The Case for Bringing Diversity to the Selection of ADR Neutrals

By Theodore K. Cheng

Addressing the dearth of women and people of color who are selected to act as neutrals in the alternative dispute resolution (ADR) field has long been a challenge.[1] Historically, not only have the various rosters and lists maintained by private ADR providers (and courts, for that matter) failed to reflect the pool of available and qualified women and minority neutrals, but the selection process has also repeatedly afforded opportunities to only a small percentage of this growing pool. Corporate America's emphasis on diversity and inclusion over the past several decades demonstrates the growing understanding of the value added by promoting a diverse workforce and demanding that its suppliers also be similarly committed. However, while great strides have been achieved in many disparate areas, little to no improvement has been seen in the selection of ADR neutrals.

It All Began with Workplace and Supplier Diversity

The awareness of the benefits of adopting principles of diversity and inclusion began with a close look at workplace diversity issues. In 1987, U.S. Secretary of Labor William Brock commissioned a study by the Hudson Institute (an independent non-profit organization) of various economic and demographic trends. This study was later turned into a book called "Workforce 2000: Work and Workers for the 21st Century," which helped develop the business case for diversifying the workforce.[2] Specifically, the trends identified by the study suggested that companies needed to make workforce diversification an economic imperative if they wanted to remain competitive and continue to be able to attract workers in a dynamic demographic environment. Thus, companies began measuring diversity, and the costs for failing to pay it heed, in terms of metrics such as retention, turnover, productivity, stock value, revenue/market share, succession planning, and public image. Looking outward, companies sought to expand their customer base to market more to diverse customers. Concomitantly, looking inward, they promulgated policies to diversify their suppliers, principally setting forth criteria and requirements applicable to their procurement processes that looked to the diversity of a supplier's workforce as part of that supplier's eligibility for continued receipt of the company's business.

Because outside law firms are suppliers of legal services to in-house corporate legal departments, as a natural extension of the supplier diversity initiatives, some companies also began imposing similar criteria and requirements to the legal profession. In 1998, Charles Morgan, BellSouth Corporation's Executive Vice President and General Counsel, authored a document entitled, "Diversity in the Workplace: Statement of Principles."[3] This document, which was signed by the Chief Legal Officers of approximately 500 major corporations, proclaimed the dedication to diversity in the workplace by corporate legal departments. However, concerned with a lack of progress in this area, in 2004, Roderick A. Palmore, General Counsel of General Mills Corporation, issued "A Call to Action: Diversity in the Legal Profession," which reaffirmed corporate legal departments' commitment to diversity in the legal profession, espousing the mantra that clients deserve legal representation that reflects the diversity of their employees, customers, and communities.[4] In some sense, this was a natural extension of the companies' obligation to be an equal opportunity employer.

These efforts have resulted in marked changes to the way in which certain corporate legal departments work with outside law firms. Notable, recognizable examples of companies who have embraced these diversity ideals include Sara Lee, Coca-Cola, The Gap, AIG, Microsoft, Shell Oil, DuPont, Eli Lilly, Wal-Mart, Pitney Bowes, and International Paper, just to name a few. For example, requests for proposals for legal work often mandate a certain level of diversity amongst the legal professionals who are anticipated to work on the matter. Corporate legal departments may also more generally require disclosure by law firms of the demographic statistics relating to the legal professionals at the firm. Some companies also now more closely track their legal spending on women and minority-owned firms. As a result, many corporate legal departments have pared down their use of law firms who do not meet their criteria and have generally put pressure on law firms to similarly embrace diversity and inclusion. In doing so, corporate legal departments have clearly stated that they want to be represented by law firms that value diversity as much as they do. Law firms have also moved in parallel. In conjunction with a shift in demographics showing an increase in women and minorities in the legal profession, they have generally sought to diversify their attorney ranks, primarily through recruiting, and then through institutional changes, such as the creation of affinity groups and sponsoring of mentoring programs to address retention issues.

