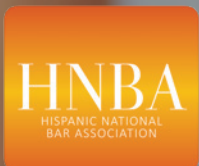


# noticias

2020 HNBA/VIA CORPORATE COUNSEL CONFERENCE & ANNUAL CONVENTION



TOGETHER  
WE RISE



STAY  
CONNECTED



# DIVERSE DECIDERS:



## PAVING THE WAY FOR MORE INCLUSIVE ADR

By Hon. Ariel E. Belen (Ret.), FCIArb, CCA

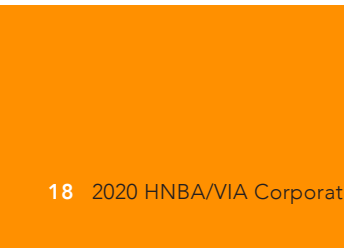
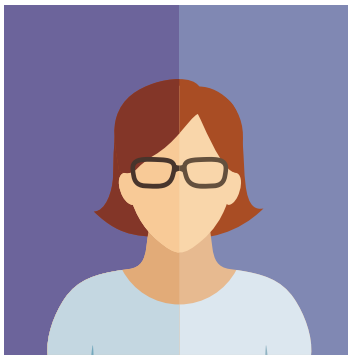
One of the theme's of this year's HNBA/VIA Corporate Counsel Conference & Annual Convention is "Together We Rise." One way to ensure that we all rise together is to promote diversity in alternative dispute resolution (ADR).

Most of the attorneys attending conference represent parties who are engaged in protracted disputes with commercial entities. Some of these disputes involve individuals suing corporations, and others involve entities against entities. Many of these disputes involve minority, and more specifically Hispanic, companies and individuals.

As it happens, major corporations have long recognized the benefits of diversity in the workplace. Former Supreme Court 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 increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."

Ironically, although large corporations have seen value in diversifying their workforces, management, in-house law departments, and outside counsel, when these same corporations consider litigation, they generally do not factor diversity into their selection of the neutrals who are retained to mediate or arbitrate their disputes.

In one of my last matters as a sitting judge, the litigants in a case had been in business together for nearly 40 years and had built up a large real estate enterprise in New York City. Unfortunately, they had a major and seemingly irreparable falling-out. One of



the litigants was a Hispanic immigrant who felt deeply wronged by his former partner. While he was conversant in English, he often drifted into Spanish when he was angry, which became an issue while speaking with his attorney, who was minimally conversant in Spanish.

It is an axiom of mediation that emotional forces can disrupt communication and produce nonproductive, if not outright irrational, decision-making. And, that was the case here. Although the broad outlines of the settlement should have been apparent to both sides, what was missing was a mediator who could get beyond the parties’—and, in particular, the Hispanic litigant’s—huge emotional investment. Luckily, I was able to bring the case to settlement thanks, in large part, to my cultural competence and fluency in Spanish.

What altered the negotiations was that as the mediator, I almost always spoke in Spanish with this litigant and always listened very carefully to what he said as well as 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, having strong cultural literacy, 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. In my time at JAMS, I have been able to settle many matters using these same skills.

This unique insight and cultural sensitivity are what diverse neutrals can bring to the table. It is a win-win for everyone and allows us all to rise together.

Finally, I wanted to highlight a unique opportunity brought about by our current circumstances. The global pandemic has raised concerns for health and safety that have pushed many meetings, matters and negotiations into virtual and online formats. Because of these new measures, I have had increasing opportunities to mediate and arbitrate matters to successful conclusion through these platforms. With geographic limitations and travel expenses no longer an issue, parties and counsel are able to choose mediators who have the experience, skills and cultural competencies they seek with increased freedom. The proliferation and effectiveness of these technology-assisted ADR options amplifies our opportunity to uplift diverse voices and leaders.

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