

Alternative Dispute Resolution

WWW.NYLJ.COM

VOLUME 260—NO. 101

MONDAY, NOVEMBER 26, 2018

A group of diverse hands of various skin tones are holding a white rectangular sign. The hands are positioned around the edges of the sign, with some fingers pointing towards the center. The background is a plain, light color.

Meaningful Diversity: The Next Chapter of The ADR Story

BY CHRIS M. KWOK

Given the historical exclusion of minorities from the legal profession, the lack of diversity in alternative dispute resolution

(ADR) is not surprising. The diversity and inclusion issue is magnified by the unique features of the ADR field. Neutrals with diverse backgrounds can help administer justice in today's increasingly

diverse society, as they are a reflection of the people they serve. Of course, mere diversity is not enough; the meaningful inclusion of those diverse candidates in the industry is the next chapter of the ADR story.

I had the opportunity to conduct a study on this issue with leading ADR professors and practitioners, and we published a paper exactly a decade ago. Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson Jr., and Christopher M. Kwok, "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). In that study, we identified professional, institutional and economic barriers that everyone faced, but we also recognized that each of those barriers were encountered more frequently by minorities, given their long-time exclusion from the legal field. Since the publication of the paper, new pathways have appeared and a new generation of

practitioners has emerged, bringing energy to the field. Using the paper as a starting point, I will comment on what has transpired in the past decade and offer my thoughts on what the next decade may bring.

In our paper, we found professional barriers, in that the entry point for the mediation field was elusive, with a very hazy career path that often demanded a strong appetite for risk and an entrepreneurial streak. In the ensuing decade, we have seen a proliferation of graduate programs in dispute resolution. In New York City, there is an LL.M. program at Cardozo School of Law and a master's program in negotiation and conflict resolution at Columbia University. Since 2009, the American Arbitration Association's (AAA) Higginbotham Fellows Program has given lawyers the opportunity to transition into neutral work. The program's offerings have served critical functions, including providing access to mentors and formal training programs, which minority lawyers often cite as resources that traditionally have been unavailable to them. Goodwin Liu, et al. "A Portrait of Asian Americans in the Law," Slide 32. In New York City, the ADR Inclusion Network allows ADR leaders

to keep diversity and inclusion issues at the forefront of the discussion.

Institutionally, we found that minority attorneys had difficulty being included on rosters. And then even once they appeared on rosters, they experienced limited opportunities for repeated selection. They also encountered economic barriers, in which compensated neutral work was hard to find, and a predominance of pro bono work. This is the heart of the issue for those in ADR: first being selected as a neutral and then, critically, maintaining recurring selections in order to make a living. To that end, ADR providers have focused on adding minority neutrals to their ranks in the last decade. The question of whether those minority neutrals are being selected is a far more difficult to answer. ADR users develop working relationships with neutrals, as well as trust and a comfort level that leads to continuing selection.

For neutrals who are former judges, their credentials, in the absence of any other information, are especially effective in spurring a first-time selection. That selection then allows them the chance to build trust and a comfort level, leading their recurring selection, probably the most

CHRIS M. KWOK is a mediator and arbitrator with ADR provider JAMS in New York, focusing on employment disputes. He joined JAMS after 15 years with the New York District Office of the U.S. Equal Employment Opportunity Commission, where he convened and mediated more than 1,000 employment law disputes involving Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967.

important component of a sustainable and successful career. To that end, a continuing dialogue regarding diversity as it relates to neutral selection is paramount.

In 2018, two important developments took place. In May, JAMS introduced a model inclusion rider clause that urges users to consider diversity as one of the factors in neutral selection. In August, the American Bar Association (ABA) adopted Resolution 105, which encourages users to select and use diverse neutrals.

How can users participate meaningfully in this dialogue about diversity? I suggest that they contact national and local minority bar associations like the Asian American Bar Association of New York (AABANY) and the National Asian Pacific American Bar Association (NAPABA) to engage new neutrals. They can also sponsor programs and conferences to widen the potential pool from which neutral selections can occur. Through Resolution 105, the Dispute Resolution Section of the ABA is highlighting the importance of diversity in ADR. The JAMS inclusion rider clause serves the same function but is placed within the contract, reminding users of the importance of diversity during the neutral selection process.

Users and providers should consider keeping diversity statistics on neutral selection, as data points on neutral selection are invaluable in accurately assessing the diversity issue we are facing. If you can't measure a problem, you can't measure progress. Statistics on diversity among law school student bodies, summer associate classes and partnership ranks have been scrutinized, and institutions are now being held accountable. Having similar data points for the ADR field would be similarly useful.

The effectiveness of mediations is predicated on seeing problems in a new light and offering solutions from a fresh perspective. Diversity of experience, such as the immigrant experience, should be recognized as a hallmark of strength in a neutral. "Outsiders" trained in ADR often bring those fresh perspectives and thus particular strength to their work as neutrals.

The first generation of neutrals primarily included retired judges and a small cohort of pioneers who blazed an early path as full-time neutrals. There was a narrow path that lead to being a full-time neutral. Because of the historical exclusion of minorities from the legal profession, the first generation of ADR professionals

reflected the composition of the legal industry at the time. In the ensuing decades, we have seen tremendous progress, but a great deal more must be done. Multiple entry points of change have emerged, and individuals can now move into the ADR profession much earlier in their careers. We have begun a paradigm shift through the increasing professionalization of the field. Each initiative advances the field a bit. Soon we will have created a new world, one that accurately reflects our society.