

Model Arbitration Rider Encourages Diversity in Selection of Neutrals

► **Kimberly Taylor, senior vice president and chief legal and operations officer at JAMS, discusses the importance of inclusion when selecting neutrals for arbitration and mediation.**

CCBJ: JAMS is the first major alternative dispute resolution provider to add an inclusion rider option to its clause workbook. Can you tell us more about this update and what the organization hopes to achieve with it?

Kim Taylor: When we look at the challenge of ensuring that a more diverse group of ADR professionals are handling cases around the country, there are some elements we have control over, but there are also many decisions that happen outside of JAMS – by the users of ADR services, for instance. We thought it might be helpful to provide language that parties can include in their arbitration contract clauses, to encourage both sides in a dispute to consider diversity when choosing an arbitrator or panel of arbitrators. The new section on diversity and inclusion in our workbook reads, “The parties agree that wherever practicable, they will seek to appoint a fair representation



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of diverse arbitrators (considering gender, ethnicity and sexual orientation) and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.”

What prompted this change?

If you look at our roster of neutrals, you'll see a mix of men and women and some ethnic diversity. But women are underrepresented, and so are minorities, in every category. This is a topic of discussion everywhere within the legal industry: Why aren't there more women and minorities in the profession? For us, it's a supply and demand problem. People join our panel in about the same numbers you would see within the partnership ranks at a typical law firm. We have about 30 percent female neutrals on our panel, and if you have seen the statistics recently, that's pretty consistent with the best statistics posted by law firms.

We make sure that we're promoting and choosing women and minority neutrals, but ultimately the marketplace decides who gets selected for cases. We don't make decisions about which arbitrator a particular party selects. We compile a strike list, typically a list of five to seven people who meet the qualifications of the contract or have experience with the subject matter of the dispute, and we take strides to ensure that the list is diverse, but ultimately the parties themselves select the neutral.

We can focus on the supply side (ensuring that women and minorities are better represented on our panel), but then there's the demand side (who the parties select). So the question is how do we encourage users to think about the importance of diversity in



reaching good outcomes? We engage with different bar association groups. We write about it. We make sure that when we present speakers we're considering diversity at all times.

Some of our readers may not be familiar with the world of clause workbooks. Can you give us some context about what the workbooks are and how your clients use them generally – and how the diversity clause fits in specifically?

We have a workbook that's geared toward domestic arbitration – in other words, arbitration that occurs between parties that are situated in the same country, typically the U.S. We also have a workbook focused on cross-border or international disputes. In both situations, when an arbitration clause is not well

drafted or omits essential terms, it can create problems with enforceability.

We have provided workbooks for in-house counsel, transactional attorneys and others who are drafting arbitration clauses with sample language. It's essentially a checklist of things to think about. We try to help people think things through, like, "What's the venue of the arbitration? What qualifications should the arbitrator have? Should it be an attorney with a certain number of years of experience? Should it be a retired federal judge or somebody with particular subject matter expertise? Do you want a single arbitrator or three arbitrators?" All of those things should be addressed in a contract clause, as it will certainly make things easier if and when arbitration is needed.

In terms of diversity and inclusion, we put that language near the other suggested language about

the arbitrator's qualifications. The language isn't prescriptive – it's merely a suggestion that the parties consider diversity when selecting their panel.

Can you tell us a bit more about JAMS itself, especially your approach to diversity and inclusion in hiring the neutrals you work with?

We have about 350 neutrals across 27 offices in the U.S. and abroad, with our international headquarters in London. We recruit people with solid reputations for fairness, knowledge of the law and good process skills. Typically, we look for judges who are about to leave the bench, either from the state or federal court, and for attorneys who have been practicing law for a number of years, specifically those who are switching their practice to more of a neutral-type practice – those who are doing more mediations and arbitrations.

In some cases, we will look for subject-matter expertise, especially if we're trying to develop a particular area, like healthcare. We're pretty deliberate about it, so we talk to lawyers in the community, try to get a sense of how the neutrals are viewed and respected. We add anywhere from 25 to 35 new people to our organization each year. One of the things we look at is diversity – we're actively looking for women and minority neutrals. We don't have quotas, but we're definitely focused on finding folks who we can help develop practices, people who have the ability and will benefit most from the support we provide.

How about the arbitration process itself?

Arbitrations are most often handled through strike lists, and most ADR providers – JAMS, the American

Arbitration Association and others – provide those lists when the parties involved are ready to seek an arbitrator. Whether it's one arbitrator or a tripartite panel, the parties choose people based on the strike list. If they agree on an arbitrator ahead of time, then of course that's the person who will be appointed to the case. If they can't agree, we provide a list of names and they have the ability to strike off two people and rank the others in order of preference. The arbitrator with the highest composite ranking gets appointed. The way we help with diversity is by ensuring that those strike lists are diverse to begin with.

Can you tell us a bit more about how JAMS is supporting diversity and inclusion within the broader legal community?

We partner with national and local bar associations that advocate for diversity – the National LGBT Bar Association, Hispanic National Bar Association, National Bar Association, the National Asian Pacific American Bar Association, the National Association of Women Lawyers – as well as a variety of local organizations, like the California Minority Counsel Program and the Massachusetts Black Lawyers Association. We sponsor programs, recommend speakers and provide diverse programming, such as the JAMS Women's Lawyers luncheon, which we hold periodically in different areas of the country. We also provide education and CLE programs on implicit bias and other diversity-related issues. It's always top of mind for us as we define our goals for the year, and we hope that this mind-set continues to spread throughout the wider legal community. ■