

## A Fresh Look At Diversity In ADR

*Law360, New York (December 13, 2012, 9:56 AM ET)* -- The increasing sophistication and demonstrated effectiveness of alternative dispute resolution has resulted in it becoming an integral part of our legal system in the United States. When you add in the challenges that many states are experiencing as a result of cuts to court system budgets and rising case backlogs, it is easy to see why attorneys and their clients are increasingly turning to ADR as a way of resolving disputes, especially as it relates to commercial cases. As ADR has grown both in terms of utilization and as an industry, it is appropriate that we examine it against one of the same criteria by which we assess other parts of our legal system, specifically to the extent to which it has embraced diversity.

To be fair, it's not as though this issue has never been looked at. Dating back as far as 1986, a small but persistent band of advocates have worked to shine a light on how ADR has not kept up with the diversity gains experienced in terms of law firm hiring and the appointment of inside counsel. Over the last several years, not only have major ADR providers stepped up their diversity efforts, but the ABA's Dispute Resolution Section has been active in this area as well. However, despite best efforts, women and minority mediators and arbitrators on commercial cases are still woefully under-represented.

In 2011, the National Law Journal 250/Am Law 200 Survey revealed that 19 percent of the partners in those firms responding were women. In the courts, 19 percent of federal judges are women. In the Partner Ethnicity section of the 2011 NLJ 250/Am Law 200 Survey, the partnership ranks of the firms responding was shown to be 93 percent white/Caucasian, 2.5 percent Asian American, 2 percent African American, 2 percent Hispanic, and "other minorities" comprised less than one percent. When it comes to the federal bench, 86 percent are white/Caucasian, 8 percent are African American, 5 percent are Hispanic, and Asian Americans along with "other minorities comprise less than 1 percent.

For some of those reading this article, a logical reaction may be "interesting, but why is this important?" People have various reasons for supporting the concept of diversity in the legal profession and they are all valid. The important thing is not so much the motivation, but rather the action taken to achieve results. There have been many studies across a variety of industries that show how diversity can increase effectiveness, whether it is at a project team level or within a board of directors. To apply this thinking in a legal context, one example would be in an employment case where a mediator who is a woman or minority might bring certain sensitivity or credibility that allows the case to more efficiently move to a satisfactory resolution. These benefits need not be limited to employment cases, but could play a role (real or perceived) in larger cases as well, such as class actions. Utilizing a more diverse pool of potential neutrals with broad perspectives simply increases the likelihood of an optimum solution regardless of the crux of a particular dispute.

A practical consideration for ADR providers is that attorneys or businesses deciding where to bring a case may be more likely to select a provider than can offer a wide range of mediators and arbitrators. While this may not have been a selection criteria in the past, as a newer generation of attorneys rise to the decision maker level, it is likely to become more of a factor. 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.

So how do we accelerate progress regarding diversity as it relates to ADR? It starts with continuing to shine a light on the issue. The ABA can play an important role, and the focus should not be limited to the Dispute Resolution Section but also to other “user groups” — litigators, corporate counsel, judges and even specific practice areas. Multicultural bar associations such as the National Bar Association and Hispanic National Bar Association are starting to pay more attention to ADR, including promoting it as a career track for their members. There are opportunities for other groups such as the National Association of Women Lawyers, Minority Corporate Counsel Association, Association of Corporate Counsel, NALP (The Association for Legal Professionals) and Leadership Council for Legal Diversity to provide input and suggestions as well.

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 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.

It is important to encourage attorneys to reach outside their typical networks to consider women and minority neutrals. The ABA and bar associations can encourage firms to use qualified women and minority mediators or arbitrators whenever possible. Firms can develop reference lists of proven and experienced women and minority ADR professionals to have on file when new disputes arise. They can also increase the opportunity to appoint diverse neutrals by seeking out potential candidates before they actually have to select one for a case, and allow them to present a seminar or roundtable to the partnership so the partnership becomes familiar with that neutrals capabilities and qualifications.

Metrics can be developed by firms to track their own neutral selection, and that progress can then be included in the diversity data that law firms provide to their clients. Corporations can also measure the diversity of those with whom firms do business, their legal and nonlegal suppliers. In-house and corporate counsel can include a diversity requirement of their legal and nonlegal suppliers.

When recruiting neutrals, ADR providers can solicit more diverse candidates and reach out to minority-owned and women-owned firms. ADR providers can encourage the more experienced and successful neutrals to mentor their less established women and minority colleagues, as well as in-house lawyers and outside counsel who show interest in the field. Providers can also encourage shadowing programs for those potential neutrals of the future. Neutrals can recommend women and minority neutrals as alternative choices when they are unable to take a matter or serve for any reason themselves.

In conclusion, accelerating progress in this important area will take boldness, plus real effort from all the stakeholders. Whether the motivation is business growth or because it is “the right thing to do,” by working together we can ensure that qualified mediators and arbitrators not only have a seat at the table but also a real chance at being selected to resolve a range of commercial disputes.

--By Mark Smalls, JAMS

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