

IN FOCUS

ADR CONTINENTAL DRIFT

It remains a white, male game

Mediation and arbitration lag behind the rest of the profession in diversifying their ranks.

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OVER THE PAST 20 years, enormous changes have marked the professional pool of legal services consumers and providers. More women and more people of color are active and in leadership positions than ever before.

But the alternative dispute resolution (ADR) profession seems immune to these changes. Why? Does it matter? And if it does, how can the situation be remedied?

In 2004, women constituted 47.5% of first-year law school enrollment and 51% of J.D.s awarded. See www.abanet.org/legaled. They comprised 44.4% of the tenure-track law school faculty (see www.aals.org/statistics), 43.4% of law firm associates and 17.1% of law firm partners (see www.nalp.org/press). The general counsel of the *Fortune* 500 included 77 women, or 15.4% of that field. See www.abanet.org/women/atagance.pdf. Women constituted 28.2% of judges in state courts of last appeal and 25.6% of

federal courts of appeals. See www.afj.org/judicial.

In 2005, 30.2% of all lawyers were women, 4.7% were black, 2% were Asian and 3.5% were Hispanic or Latino. See www.bls.gov/cps/cpsa2005.pdf.

Lack of diversity infects the community itself.

Although these figures remain disproportionate to the general work force population—in 2004, roughly 46.4% of the American civilian labor force was female and 11.3% was black; see www.bls.gov/cps/wlf-databook2005.htm—they demonstrate very substantial increases over recent years. The Equal Employment Opportunity Commission reports that in 1975 women constituted 14.5% of the legal services work force, while in 2002 they were 40.3%. African-Americans in that work force went from 2.3% in 1975 to 4.4%, and Asians from 0.5% to 5.5% during that same period. See www.eeoc.gov/stats/reports/diversitylaw/index.html.

Many prominent corporations are taking the lead in urging that this situation change. They look at their employee base, their customer base and the trends of future population and decide that as a business matter they must hire to serve the needs of these constituents and customers—including hires in the legal department and engagement of outside counsel.

These corporations have put pressure on their law firms to monitor minority hiring and assignments of women and minorities to their cases. In 1999, Charles Morgan, then general counsel of BellSouth Corp., launched an initiative titled “Diversity in the Workplace: A Statement of Principle,” more generally known as “The Morgan Letter.” See www.acca.com/gc-advocate/diversitystmt.html. The Morgan Letter was a statement by chief legal officers of more than 500 companies, who said: “Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking

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and solutions. Thus, we believe that promoting diversity is essential to the success of our respective businesses. It is also the right thing to do." Signatories to the Morgan Letter held their outside counsel accountable for diversity in their workplaces and pledged that, "In making our respective decisions concerning selection of outside counsel, we will give significant weight to a firm's commitment and progress in this area."

In 2004, Rick Palmore, chief legal officer of Sarah Lee Corp., drafted a "Call to Action" to boost that effort up a notch, collecting corporate signatories who endorsed the explicit statement that "we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse." See www.clocalltoaction.com.

But what is happening in ADR? Not much, at least at the high-end commercial level. John Bickerman, a well-known mediator and chair of the American Bar Association Section of Dispute Resolution, observed in a recent interview: "In terms of the big cases, we see the same names all the time, and they are the same very accomplished, well-established, high-profile white men that have been doing this for the past ten or fifteen years."

And in arbitration things look little better. Benjamin G. Davis of the University of Toledo College of Law has written that, "throughout the 1,000 international commercial arbitrations I personally supervised on a day-to-day basis [while at the International Chamber of Commerce in Paris] and the 4,000 other arbitrations of my colleagues that I indirectly learned about, in the colloquia, seminars, commission

meetings and conferences, I never ran into minority Americans who were arbitrators in international commercial arbitration and very rarely into persons who acted as counsel." Benjamin G. Davis, "The Color Line in International Commercial Arbitration: An American Perspective," 14 *Am. Rev. Int'l Arb.* 461, 465 (2004). Davis' survey concluded that "American minorities are essentially non-existent in international arbitration as arbitrators (or otherwise)." *Id.* at 496. "As contrasted with other arenas in the law and or in society as a whole in which minorities have made progress, the data suggest that U.S. minorities have made glacially slow progress in international commercial arbitration." *Id.* at 505.

Institutions have a social obligation to correct injustices.

What's the problem?

Various reasons are given for this state of affairs. Most prominent arbitrators and mediators are senior attorneys, and most senior attorneys are white males. Moreover, given corporations' success in identifying minority vendors and minority outside counsel, and their progress toward minority goals in practically every other respect, their inability thus far to identify minority ADR practitioners suggests that they may not be out there. That is to say, this may be a "supply-side problem."

So what? Other than a sense that female or minority professionals ought not be disenfranchised, what is the harm in having mostly white, mostly male, mostly older mediators and arbitrators?

