17; Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119 (2008); F. Peter Phillips, *ADR Continental Drift: It Remains a White, Male Game*, NAT’L L.J. Nov. 27, 2006.

³¹ The Women in Dispute Resolution Committee of the ABA Dispute Resolution Section has published a directory of its members for the past several years. See WIDR Member Directory of ADR Practitioners. https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/widr_directory2017.authcheckdam.pdf. Similarly, the Diversity Committee publishes the Minorities in Dispute Resolution Directory. https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/MIDR-Directory.authcheckdam.pdf. The College of Commercial Arbitrators, one of the premier arbitration organizations in the US, which selects Fellows through a thorough application process, has invited a significant number of female Fellows into its rank. A list of all Fellows can be found on its website.

³² Theodore K. Cheng, *The Case for Bringing Diversity to the Selection of ADR Neutrals*, NYSBA New York Dispute Resolution Lawyer (Summer 2016) at 19 (In the case of private ADR providers, we are facing “a double-screen problem: a neutral must generally first be appointed to a roster or list, and then either outside counsel or in-house counsel must select the neutral from that list.”)

chosen or at least vetted through the networks of equity law firm partners, and (2) established neutrals are often asked to make referrals to other neutrals. In both cases, the networks are largely white and male, and the recommendations and referrals subject to implicit bias. Second, the confidentiality and privacy that are integral elements of most dispute resolution processes reduce public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change—clients.

A. The network-based culture broadens the impact of implicit bias.

Neutral appointment and selection processes vary by dispute resolution providers, and are often customized by the parties. Regardless of the formal process applicable to a dispute, however, neutrals are predominantly hired based on the consent of the parties. Thus, they are often informally vetted and selected through a classic informal “old boy network” through which colleagues consult one another for recommendations:

Companies largely continue to outsource both the drafting of dispute resolution clauses and the actual neutral selection to outside counsel, abdicating these fundamental strategic decisions to others. Far too much reliance is placed on established networks, word-of-mouth, and the recommendations of the same ‘usual suspects,’ leading to a reluctance to try out someone new and an attendant loss of opportunity to broaden the company’s roster of preferred neutrals.³³

It is natural and indeed common for people to recommend and select those with whom they are most familiar. However, it has been suggested that “[t]his dynamic, flows at least partly from a sense among attorneys that retired judges and veteran litigators, a largely older, white and male cohort, are the most palatable figures to clients when pursuing a dispute outside of the courtroom.”³⁴ Unfortunately, this tendency is reinforced by implicit biases to which we are all subject and that often lead even well-meaning individuals to

³³ Cheng at 19. See Gender Diversity in Arbitrator Selection, Deborah Rothman, Dispute Resolution Magazine, (Spring 2012) at 24 (“Even when women manage to get recruited to the arbitration panels of major ADR providers, they are not as likely to be selected as their male counterparts. When they receive a strike list of ten potential arbitrators, the law firm drill is to circulate an internal memo to get feedback on the names on the list.”) See also 2018 International Arbitration Survey at 20 (survey responses show “how important it is for parties and their in-house or external counsel to be part of a sophisticated network of peers so that all relevant information is potentially just a few phone calls away.”)

³⁴ See Implicit Bias and the Legal Profession’s ‘Diversity Crisis’: A Call for Self Reflection, Nicole Negowetti, Nevada Law Journal, 432, at 436-442 and 447-451, 2015. See also Debra Cassens Weiss, *Partners in study gave legal memo a lower rating when told the author wasn’t white*, ABA Journal (April 21, 2014) (Leadership consulting firm Nextion conducted an experiment to demonstrate implicit bias in evaluation of legal work by recruiting partners from a large number of firms to review a legal memo in a “writing analysis survey.” All of the partners were given the same memo, in which Nextion inserted errors. Half of the reviewers were told that the memo was written by a white man named Thomas Meyer and half were told that it was written by a black man named Thomas Meyer. The reviews gave the memo supposedly written by the white Thomas Meyer an average rating of 4.1 out of 5, and generally praised his work. Reviewers gave the memo written by the black Thomas Myer an average rating of 3.2 out of 5, and criticized the memo as average at best and needing a lot of work.)

pass over those who are “different.”³⁵ The network-based culture and implicit bias, operating in tandem, are key drivers of the low levels of diverse neutrals actually selected for better-paying commercial matters—levels that are much lower than diversity in Dispute Resolution, as well as diversity in the legal profession as a whole.³⁶

B. Confidentiality and lack of transparency inhibit effective solutions to the lack of diversity in Dispute Resolution.

The effects of a network-based culture and implicit bias are compounded by the confidentiality and privacy that are important elements of mediation, arbitration and other dispute resolution processes. Confidentiality (often cited as the reason for the lack of data) inherently reduces public awareness of the low level of diversity and inclusion in Dispute Resolution, and thus, public pressure for change. But the problem extends beyond lack of public awareness. The tendency of companies to outsource neutral selection to outside counsel creates a functional lack of transparency to clients regarding diversity issues in Dispute Resolution. That lack of transparency, in turn, undermines the ability of clients to act as agents of change. Consequently, clients often fail to focus on enhancing opportunities for diverse neutrals as part of their broader and influential efforts to enhance diversity in the legal profession. This is particularly harmful because inside counsel have a special ability to require greater diversity—for example, through the use of tools such as Outside Counsel Guidelines.³⁷ Greater client focus and willingness to require change are essential to driving the changes necessary to improving diversity in Dispute Resolution:

Achieving real progress will not only require continued attention from providers in terms of recruiting and supporting women and minority mediators and arbitrators, but also clients who are willing to ask questions that perhaps they haven't in the past. This includes questions from corporate counsel to their law firms and from outside counsel to ADR providers. It will take willingness for clients to go beyond using the same people from the same short list. It will take ensuring that there is a sufficient pipeline of women and minorities that know what it takes to prepare for a career as a successful mediator or arbitrator.³⁸

³⁵ Hancock at 10.

