

ARTICLES

A Brightening Horizon for Diversity in the Dispute Resolution Profession

By Kimberly Taylor – March 05, 2019

One topic that has dominated the headlines recently is diversity, or its absence, in a wide variety of industries. Notably, in March 2018, actress Frances McDormand made headlines for her Oscar acceptance speech when she said, “I have two words to leave with you tonight . . . inclusion rider.” This was a familiar term to many in the auditorium that evening—a contractual stipulation that requires racial and gender diversity among participants in a film project—and it was starting to get some attention as a means to address the poor representation of diverse groups in film and elsewhere in the entertainment industry. The term was not widely known outside Hollywood, however, including in many other industries that are notoriously homogenous, like the legal profession.

In 2016, the ABA—recognizing that despite inroads that women and minorities have made in many professions, their representation in the top ranks of the legal field remains disappointingly low—adopted [Resolution 113](#). It urged “all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and . . . to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.” Although top global law firms recently have announced higher-than-usual numbers of women and minorities being elevated to partner status, women still make up only about 20 percent of equity partners in AmLaw 200 law firms, and the number of minority partners is even smaller.

That lack of diversity is reflected among dispute resolution professionals. The National Association of Women Judges (NAWJ) [reports](#) that in 2018, 33 percent of all state court judges were female. The American Constitution Society recently constructed a [database of state judicial biographies](#), including more than 10,000 sitting judges throughout the United States, and determined that people of color represent less than 20 percent of state court judges.

Many alternative dispute resolution (ADR) professionals transition into that work after reaching partner status in their law firms or serving on a state or federal court, so it is unsurprising that lack of diversity among mediators and arbitrators is a challenge in the ADR industry. In August 2018, the ABA adopted another resolution to address the issue ([Resolution 105](#)), this time urging ADR providers like JAMS and the American Arbitration Association (AAA) to expand their rosters with diverse neutrals (minorities, women, persons with disabilities, and persons of differing sexual orientation and gender identities). Resolution 105 also encourages users of domestic and international legal and neutral services to select and use diverse neutrals.

ADR providers have been focused on this issue for some time, recognizing that diverse neutrals (like diverse teams in the workplace) bring new perspectives to decision making and instill greater confidence in the outcome among the users of their services. Among their other efforts, AAA (including its international branch, AAA-International Center for Dispute Resolution) and JAMS include diversity as part of their core values. JAMS was an early supporter of the [Equal](#)

[Representation in Arbitration Pledge](#), which seeks to increase the number of women appointed as arbitrators, with the ultimate goal of full parity. AAA's [Higginbotham Fellows Program](#) attempts to introduce diverse neutrals to the ADR profession. The International Institute for Conflict Prevention and Resolution (CPR) issues an annual Diversity Award; and JAMS—inspired by Frances McDormand's Oscar night entreaty—[issued its own inclusion rider](#) earlier this year as a means to encourage parties to consider diversity when choosing an arbitrator or panel of arbitrators. The “rider” is sample language that parties can include in their arbitration contract clauses: “The parties agree that whenever practicable, they will seek to appoint a fair representation 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.”

The rider attempts to address a perpetual problem within the ADR industry that is holding diverse neutrals back. On the one hand, ADR providers can and do actively pursue increased diversity among their practitioners, recognizing the benefits of recruiting and retaining the most qualified ADR professionals inclusive of varied ethnicity, race, gender, religion, and sexual orientation. ADR providers primarily draw their recruits from law firm partner and judicial ranks, so until the numbers of women and minorities in those pools increase, that will have an impact on who enters the ADR profession. More importantly, however, it is the marketplace—including those lawyers who are drafting contracts requiring arbitration and the litigators and clients who are involved in the arbitrator selection process—that decides who gets selected for cases. The ADR providers rarely make the decision about which arbitrator a particular party chooses, and it isn't evident that those who do make the decisions are thinking about diversity when they do so.

That problem was highlighted recently when New York rapper and mega-star Jay-Z asked a New York court to halt an arbitration because there were too few minority arbitrators to choose from. That matter is in dispute, but it received a lot of media attention. Attorneys who represent diverse clients should think about their clients' perspective and whether they might have more confidence in the outcome of a dispute if the decision makers more accurately reflect the general population, bringing different life experiences and backgrounds and a fresh perspective to their decision making.

ADR providers will continue to rigorously identify and mentor diverse neutral candidates. Law firms, corporations, and legal departments should partner with the ADR providers to bring more diversity to ADR by signing the Equal Representation in Arbitration Pledge, incorporating the inclusion rider into their arbitration clauses, and being mindful of diversity during the arbitration selection process.

The road toward inclusivity and diversity has been long, and the progress slower than ideal. But progress is being made; and so long as all stakeholders in the process—law firms, corporations, in-house counsel, and ADR providers and practitioners—embrace the importance of diversity in the ADR industry (not to mention the broader legal profession) and work together to consciously and deliberately encourage the appointment of diverse candidates to state and federal courts,

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promote diverse attorneys onto the partnership track in law firms, and choose qualified diverse candidates as their ADR professionals, we can change the landscape for the future.

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