

It's time to focus on diversity in ADR

Mark Smalls

Most of us have read at least one article discussing the need for greater diversity in the legal profession. Typically the focus is on law firms needing to diversify their ranks, or the role that inside corporate attorneys can play in encouraging their outside counsel to pay attention to diversity. However, there is a large segment of the legal profession that is *not* typically included in a discussion of diversity: alternative dispute resolution. According to a report published in 2008 by the Journal of Empirical Legal Studies, somewhere between 80 and 92 percent of all disputes are settled out of court instead of through litigation. Corporate law departments or law firms select thousands of mediators and arbitrators each year to handle matters ranging from employment to bankruptcy to patent infringement. While there are no industry statistics that break out demographics of mediators and arbitrators, discussion with general counsel, ABA officials and outside counsel reveal a common theme: ADR practitioners who have built a successful practice are less likely to be women and even less likely to be minorities.

"Why is this important?" you might ask. Over the past couple of decades there has been a general acceptance that diversity yields real benefits to the legal process, whether working out the details of a business deal in an emerging market, or ensuring that a high-stakes em-

ployment case doesn't escalate into an unnecessarily expensive (or embarrassing) debacle. The ability to tap into a variety of perspectives based on gender, age, ethnicity or sexual orientation helps ensure strategies and solutions reflect the increasingly diverse world we live in. The realization of these benefits has driven an increased focus on hiring and retention strategies within both law firms and corporate legal departments.

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If diversity is indeed beneficial to achieving optimum solutions in legal matters, then it stands to reason that this would include the large percentage of cases that are settled through mediation and arbitration. Many of the aspects and goals of the ADR process are the same as with litigation. Plaintiffs and defendants come to the table with a variety of backgrounds and perspectives. Attorneys present their case in hopes of prevailing on behalf of their clients. An individual is charged with hearing the arguments and facts presented and ensuring that the process is conducted fairly and in accordance with generally accepted procedures. Given these similarities, one would conclude that diversity would be

just as advantageous for the ADR process as it is for other areas of the law.

So why have we not seen the same progress in ADR that we have seen in other sectors of the legal industry? The first of three reasons relates to the selection process for neutrals, as arbitrators and mediators are often called in the United States. When parties decide to attempt to settle a case using ADR, one of the first steps is to select a neutral. More often than not this involves counsel (or sometimes paralegals) from one or both sides of the matter conducting a search. This search is sometimes a short one, as attorneys are typically most comfortable recommending someone they know or have previously worked with. When that is not possible, they rely on recommendations from other attorneys. Outside counsel who are frequent users of ADR often indicate that they see it as "risky" to recommend to their client a neutral they have not worked with previously. While this rationale may make sense on a practical level, it can make it difficult for neutrals who are not known to the selecting attorney or their clients to be chosen ... even if they possess the appropriate background.

The second reason we don't see more diversity in ADR is a "pipeline" issue. To become a successful mediator or arbitrator, attorneys need to 1) know that ADR is a viable career option, and 2) build a resume that makes them an attractive candidate to a major ADR provider or have enough experience to successfully maintain their own ADR practice. The most attractive recruits to major ADR providers are former judges with substantial civil court experience or attorneys that have ascended to the senior (i.e., partner) level at major law firms. Women and minorities are underrepresented in both of these talent pools so it is no wonder that fewer of them go on to become successful neutrals. From a gen-

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der standpoint, the numbers of women mediators and arbitrators are not terrible, but certainly don't mirror the percentage of women who enter the legal profession. The same forces that keep many women from reaching the partner level at law firms or attaining the general counsel title at corporations naturally reduce the pool of candidates that transition to a career as a mediator or arbitrator.

When discussing diversity within the ADR profession, it is important to make the distinction between *becoming* a mediator and having a thriving practice. The barriers to starting an ADR practice are actually relatively low. There are hundreds, if not thousands of mediators who are hearing smaller, local disputes among individuals, community or civic groups. It is the higher-income segment that has proved more difficult to crack. In fairness, there are certainly exceptions. There are a number of high-profile, very successful women neutrals. Some are former federal judges and others have parlayed successful law firm careers into thriving ADR practices. But there are far fewer than their male counterparts, and some female neutrals report that while they can get steady work in areas like employment, it is much more difficult to be selected to mediate a huge class action or chair a high-profile tripartite arbitration. Likewise, there are also successful minority mediators and arbitrators. But again, this is a relatively small group, including some who have managed to leverage their knowledge of specialty areas, like construction disputes, to build their

practices.

The final reason why we haven't seen more progress is that ADR itself is somewhat of an "afterthought" in the legal mosaic. Despite the large number of cases settling before they get to the courthouse steps, ADR is not something the average general counsel or law firm practice head goes to bed thinking about. This is true even if that individual happens to also be the head of that firm's diversity committee. I have read many articles and heard numerous panel discussions devoted to chronicling the diversity efforts of various law firms and Fortune 500 legal departments. However, on those occasions when I asked if ADR has ever come up during internal discussions, the response is typically "*interesting, I never thought about that.*" One senior attorney was candid enough to admit that he did think about gender and ethnicity when deciding how to staff sensitive employment cases. However, he said that it hadn't dawned on him that it might also be a relevant consideration in terms of selecting the ideal mediator to handle some of those disputes.

One thing that both women and minority neutrals and the attorneys who select them agree on is that the first consideration for selection should be *competence*. It does no one any good to have a neutral hearing a case without the skills and experience to settle it. The good news is that as doors have opened wider both in law firms and within the judiciary system, there are more women and minorities with the subject matter expertise,

legal knowledge and disposition to be effective mediators or arbitrators. The trick is finding opportunities to showcase what they can do.

While more work needs to be done, tremendous strides have been made in increasing and leveraging diversity at law firms, in corporate legal departments, and in courtrooms. However, ADR remains an area where progress has been significantly slower. The multiple constituencies that stand to gain from accelerating this can play a role in making it happen. Corporate clients that encourage their outside counsel to focus more on diversity can extend this "gentle push" to ADR. Law firms that want to showcase their belief in the power of diversity can do so by seeking out and utilizing qualified neutrals outside of their typical network. ADR providers can be vigilant about identifying high-potential recruits and then having them mentored by successful neutrals. Organizations like the ABA, National Bar Association, Hispanic Bar Association and the National Association of Women Lawyers can provide information to prepare for a successful ADR career and make available lists of members who meet certain ADR experience criteria. Seeing real progress on diversity will take a group effort and won't happen overnight. We are starting to see the fruits of the effort that many individuals, law firms, corporations and organizations have put forth to affect change in other areas of the legal profession. For ADR to enjoy similar success, we have to start somewhere.