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DEI & ADR: 5 Practical Ways to Increase Diversity in the Selection of Neutrals

Cultural Competence

Litigation and Dispute Resolution

Cheat Sheet

- **The ADR field lacks diversity.** As of 2021, only one third of the panelists at two of the largest US ADR providers are women or racially and ethnically diverse, according to data reported by the American Arbitration Association and JAMS.
- **Challenges to increasing diversity.** ADR is not often on the radar of diversity initiatives, and the default process for selecting neutrals using legacy relationships perpetuates the problem.
- **In-house counsel can effect change.** From reassessing their vetting processes to adding diversity clauses in contracts, in-house counsel have the power to drive change.
- **Commit.** Companies should build ADR diversity into their corporate policies and tracking.

While it is no secret that the legal field is not as diverse as the population it serves, the alternative dispute resolution (ADR) field is even more homogeneous. Clients are the decision-makers in selecting mediators and arbitrators and as such, client-driven diversity, equity, and inclusion (DEI) initiatives have the greatest potential for change.

The first step is recognizing there is a problem. Then, understanding the factors that are contributing to the underutilization and selection of diverse neutrals helps identify practical solutions.

Defining diversity and the current landscape

There are many ways to define “diversity.” Some arbitration-focused initiatives and organizations, such as Arbitral Women, shine the spotlight on the historical underrepresentation of women in international arbitration. For purposes of this article, I consider diversity broadly to encompass gender, race, color, sexual identity, gender identity and expression, age, disability, and being a member of historically underrepresented communities.

William Crosby, senior vice president and associate general counsel, Interpublic Group, illustrates the importance of diversity in ADR:

William Crosby, Senior Vice President and Associate General Counsel, Interpublic Group

“As in-house counsel, … we have long appreciated the importance of having diverse perspectives included as we advise our business teams … and it follows that by opening up the ranks of neutrals on ADR rosters to include more women, people of color and members of LGBTQ communities, we can create more opportunities for ADR to provide diverse perspectives that can lead to better outcomes.”

In his view, there’s “continuing evidence” that demonstrates instances in which “the lack of a diverse perspective caused a company to make a very big mistake.”

Despite the need for diverse perspectives, there is a lack of diversity in potential candidates for

mediation and arbitration, and those who ultimately get selected and appointed by parties. Data on how often diverse neutrals are *selected* is sparse, partly because of the inherent privacy and confidentiality of arbitrations and mediation.

Aside from observing attendance at professional events, engaging in conversations with others in the industry, and reflecting on the most popular neutrals with the biggest books of business, the member demographics of ADR rosters (most of which pertain to arbitrators not mediators) highlight the disparity.-

> The majority of neutrals on ADR rosters are still white men. For example, the American Arbitration Association reports that as of the end of 2021, less than a third of the panelists are "women and racially and ethnically diverse."

Over the last few years, ADR providers have demonstrated their commitment to diversity by implementing various initiatives — from actively recruiting and marketing to scholarships and fellowship programs. Even so, the majority of neutrals on ADR rosters are still white men. For example, the American Arbitration Association reports that as of the end of 2021, less than a third of the panelists are "women and racially and ethnically diverse."

Similarly, a JAMS Panelist Survey for 2021 reported 68 percent are male and over 85 percent are white. "To put this into perspective," according to a June 2021 American Association for Justice study, "individuals who identify as BIPOC [Black, Indigenous, and people of color] make up nearly 40 percent, and women make up 51 percent, of people living in the United States."

Similarly, more than half of the 1,200 respondents to the 12th empirical International Arbitration Survey conducted by the School of International Arbitration (SIA), Queen Mary University of London, in partnership with White & Case LLP, agreed "that progress has been made in terms of gender diversity on arbitral tribunals over the past three years. However, *less than a third* of respondents believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity."

Identifying the issues in selecting diverse neutrals

The first step to fixing the problem is identifying some of the root causes leading to the underrepresentation of diverse neutrals as they pertain to in-house counsel.

For starters, diversity within ADR is not often a focus of in-house counsel. In-house counsel and law firms have taken steps to increase diversity within their top ranks. Companies are demanding specific results from their law firms in terms of hiring, staffing, and hours worked. *But many of these initiatives do not apply to the selection of mediators and arbitrators.*

This is not because of any nefarious intentions, but the opposite — because companies are not selecting neutrals as often as they are retaining lawyers, the lack of diversity is not on companies' radars.

Second, the default process for selecting neutrals perpetuates the problem. Historically, law firms and clients rely on legacy relationships. "People go with who they know," says Vijay Bondada, vice president and chief litigation officer, Duke Energy. Law firms propose a list of candidates to the clients containing the neutrals with whom they have prior relationships. The same individuals are

selected over and over, giving the impression that these neutrals are the most “qualified.”

