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Diversity Matters

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The Lack of Diversity in ADR —and the Current Beneath

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Private dispute resolution through mediation and arbitration is an important complement to the public court processes that are the fallback. However, the selection of neutrals by private parties has none of the oversight provided by the public appointment or electoral systems. Nor has it been the subject of well-accepted corporate norms that require law firms (and other service providers) themselves to improve diversity and accept that better outcomes occur with a diverse workforce. Because the American Inns of Court are dedicated to civility, professionalism, and excellence, we are a good place to foster increased diversity in the alternative dispute resolution (ADR) field.

As a point of comparison, consider the U.S. federal judiciary, where the lack of diversity remains despite recent improvements. Compared with the U.S. population, women and minorities have long been underrepresented. As tracked by the Federal Judicial Center, during the judiciary's 225-year history, approximately 3,294 individuals have been appointed to various levels of the Article III system. Of those, women have composed only 12.4 percent and minorities only 11.5 percent. Currently, there are 1,350 sitting federal judges, of which women compose about 33 percent and people of color only 20 percent. However, diverse appointments to the federal bench have increased markedly in recent years. As of July 31, 2015, President Barack Obama had appointed more women and minorities in total than any other president before him (with the exception of African-Americans, of whom President Bill Clinton had appointed two more), according to the Minority Corporate Counsel Association. Obama

appointed more Asian-Pacific Americans than the combined total of all prior administrations, and he appointed 130 women, while an aggregate total of 294 had been appointed by all presidents before him. Notwithstanding these accomplishments, the federal courts still have a long way to go if they are truly to reflect the communities they serve.

For ADR neutrals, the situation is dismal: Far less progress has been made and a stubborn lack of diversity persists, although precise empirical data is lacking due to its principally private and confidential nature. Parties who are already in a dispute must agree to select an individual or a panel of neutrals, and the professionals who recommend these choices naturally want to foster the best outcomes for their clients. Thus, they are inclined to go forward with neutrals they know or can best (or easily) research. Many of the advisors who select neutrals for the resolution of business

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disputes are professionals in law firms, and many of them are male and white. The resulting selections have made ADR a bastion of a dated social order that badly needs to change.

A pair of Law.com articles from 2016 sets out vastly different statistics for the U.S. federal courts (where, for example, in excess of 30 percent of judges are women) and for ADR (where, in cases involving disputes over \$500,000, less than 30 percent of selected neutrals are women, and for international disputes, well under 20 percent). In one of the articles, the author talks about a time lag, stating that a large number of selected neutrals are retired judges or attorneys, which results in a smaller pool of diverse neutrals because that pool “reflects the legal industry not as it looks today, but as it appeared a decade or more ago.” This statement, if true, reflects the operation of implicit bias. There is no reason that neutrals need to attain some abstract august retirement age, and many lawyers—indeed, many diverse lawyers—have a great deal of practice and other experience before they reach retirement and are highly capable neutrals. In many cases, they have enough experience to be appointed to the judiciary themselves long before they contemplate retirement. The pipeline argument that the article posits is simply false. If there are enough women and minorities to make up respectable percentages in the judiciary, then there are just as many accomplished female and minority lawyers who can ably serve as neutrals.

Admittedly, implicit, unconscious bias is difficult to address. As recognized in a recent report by the Brennan Center for Justice, “Our stereotyping mechanism is not easily turned off, even when we want to pull the plug on it, as in the case of gender biases. Merely voicing support for gender equality is not transformative—our brains’ deeply engrained habits do not respond on cue.” The report concluded that we need to become more aware of our own stereotyping mechanisms, be motivated to correct them, and have sufficient control over our responses in order to be able to correct them.

In order to get a more diverse pool of neutrals into the mix, we have to alter perception and knowledge. Big Law needs a new model. We should strive to find a better way to make the larger pool of neutrals known rather than rely solely on the “Old Boys’ Network”.

To be sure, retired judges feel like a safer bet—akin to choosing IBM for your technology problem—because there is more information available about them to gather and review, and more people to ask about how they performed. After all, their

written decisions are publicly available and easily retrievable. But rather than allow that proxy to overtake the selection process, we have to make more information available about neutrals who have not served as judges. The International Mediation Institute has begun an effort to do just that in the mediation arena. Certification of its mediators requires evaluations by at least ten participants and excerpts of the evaluations are available online. The satisfaction of users can be assessed and the style of the mediator may be mentioned. Comparable information on arbitrators is perhaps a bit more difficult to obtain because one party would have lost in every case, which would possibly slant the evaluations. But if lawyers are able to evaluate the performance of judges, then why can they not do so for arbitrators? It is the reputation and experience of others that now heavily influences the selection of ADR neutrals. We must work towards increasing both the quantity and quality of the available information about these individuals so that, in turn, a larger number of them can be considered when the opportunity for selection arises.

ADR providers have long understood and lamented this problem, and some are undertaking bold steps in hopes of fostering improvement. As reported by Law.com, within the last three years, the American Arbitration Association (AAA) launched an initiative requiring that 20 percent of neutrals on lists provided to the parties be women or people of color. In 2009, the AAA also created the A. Leon Higginbotham, Jr., Fellows Program as a way to provide training, mentorship, and networking opportunities to up-and-coming diverse ADR professionals. Through that program, coupled with its other diversity and inclusion recruitment efforts, about one-third of the AAA’s new panelists in 2016 have been women and minorities, according to Law.com. Earlier this year, the International Institute for Conflict Prevention and Resolution (CPR Institute), working in conjunction with the Leadership Council on Legal Diversity and the Financial Industry Regulatory Authority, also launched a Dispute Resolution Fellows Program, to afford opportunities to emerging women and minority ADR neutrals. These initiatives help expose women and minority neutrals to those who are in the position to make selections on ADR matters, and assist in promoting and developing the careers of those who have historically been denied a meaningful opportunity to participate in this field.

Raising awareness among corporate users of ADR who already impose diversity metrics and requirements in other areas is also tremendously helpful.

Several years ago, the CPR Institute promulgated a Commitment on Diversity, calling upon companies and law firms to implement a commitment to diversity and inclusion in the selection of neutrals by asking outside law firms and their counterparties to “include qualified diverse neutrals among any list of mediators or arbitrators they propose” and doing the same in lists they provide. In 2015, the Equal Representation in Arbitration pledge was devised to address the under-representation of women on international arbitral tribunals. It “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.” The pledge now has nearly 1,500 signatories, of which over 260 are corporations, law firms, and other organizations, including a growing list of U.S. firms, institutions, and companies. Notably, arbitral institutions and associations have also signed on, including the Chartered Institute of Arbitrators, the CPR Institute, the Hong Kong International Arbitration Centre, the

International Centre for Dispute Resolution, the ICC International Court of Arbitration, JAMS, the London Court of International Arbitration, the Silicon Valley Arbitration and Mediation Center, and the Singapore International Arbitration Centre.

All of these efforts are significant, and, in the aggregate, may lead to heightened awareness and improved diversity in the ADR field. But they are not enough. ADR is the privatization of what many consider to be a public function and must reflect diversity and inclusion. As members of the American Inns of Court, we are well-placed to make this a focus for court-related programs and for our own practice in mentoring and monitoring improvement in the ADR field. ♦

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