WHY AND HOW CORPORATIONS MUST ACT NOW TO IMPROVE ADR DIVERSITY

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There is wide agreement that the state of diversity in ADR is appalling and that there is no justification for this given the availability of highly qualified women and minority neutrals. Over at least the last eight years, there has been a concerted effort by ADR providers – the International Institute for Conflict Prevention and Resolution (CPR) Diversity Task Force, the ABA Dispute Resolution Section and its Women In Dispute Resolution Committee, the New York State Bar Association’s Dispute Resolution Section, and scholars in ADR – to document the problem and suggest remedial measures.

The statistics are shocking and compare unfavourably with the days when women first entered the legal profession. The Brennan Center for Justice published a report on diversity in the judiciary in 2010, noting that white males were overrepresented on state appellate benches by a margin of nearly two to one. Almost every other demographic group is underrepresented when compared to their share of the nation’s population. Nevertheless, state and federal courts, which are still struggling to improve, have close to 30 percent women (although fewer minority) judges. In large commercial and international arbitrations, the highest recorded statistics for the participation of women have been in the neighbourhood of 6 percent; the participation of minorities is not even this significant (see Lucy Greenwood and C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, Arbitration International Vol. 4 (Kluwer 2012); also Barbara A. Mentz, *Women in Law and Arbitration: Running in Place or Sliding Backward*, New York Dispute Resolution Lawyer Vol.5 No.1 (NYSBA Spring 2012).

This is a meaningful comparison because the privatisation of dispute resolution through ADR (which is sometimes annexed to court processes) cannot alter the legitimacy of requiring that society’s dispute resolution professionals, who perform a quasi-public function, reflect the population at large. It is required in the political process and is an accepted value by those who use these services.

We also know that judgment is improved when there are diverse decision-makers with different points of view (see James Suroweiki, *The Wisdom of Crowds*, Random House, 2004; and Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies*, Princeton, 2007). Certainly, when there are panels of three neutrals, they will make better judgments if they are diverse.

Corporations have actually been at the forefront of diversity initiatives requiring metrics and monitoring spending in order to promote what they recognise as a mandate for better diversity results. There are numerous sources on the internet which list the top 50 companies for diversity and discuss their commitment to recruitment, promotion and metrics. These companies are among the most recognised in the world. They vie for this recognition and have acknowledged that diversity is a business imperative and a core value.

But the selection of neutrals has eluded corporate attention and now deserves its focus. This is because...
corporations often outsource both the drafting of dispute resolution provisions and the selection of neutrals once a dispute arises—unconscious bias and the easy fallback to comfort and networks trumping corporate policy.

The Brennan Center for Justice Report reported that appointive systems for selection of judges tend toward class-based exclusivity or racial and gender homogeneity. The method used to select mediators and arbitrators also involves the ultimate ‘appointment’ by outside lawyers and inside counsel, thus potentially perpetuating the same homogeneity. In some respects, a double screen may impede the appointments of diverse mediators and arbitrators because ADR providers and the courts first place candidates on the list. Then, outside lawyers and inside counsel weigh in.

The existing diversity metrics and policy must be specifically applied to the selection of ADR neutrals whether by inside or outside counsel. Corporations should require year over year improvement in individual firm statistics relating to the selection of neutrals and include performance in this arena in the overall assessment of diversity compliance.

CPR’s National Task Force on Diversity in ADR has developed a Diversity Commitment—any company (whether a CPR member or not) can sign on—it affirms a commitment to diversity and provides: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of neutrals or arbitrators they propose. We will do the same in lists we provide.” That is a beginning, but measurable improvement needs to be demanded and actual selection of diverse neutrals needs to be the metric.

Implicit, unconscious bias is difficult to address, as the Brennan Center report recognised: “Recent research indicates that the task of dismantling sex and race discrimination in the workplace is more complicated than originally thought because the way we discriminate is complicated. Principles of psychology and sociology have enlightened us as to what we actually do, rather than what we think we are doing, want to do, or claim to be doing. ... Our stereotyping mechanism is not easily turned off, even when we want to pull the plug on it, as in the case of gender biases. Merely voicing support for gender equality is not transformative — our brain’s deeply engrained habits do not respond on cue. To exacerbate the situation, we often labor under misleadingly optimistic notions of our decision-making capacity that hide these methodical mistakes. Therefore, we need to become aware of our stereotyping mechanism, be motivated to correct it, and have sufficient control over our responses to correct them.”

Improvement will only happen if diversity is demanded and monitored. Wouldn’t it be great for companies to develop this focus as a possible source for special recognition so that we can really motivate change and then measure that change?

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