Vijay Bondada, Vice President and Chief Litigation Officer, Duke Energy

For decades, mediators and arbitrators were primarily retired judges and law firm partners — ranks that were dominated by white men. As such, it’s not surprising that the legacy relationships built with law firms lacked diversity, and each new engagement resulting from these relationships continues to exclude qualified diverse neutrals.

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Third, for those companies who want to consider a “new” neutral — as in never used before, not necessarily new to the field — they must overcome the perceived and unquantifiable risk that comes with this. When facing “high-ticket, high risk, bet-the-company litigations” or cases that could bring “reputational risk,” says Bondada, many companies “can be reluctant to roll the dice” with someone new.

Sarah Downey, Claims Leader, Lockton Financial Services

Even for lower-profile cases, however, many companies are also unwilling to add risk into the equation. Sarah Downey, claims leader, Lockton Financial Services, says, “Insurance companies, for example, especially in D&O [directors and officers] cases, rely on trusted relationships that they have cultivated for years. They’ve gotten good outcomes in the past, and they simply don’t see a need to switch gears compelling enough to outweigh the potential risk.”

Absent some “external catalyst — social movement or significant client directive — large enough to trigger change, convincing companies to change course remains an uphill battle, says Downey.

Furthermore, the selection process is complicated by “the inherent nature of how parties in disputes come to mediation or arbitration … these are adversaries that come with their share of friction,” says Bondada. Effectuating change is “extremely hard to do when you’ve got adversaries on the other side that may not be as committed to diversity,” Bondada says.

Notably, he observes, “Right now, it’s not commonplace in arbitration clauses to include any aspect of looking at diverse neutrals or mediators … so even if you come up with a panel of proposed neutrals that are diverse, you still need to get over the hurdle of having the other side agree.” It’s much easier for clients to drive DEI initiatives focused on selection of outside counsel, but “it is a lot harder to do in the ADR space,” in Bondada’s opinion.

In-house counsel have the power to effect change

The following are five recommendations that can, if implemented by companies that regularly select mediators and arbitrators, help start to shape the future of the ADR field. The industry has a long way to go, and there are many steps that need to be taken. These recommendations are intended as initial steps only.

1. Acknowledge there is a problem that needs to be addressed and that in-house counsel hold the power

In-house counsel should specifically pay attention to diversity in selecting neutrals. Crosby says the first step in increasing diversity in ADR is to “be aware of the problem.” We need to “recognize the power that we have as in-house counsel,” he adds.

Rather than defer the selection process to outside counsel, in-house counsel should require firms to provide lists with diverse candidates — whether it’s more women or more people of color, in-house counsel should not be hesitant to push back and ask more of their outside counsel. “Being aware of [the issue] is the first step — and making outside counsel aware of it is the next step. Once you do, the next time around … they give you a more diverse list.”

Joanne Saint-Louis, director, diversity outreach, JAMS, echoes this sentiment: “In-house counsel

holds the purse strings.” Many companies care about diversity in the legal space, and the same attention needs to be given to ADR, she adds. That said, Noah Hanft, former general counsel, Mastercard Worldwide, and mediator and arbitrator, AcumenADR, cautions that requiring diverse slates doesn’t necessarily move the numbers. It comes down to *selection* — in-house counsel, as the ultimate decision-makers, also should be intentional in their choices.


Joanne Saint-Louis, Director, Diversity Outreach, JAMS

2. Be proactive: Don’t wait for a dispute to arise to find and vet potential candidates

Counsel should be proactive before disputes arise and keep a roster of vetted potential candidates. Again, it is recommended that clients be involved in the process rather than deferring to outside counsel.

The best solution to increase diversity is to “be intentional,” Bondada says. “We routinely interview people that we don’t use just because we want to keep on top of who is out there and see who we could keep in our quiver.” His company’s practice is to meet with potential candidates, get to know them, and if they think they may be of interest, they put that neutral person on their roster for potential use in the future.

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- Vijay Bondada, vice president and chief litigation officer, Duke Energy

Former Global Head of ADR, AIG, and independent arbitrator and mediator with Gleason Alvarez ADR, Erin Gleason Alvarez, had a similar practice of not deferring to outside counsel, but rather proactively seeking out qualified neutrals for AIG to consider for future opportunities.

Vetting potential neutrals will help you get comfortable with giving someone their first opportunity.

So, how do you vet a neutral? “You do your homework,” Bondada says. “Just like we do with anybody we use in litigation, whether it’s outside counsel, jury consultants, experts, etc. We make sure that we do our background and due diligence on the person and their capabilities.” “Experience is critical,” so take the steps to “make sure this is someone who has the credentials and reputation that you could say to the other side, ‘they can do the job.’”


