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Changing the Face of Alternative Dispute Resolution

Litigation and Dispute Resolution



Legal teams' initiatives and policies to increase diversity, race, and gender representation in the legal field are a work in progress. Despite this focus on diversity, there has been little attention paid to one facet of the legal ecosystem: alternative dispute resolution (ADR).

In-house counsel can use traditional business strategies and concepts, such as Six Sigma, to evaluate their company's approach to ADR and increase diversity among professional neutrals.

What the data shows

Many ADR professionals come up through the legal profession. For the past few decades, the American Bar Association (ABA) has implemented several [initiatives](#) to improve diversity in the legal profession. However, they have not had the impact or wide adoption anticipated.

In their most recent resolution promoting diversity in corporate law departments and law firms, the ABA's principal findings illustrated that law firm leadership consisted overwhelmingly of white men. Although the minority associate pipeline was growing, it declined at the higher levels of partnership; and minority attrition was greater than that for white attorneys.

Some initiatives, such as the [Mansfield Rule](#), have had more success. Under the rule, 30 percent of interviews for an open position should be with diverse candidates.

After the inaugural year of the program, Diversity Lab, an independent research firm, determined in 2018 that 41 of an initial cohort of 50 firms would be "[Mansfield Certified](#)". This doesn't mean that the firms have reached the finish line. Rather, they now have a process by which they can effectively reach their diversity goals.

How this can help ADR

This development is significant for neutrals in ADR practices because corporate law departments and law firms are the key gatekeepers in arbitral and mediation case assignments. As principal selectors of ADR neutrals, they have been generally viewed as lagging in the selection of diverse neutrals. This prompted the adoption of [Resolution 105](#) by the ABA in 2018, which called for an increased representation of minorities in rosters and increased selection by users of neutral services, that is, corporations and law firms.

According to the ABA, the impetus of this resolution was the “lack of transparency” and the “network-based culture” that drives the selection process of neutrals. The sponsor of Resolution 105, the ABA Section of Dispute Resolution, concluded, “[It is] essential to shine a spotlight on the low level of diverse representation on neutral rosters and the special challenges created by the combination of the network-based culture within the profession, implicit bias, and the confidentiality that tends to obscure the degree to which Dispute Resolution lags behind the legal profession as a whole.”

With the incremental change driven by the Mansfield Rule, corporations have a chance to address the dilemma presented by the low-level of diverse neutrals in ADR. The question is: Do we have to wait for that incremental change? Or are there other available tools to address the issue contemporaneously with the accruing benefits of that diversity program?

More and more corporations keep diversity metrics for their legal work. Extending that tracking to ADR, an often overlooked area of legal practice, is an easy pivot. Corporations often use a closed referral network (“the old boy network”) for high value or “bet the firm” cases. But do all their cases fall into this category?

Six Sigma can increase workforce diversity

During my time at GE, I learned how the business philosophy of Six Sigma could improve processes. According to [Six Sigma proponents](#), actions and behaviors are a function of our values and beliefs. Therefore, a corporate culture guided by a system of values reinforced by metrics and goals becomes ingrained. Employees have a clear understanding of what the company stands for and how they can support their company’s goals.

While most corporations are familiar with Six Sigma in achieving quality processes in products, it can also accelerate change — including ADR diversity. Six Sigma principles state:

- We don’t know what we don’t know;
- We can’t act on what we don’t know;
- We won’t know until we search;
- We won’t search for what we don’t question; and
- We don’t question what we don’t measure.

When firms seek to address these unknowns, they adopt the “DMAIC” (Define, Measure, Analyze, Improve, Control) process to uncover the truth of the processes that are not offering the quality they

want to achieve. Corporations can apply these principles to their ADR policies.

For this purpose, let's define the issue as how the corporations diversity values are reflected in their assignment of neutrals.

Establishing a baseline (the firm's past two, three, or five years of cases) will be instructive in applying the principles cited. Concurrently, analyzing this cohort of cases, the firm can stratify the cases along identifiers such as type of case (arbitration, mediation), case issue (employment, consumer, contract breaches, etc.), amount at risk (this will help identify the actual number of "high value" cases), diversity of the arbitrator or mediator, and outcomes. The metrics from the last three criteria will illuminate information critical to whether high value cases are really driving assignments, who your assignees are, and whether you need to make informed changes in your case assignments.

After conducting the appropriate assessment, and determining whether the company's diversity policy is reflected in its assignment of neutrals, you can see if your ADR policy is adequately diverse. That is, you can proactively "improve" your criteria to ensure your diversity policy is actively extended to every sector of your firm's operation.

Institutional options

Most companies use one or more of the major institutional providers (such as the American Arbitration Association, JAMS, and the International Institute for Conflict Prevention & Resolution) as their case administrator in ADR. Most, if not all, of these institutional providers have implemented program changes to ensure that they have vetted highly qualified and experienced diverse neutrals. They offer selectors 20 to 30 percent of diverse neutrals with every selection list offered in a pending case, or have committed their members to diversity pledges.

A continuing task for these institutional providers, of course, is to assess whether actual selections reflect the goal of their diverse lists. But aside from these institutional providers, there are a myriad of neutral organizations (such as the College of Commercial Arbitrators, the National Academy of Distinguished Neutrals, and the National Academy of Arbitrators) that can identify diverse neutrals with published resumes identifying the depth and variety of their expertise as either arbitrators, mediators, or both.

In other words, there are many other tools and resources available. Relying solely on the recommendation of individuals in your network is not your only resource. And, based on your Six Sigma analysis, it may be limiting effective deployment of your diversity policy. After all, your diversity policy should be based on objectively analyzed criteria that supports your corporate values, strengthens outcomes for your internal and external stakeholders, and is in general good for our society. Therefore, ensuring its application is reflected in all areas of company business is just good business.

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Professional associations include: American Bar Association (Section on Dispute Resolution), Women in Dispute Resolution: Co-chair of Regional Chairs Committee; New York State Bar Association (Section on Dispute Resolution); Association of the Bar of the City of New York (Member, Arbitration Committee/Past Member, Mediation Committee, Hispanic Bar Association of New Jersey; Member, Justice Marie L. Garibaldi American Inn of Court for ADR: Scholarship Committee; Women Owned Law-NY; and, NJ Association of Professional Mediators: Secretary & Member, Diversity Committee.

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