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We Need More Diversity In Mediation

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Law360, New York (March 15, 2013, 12:22 PM ET) -- Imagine two parties locked in a bitter and acrimonious dispute that has gone through six years of hotly contested litigation. Claims of contract and fiduciary breach, unjust enrichment, waste and fraud have been hurled back and forth. At issue are the ownership and control of at least a dozen New York commercial and residential properties valued in the tens of millions of dollars. There have been multiple appearances, depositions, motions, referrals to referees for hearings and the prospect of more of the same, both scheduled and unscheduled, ad infinitum.

The litigants in this case were associated for nearly 40 years and had built up this large real estate enterprise from scratch. Unfortunately, they had a major and seemingly irreparable falling-out. They were now perfectly willing to do legal battle until the last man was left standing. One of the litigants was a Latino immigrant, who felt deeply wronged by his former partner. While he was somewhat fluent in English, he often drifted into Spanish when he fumed with his attorney who was minimally conversant in that language. They were no closer to resolving this case than they had been at its commencement.

It is an axiom of mediation that emotional forces can disrupt communication and produce nonproductive, if not outright irrational, decision-making. Apparently, that was what was happening in this case. Although the broad outlines of the settlement should have been apparent to both sides for a long time, what was missing was the ability of a mediator to get beyond the parties' and, in particular, the Latino litigant's huge emotional investment. Luckily, this case recently settled with the assistance of a mediator who was Latino and fluent in Spanish.

What altered the negotiations was that the mediator almost always spoke in Spanish with this litigant and always listened very carefully to what he said and to what he did not say. Indeed, it has been said in the mediation context that "people can't really listen until they've been heard." It took conversing with this litigant in his primary language, hearing and empathizing with his struggle to come to America, settle here and build this enterprise — and not merely poring over contracts, ledgers, mortgages and deeds — to allow him to feel that he "had been heard."

At first small talk and then more in depth conversations about extraneous matters such as family, politics, holidays, even Latin cuisine, became critical in gaining the trust necessary for this tough businessman to see the mediator as a truly neutral deal broker who could help resolve this litigation, which involved his life's work and had completely consumed him. The cultural connection between the mediator and the litigant positively affected the litigant's confidence that his views were being understood and respected, and this allowed him to eventually agree to a compromise with his former business partner. This settlement, however, would be a rarity in today's world of alternative dispute resolution because of the scarcity of Latino ADR practitioners in the United States.

Familiarity with cultural nuances, fluency in a language and diverse life experiences can be tremendously beneficial in the resolution of a dispute. A mediator or arbitrator who has these qualities may be much better suited to facilitate the disposition of a case precisely because so much of what drives litigation has to do with hidden agendas and personal idiosyncrasies that a culturally attuned ADR practitioner would be in a much better position to identify, comprehend and address. It has been said that " [a] mediator's ability to navigate the cultural differences across disputing parties is paramount for success of dispute resolution … cultural competence is an essential skill in a mediator's tool-kit … . Cultural competence is a central skill a mediator must master."

Unfortunately, even as the United States becomes more and more diverse, there is a dearth of professional mediators from minority backgrounds.

Anecdotally, the evidence is very strong that among the thousands of mediators and arbitrators selected to resolve disputes every year, it is rare that a minority ADR practitioner is chosen.

Corporations, on the other hand, have long recognized the benefits of diversity in the workplace. Justice Sandra Day O'Connor noted the same when she cited General Motors' amicus brief in her majority opinion in Grutter v. Bollinger for the proposition that, "(T)hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's marketplace can only be developed through exposure to widely diverse people, cultural ideas and viewpoints."

Indeed, a recent report by Forbes Insights based on a survey of 321 executives of large global enterprises with annual revenue of more than $500 million dollars found, among other things, that, "Diversity is a key driver of innovation and is a critical component of being successful on a global scale." Notably, corporate law departments have significantly outpaced major law firms in the area of diversity. The rate of lawyers of color becoming general counsel is significantly greater than that of minority attorneys achieving partnership in major law firms.

Ironically, although large corporations have seen the value in diversifying their workforces, management and law departments, when these same corporations are considering or actually engage in litigation, their selection of diverse neutrals to mediate these disputes is often hampered by the lack of minority ADR practitioners. Like the lack of women ADR practitioners, this phenomenon is mainly attributable to what has been called both "supply side and demand side obstacles."

In the United States, most ADR practitioners come from the ranks of the judiciary or the senior levels of law firm practices. Since minorities are underrepresented in both of these forums, a supply-side or "pipeline" problem exists for the development of minority neutrals. Indeed, the diversity picture at New York City law firms, for example, is "stagnating," which only serves to lessen the potential number of minority neutrals coming through the ADR pipeline in New York City.

Compounding this problem of limited supply is the problem of demand. Neutrals are hired based on the consent of the parties to a dispute. Law firms that retain neutrals tend to hire neutrals with whom they are familiar from prior engagements. Since minority neutrals are few and far between, they are much less likely to have been previously retained. Consequently, the demand for their selection is much less. The same supply-side and demand-side problems tend to exist for women in ADR.

These problems in the development and retention of minority neutrals exist even as the United States population grows more and more diverse. For example, more than half the growth of the total population of the United States between 2000 and 2010 was due to the increase in the Hispanic population, and that population itself grew by 43 percent. The number of Latino ADR practitioners has not kept anywhere near pace with this growth.

We live in an increasingly interconnected global marketplace and United States corporations doing business nationally and internationally could well profit by engaging ADR practitioners who are familiar with these diverse cultures.

Corporations have recognized the value of diversity in their workforces and legal departments. Would they add value to their litigation efforts by selecting minority ADR practitioners? All the evidence tends to point in that direction.

--By Hon. Ariel E. Belen, JAMS

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