Noah Hanft, Mediator and Arbitrator, AcumenADR

The general consensus is that clients, not just outside counsel, should ask for referrals, review candidates' websites, and interview them. While each particular case is different, clients should consider the neutral's subject matter expertise, personality, legal experience, how they handle

certain issues, and the value that a diverse perspective may bring to the table. The specific vetting process for mediators and arbitrators may differ, but for mediation, “Nothing precludes in-house counsel from sitting down with the mediator and getting comfortable with them,” says Hanft. In-house counsel should take the time and make diversity a priority.

In addition to seeking referrals, counsel should seek out and meet neutrals at professional conferences, training seminars, and other events. “It’s where you’re looking and how you’re looking — you need to readjust your lens,” Gleason Alvarez says.

There are also resources available. ADR providers such as the American Arbitration Association (AAA), International Institute for Conflict Prevention and Resolution (CPR), and JAMS will provide clients lists of diverse candidates. Also check bar associations for lists of diverse neutrals, such as the New York DEI Neutral Directory, published by the New York City and New York State Bar Associations. Alterity ADR, a recently launched dispute resolution firm consists entirely of diverse neutrals and later this year, the ADR Inclusion Network will publish a Speaker’s Bureau listing diverse individuals who are available to speak on a broad array of ADR-related topics.

3. Be creative when looking for opportunities to select neutrals you haven’t worked with before

Finding the first opportunity for a neutral allows counsel to learn about their style, how they handle certain types of issues, and how counsel may want to work with them in the future. “It’s about finding ways to allow people to get their foot in the door to get a sense of what they are capable of,” Gleason Alvarez says. For many larger companies with a high volume of disputes, finding opportunities is easy — it’s about willingness.

For some clients, they “have to be creative” when looking for opportunities, says Saint-Louis. “The ADR process is their process. ADR providers are willing to work any way they want, as long as the parties agree. The providers can give suggestions; the parties just need to be open to them.”

Erin Gleason Alvarez, Arbitrator and Mediator, Gleason Alvarez ADR

Smaller exposure cases are opportunities to experiment with new neutrals. While it is unreasonable to expect companies to select a neutral for the first time for a high-profile, high-risk case, not every case is a bet-the-company litigation.

Crosby offers an analogy to the selection of counsel: There are many opportunities to hire a new law firm or have associates take the lead role to give them “a chance to develop a relationship and build their practice.” He argues, “the same applies in ADR.” There are many cases where “you have some room to take a chance.” Especially with mediation, which is non-binding, companies can get a sense of a neutral’s skills, and over time, hopefully learn to trust the neutral’s ability to handle various types of matters.

Another suggestion is to consider co-mediation, which is an opportunity for companies to select a neutral they have previously worked with and, at the same time, a new one. The parties receive two perspectives and reduce the perceived risk of selecting someone for the first time.

> Bottom line, if counsel has done their homework in properly vetting neutrals, then providing the first opportunity becomes less of an unquantifiable risk as it may first appear.

Similarly, in larger arbitrations there may be discrete issues (i.e., discovery) that the parties want to engage a special master to resolve rather than the main neutral. This is an opportunity to select someone for the first time in which the impact of any decisions (and thus, the potential risk) is contained. It provides an opportunity to learn firsthand about the neutral’s experience, style, and ability to handle various issues.

Tripartite arbitrations also provide opportunities to try a neutral for the first time — either as a party-appointed wing arbitrator, or clients can encourage their chosen arbitrator to choose a diverse neutral as chairperson. Because there will be three arbitrators making decisions, this will be less of a “gamble.”

Bottom line, if counsel has done their homework in properly vetting neutrals, then providing the first opportunity becomes less of an unquantifiable risk as it may first appear.

4. Implement diversity clauses into contracts

Contracts commonly include dispute resolution provisions that dictate the process the parties will follow when a legal dispute arises. Since selecting neutrals often requires the agreement of all parties, one way to ensure that your adversary will be equally committed to considering and selecting diverse candidates is to incorporate a diversity and inclusion clause into contracts. ADR providers including JAMS and CPR offer sample language.

5. Implement a policy to track progress

An important component of any initiative is for companies to memorialize their commitment to diversity into a formal corporate policy. When a policy is in place, companies are more likely to follow through with their commitment. A policy also helps counsel track progress, which Bondada recommends to ensure the company stays true to its goals and values.

Companies “don’t need to reinvent the wheel — they can leverage what exists in other contexts to

help track progress," says Gleason Alvarez. Many companies have already implemented diversity policies that track how much they are spending on female and minority-owned businesses. They have policies to track their law firms' commitment to diversity. ADR fits within one or more of these initiatives, and counsel simply needs to include it.

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>
> - Erin Gleason Alvarez, arbitrator and mediator, Gleason Alvarez ADR

Similarly, companies can demonstrate their diversity commitment by adopting one or more diversity pledges, such as the Ray Corollary Initiative or the Equal Representation in Arbitration Pledge. Companies should also ask ADR providers for utilization reports that detail their appointments and helps them stay on target.

There are various methods to measure progress. But at the end of the day, progress depends on a company's commitment.

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