³⁶ While implicit bias is an issue for all diverse groups, it has been suggested that the risk of implicit bias increases at lower levels of representation. See Isaacson at 1 (“Take minorities, for instance. As seen in the graph below, the threat of implicit bias for minority groups is even higher than it is for women, due to their lack of representation.”)

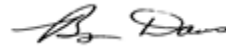
³⁷ *ADR Conversations – Increased Diversity in ADR Essential to Keep Up With Evolving Global Marketplace*, JAMS Dispute Resolution Alert (Winter 2012), at 4 (“As legal departments enter into professional relationships with law firms and other legal vendors, they include diversity as a criterion for engagement, and the policy should be extended to requiring consideration and selection of mediators and arbitrators with diverse backgrounds”); see also Mark Smalls, *A Fresh Look at Diversity in ADR*, Law360 (December 13, 2012) (“One need only look at the pressure that various corporate clients put on their outside counsel in recent years regarding hiring, promotion and case assignments to see how paying attention to diversity can lead to securing (or losing) business.”)

³⁸ Smalls at 2.

Conclusion

To enhance diversity and inclusion in Dispute Resolution, it is essential to shine a spotlight on the low level of diverse representation on neutral rosters and the special challenges created by the combination of the network-based culture within the profession, implicit bias, and the confidentiality that tends to obscure the degree to which Dispute Resolution lags behind the legal profession as a whole. By explicitly linking ABA Goal III to Dispute Resolution, this Resolution provides precisely the spotlight needed to encourage active engagement on the part of all stakeholders with the ability to move the needle to increase representation of diverse neutrals on rosters, and to enhance their likelihood of success in the selection process.

Respectfully Submitted,



Section Chair, Ben Davis
Dispute Resolution Section
August, 2018

GENERAL INFORMATION FORM

Submitting Entity: Section of Dispute Resolution

Submitted By: Benjamin G. Davis, Chair of the Section of Dispute Resolution

1. Summary of Resolution: The resolution urges (a) providers of domestic and international dispute resolution to expand their rosters with diverse and to encourage the selection of diverse neutrals; and (b) users of domestic and international legal and neutral services to select and use diverse neutrals.

2. Approval by Submitting Entity: This Resolution and Report was formally approved by a vote of the Section of Dispute Resolution Council during its meeting in Washington, D. C. on February 9, 2018.

3. Has this or a similar resolution been submitted to the House or the Board Previously? This specific resolution has not been previously submitted. In 2016, however, the HOD adopted a resolution for the ABA to urge (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys. In addition, in 1986, the HOD adopted a resolution for the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.” The instant resolution is the logical progression of the 1986 and 2016 resolutions passed by the HOD and is necessary to further advance diversity and inclusion in Dispute Resolution.

4. What Existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The relevant policies are referenced in the Background section of this Report: specifically, Goal II, “improving our profession,” and Goal III, “eliminate bias and enhance diversity.” Adopted in 2008, Goal III objectives are to: “1. Promote full and equal participation in the association, our profession and the justice system by all persons. 2. Eliminate bias in the legal profession and the justice system.” The Section of Dispute Resolution’s proposed policy resolution supports ABA Goals II and III.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Dispute Resolution Section is developing tools for systematic collection of data addressing the issues set forth in the Report in order to provide a foundation to identify, develop, and implement more effective approaches to enhancing diversity. In addition, the Section intends to seek opportunities to collaborate with both the Commission on the Status of Women in the Profession and the Commission on Racial and Ethnic Diversity to better assure that diversity in Dispute resolution is an integral element of efforts to enhance diversity in the legal profession as a whole.

8. Cost to Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable) N/A

10. Referrals.

All SDFs and All Commissions
National Bar Association
Hispanic National Bar Association
National Asian Pacific Bar Association
National Native American Bar Association

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This particular Resolution focuses on expanding representation of diverse neutrals on the rosters of providers of domestic and international dispute resolution and encourages users of domestic and international dispute resolution legal and neutral services to promote and support the selection thereof. The Resolution is a continuation of the policies adopted previously by the American Bar Association addressing the need for diversity in the selection and use of diverse individuals in the provision of professional dispute neutral services in Resolution 113 and in furtherance of Goal III.

2. Summary of the Issue that the Resolution Addresses

This Resolution encourages and supports the selection of diverse dispute neutrals.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This proposed policy position addresses the issue through the encouragement and support of hiring diverse dispute neutrals by lawyers, law firms, and dispute resolution service providers.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

The Section of Dispute Resolution is unaware of any minority views or opposition, either internal or external, to this proposed policy.