"A lot," Charles Morgan, author of the Morgan Letter and executive vice president and general counsel for On Site E-Discovery, said in a

recent interview. "Say all of your arbitrations were conducted by graduates of Stanford Law School. Stanford's a great school and I'll bet the arbitrators would be terrific. But there's a big pool of talent out there that you're ignoring and, just maybe, there's a bunch of perspectives and backgrounds and points of view that you may not be taking advantage of."

He continued, "The point is self-evident. No one in their right mind would purposely choose to hire lawyers from only one law school, or having only one background or one perspective. Yet that is, essentially, what we're doing when we pick mediators and arbitrators the way we do."

Morgan's argument also reflects general business practices. From the assembly line to the boardroom, it is an increasingly common management practice to include as many perspectives as possible in the problem-solving process, on the ground that different values and assumptions coming into the process will yield a more sophisticated result. When it comes to mediation, many corporate end-users are convinced that they simply must have a wider variety of views and alternatives than seem to be available to them at this point.

Lack of diversity infects the community itself. The few pioneer women who participated in ADR trainings, seminars and professional colloquia in the early 1990s recall that they often felt acutely out of place. Everyone else was older, and everyone else was male. Those participants, 15 years later, are now highly valued veterans of the ADR movement. They report feeling much more welcome and much more at home, but still among a group of peers that is, by and large, older and male. ADR is still a surprisingly closed area of the law.

To note that the call for diversity has been strongly corporate-led is not to say that minority and female practitioners have not been active. Homer LaRue of Howard University

School of Law, Gene Johnson of Safe Horizon Mediation Programs in New York and others have been instrumental in holding networking, training, advocacy and other initiatives, particularly through the ABA's fast-growing dispute resolution section.

Nor is it to say that the sole justification for ADR diversity is to meet the expectations of corporate end-users. It has been generally acknowledged that institutions of influence have a societal obligation to address and correct injustices to individuals who historically have been excluded from opportunities to contribute to our diverse culture.

The point is that whether one does it as an exercise in social engineering, or as a commitment to creation of corporate shareholder value, it has to be done: More women and minorities are needed among the arbitrators and mediators who are proposed by outside counsel for appointment to "big ticket" ADR proceedings.

What to do?

The challenge, then: What actions need to be taken to ensure that women and people of color get the experience, the reputation, the exposure, the training, the social networking—whatever it takes to end up on that list that is presented to the parties of an arbitration?

There's a lot of sensitivity to the issue. For several years, the ABA dispute resolution section has held a diversity forum at its well-attended section meetings at which both individual practitioners and corporate end-users exchange views of the issue. The International Institute for Conflict Prevention & Resolution, sometimes called the CPR Institute, made a concentrated effort to identify diverse candidates for its neutrals list a few years ago, and this year it convened a National Task Force on Diversity in ADR. Two years ago, the William and Flora Hewlett Foundation gave a grant to Maryland's Access ADR initiative to enhance the access of ADR professionals of color to ADR

clients—an initiative that was also supported by the JAMS Foundation and the ABA Section of Dispute Resolution.

So there is a "will." But that does not seem to have translated into a "way"—at least, not so far. New ideas are needed.

Here are some ideas:

■ What if the country's leading law firms—from which so many of our leading mediators and arbitrators emerge—had an incentive to encourage more diverse members of the firm to enter this field?

■ What if a benchmark survey were conducted to determine how often law firms suggest mediation to their clients; how often mediation is in fact tried; and how often diverse mediators are proposed to clients by outside lawyers and ADR provider organizations?

■ What if the property casualty insurance industry, as the largest consumer of legal services and of ADR services, conveyed its expectation that the firms that insurers pay for, when they propose mediators and arbitrators, will be expected to propose diverse individuals?

■ What if influential national ADR organizations combined forces to better reflect their corporate and legal constituents, and meet their customers' expectations, by sharing information on excellent women and minorities who are not now on their lists, but should be?

■ What if initiatives were undertaken to encourage particularly promising women, younger people and minorities from firms to attend ADR colloquia, seminars and other events in order to network, learn and advance their visibility and recognition among the ADR community, as well as to contribute diverse views and perspectives?

■ What if a mentor program were designed and funded, pursuant to which younger female and minority attorneys could "shadow" established mediators and arbitrators (whether or not they are women or minorities) and establish skills and reputations thereby?

■ What if corporations and law firms intentionally engaged younger mediators who are women and minorities in smaller matters, so that those professionals would gain experience as neutrals and be better positioned for the larger cases?

■ What if scholarships were established to enable young people to be trained as mediators and arbitrators, with the expectation that a person thus trained would be skilled not only as a neutral, but more generally as a negotiator and client representative in settlement?

■ What if a very "early pipeline" were begun, and ADR institutions worked with Street Law Inc. (www.streetlaw.com), a national program that trains high school students in legal issues, or a similar organization to provide materials and information for children to become interested in ADR as a profession?

It is perplexing that this one aspect of the legal profession—a field that is otherwise so robust, so progressive and so creative—lags behind so miserably in satisfying client expectations for diverse practitioners. But there is no indication that it must be so.

And with diligence, creativity and practical action, it will not long be so. ■■■