Curiously, however, unlike the manner in which corporate legal departments select diverse outside counsel, corporations persist in pursuing an outdated approach to the selection of diverse neutrals. Companies largely continue to outsource both the drafting of dispute resolution clauses and the actual neutral selection to outside counsel, abdicating these fundamental strategic decisions to others. Far too much reliance is placed on established networks, word-of-mouth, and the recommendations of the same "usual suspects," leading to a reluctance to try out someone new and an attendant loss of opportunity to broaden the company's roster of preferred neutrals. Relatedly, there is a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process, which can exist just as easily in the decision to select the neutrals who will oversee the resolution of the dispute.[5] The end result – at least in the case with private ADR providers – is the existence of a double-screen problem: a neutral must generally first be appointed to a roster or list, and then either outside counsel or in-house counsel must select the neutral from that list.

Neutrals, after all, are suppliers of services to in-house corporate legal departments as well. Yet, they are not viewed in the same way as outside counsel, let alone the entity who sells the company its reams of copier paper. It is simply not in the consciousness of Corporate America in the same way as other suppliers and vendors. Perhaps some companies have not fully analyzed the trade-offs – advantages or benefits gained vs. losses or disadvantages incurred – from pursuing diversity and inclusion as one component of a strategy for selecting neutrals. Maybe some companies do not construe law firms and similar professional services providers to be a part of their procurement process, thus exempting them from any applicable supplier diversity requirements. As a result, the diversity and inclusion mandate that appears to have permeated a large swath of corporate legal departments has not trickled down to the selection and hiring of mediators, arbitrators, and other types of ADR neutrals. At the same time, there has been a tremendous increase in the number of ADR practitioners, and, in particular, a large increase in the younger, unseasoned cohort of that population. This likely stems from law schools increasingly offering both substantive courses and experiential clinics devoted to ADR, thereby exposing students to the profession and encouraging them to consider a career as a

prospective neutral. Thus, the lack of diversity we see in the ADR profession is not necessarily rooted in an issue of lack of supply. There appears to be plenty of women and minority neutrals willing and able to serve.[6] They just need to be given the opportunity to actually do so.

Why is Diversity in ADR Important?

By any measure, the state of diversity in ADR is dismal.[7] Yet, there are sound rationales for why diversity is and should be an important (although perhaps not the sole or overriding) factor in selecting an appropriate neutral to resolve a dispute.

First, because ADR processes are essentially the privatization of a public function – namely, a proceeding brought in a judicial forum to resolve a dispute – the need for diversity is paramount.[8] As is the case for the judiciary, an ADR profession dominated by individuals of one background, perspective, philosophy, or persuasion is neither healthy nor ideal.[9] Rather, the professionals who sit as neutrals should reflect the diverse communities of attorneys and disputants whom they serve. A diverse pool of neutrals also instills confidence in those constituents and ensures a measure of fairness, public access, and public justice.

Second, particularly in situations where more than one decision-maker has been engaged (*e.g.*, a panel of arbitrators), the process of decision-making itself is generally improved, resulting in normatively better and more correct outcomes, when there exists different points of view.[10] Aside from the value of affording cognitive diversity to the panel, having a diverse panel typically adds new perspectives, while destroying the tendency to have the panel engage in unnecessary groupthink, so long as the decision-makers are able to exercise independence of opinion.

For these reasons alone, corporate legal departments should think more strategically when selecting neutrals to serve as arbitrators and mediators on their disputes. There is already a deep-rooted commitment stemming from Corporate America's workplace and supplier diversity initiatives, and the "Call to Action" has resulted in noticeable changes in the legal marketplace (although there is admittedly more that needs to be done). That same dedication and resolve should be applied to improve the paucity of women and people of color who are selected to act as neutrals in the ADR field.

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1 *See, e.g.*, David A. Hoffman and Lamont E. Stallworth, "Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity," *AAA Dispute Resolution Journal*, Vol. 63, No. 1 (Feb./Apr. 2008), at 36, available at http://lamontstallworth.org/Articles/PDFS/Leveling_the_Playing_Field.pdf.

[2] *See* William B. Johnston and Arnold E. Packer, "Workforce 2000: Work and Workers for the 21st Century" (Hudson Institute 1987), available at http://files.eric.ed.gov/fulltext/ED290887.pdf.

[3] *See* "Diversity in the Workplace: Statement of Principles," available at http://heinonline.org/HOL/LandingPage?handle=hein.journals/busiltom9&div=78&id=&page=.

[4] *See* "A Call to Action: Diversity in the Legal Profession," available at http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074.

[5] *See, e.g.*, Edna Sussman, "Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them," 24 *Amer. Rev. Int'l Arb.* 487 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372307; Linda R. Tropp and Rachel D. Godsil, "Overcoming Implicit Bias and Racial Anxiety," *Psychology Today* website (Jan. 23, 2015), available at https://www.umass.edu/peacepsychology/sites/default/files/Overcoming%20Implicit%20Bias%20and%20Racial%20Anxiety%20|%20Psychology%20Today.pdf; Rachel D. Godsil, "Answering the Diversity Mandate: Overcoming Implicit Bias and Racial Anxiety," *New Jersey Lawyer Magazine* (Feb. 2014) at 44.

[6] *See, e.g.*, Women in Dispute Resolution (WIDR) Member Directory of ADR Practitioners (ABA Mar. 2015), available at http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/widr_member_directory.authcheckdam.pdf; Minorities in Dispute Resolution (MIDR) Member Directory (ABA May 2015), available at http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/MIDR-Directory.authcheckdam.pdf.

[7] *See, e.g.*, Beth Trent, Deborah Masucci, and Timothy Lewis, "The Dismal State of Diversity: Mapping a Chart for Change," *ABA Dispute Resolution Magazine*, Vol. 21, No. 1 (Fall 2014) at 21, available at http://www.americanbar.org/publications/dispute_resolution_magazine/2014/fall/the-dismal-state-of-diversity--mapping-a-chart-for-change.html; Gina Viola Brown and Andrea Kupfer Schneider, "Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey," 47 *Akron L. Rev.* 975 (2014), available at http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1274&context=akronlawreview; Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr., and Christopher M. Kwok, "Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field," 35 *Fordham Urban L. J.* 119 (2008), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2278&context=ulj; Hon. Ariel E. Belen, "We Need More Diversity in Mediation," *Law360* (Mar. 15, 2013) ("Anecdotally, the evidence is very strong that among the thousands of mediators and arbitrators selected to resolve disputes every year, it is rare that a minority ADR practitioner is chosen."), available

at http://www.jamsadr.com/files/Uploads/Documents/Articles/Belen-Diversity-2013-03-15.pdf.

[8] *See* Laura A. Kaster, "Why and How Corporations Must Act Now to Improve ADR Diversity," *Corporate Disputes* (Jan.-Mar. 2015) at 36, 37, available at http://www.corporatedisputesmagazine.com/why-and-how-corporations-must-act-now-to-improve-adr-diversity/; David H. Burt and Laura A. Kaster, "Why Bringing Diversity to ADR is a Necessity," *ACC Docket* (Oct. 2013), at 41, available at http://www.cpradr.org/Portals/0/Why%20Bringing%20Diversity%20D%20Burt.pdf.

[9] *See* Vincent T. Chang, Theodore K. Cheng, and James P. Chou, "Reflecting the Communities it Serves: Increasing the Diversity of the Federal Bench," *AABANY Advocate* (Winter 2011) at 3, available at http://c.ymcdn.com/sites/www.aabany.org/resource/resmgr/imported/Advocate%20Winter%202011.pdf.

[10] *See generally* Scott Page, "The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies" (Princeton Univ. Press 2007); James Surowiecki, "The Wisdom of Crowds" (Anchor Books 2004).