Choose Diverse Neutrals to Resolve Disputes – A Diverse Panel Will Improve Decision Making
By Laura A. Kaster

Diversity and inclusion are watchwords in the corporate world where companies vie for recognition of their programs. Many tout improvement in results achieved by increasing the multiplicity of experience and points of view that the workforce can employ to innovate and to address commercial and consumer challenges. In an increasingly interrelated world, business appears to recognize that the most innovative teams include diverse members. Many companies impose requirements for on partners or suppliers to report diversity and diversity improvement. But there has been little attention paid even by these very same committed companies to diversity in the context of alternative dispute resolution (ADR). Instead, dispute resolution is outsourced to law firms and their recommended neutrals. The result has been a remarkable and stubborn lag in the participation of women and non-white mediators and arbitrators in the most significant commercial, international and investor/state disputes.

Because alternative dispute resolution is a privatization of otherwise public court systems, it is a valid to compare the public judiciary to the private neutrals in commercial arbitration. If we look at the Federal court system, lack of diversity remains, but there has been recent improvement. Currently, there are 1,350 sitting federal judges, about 33% are women and only 20% are and people of color. The number of diverse appointments to the federal bench has increased markedly in recent years. Indeed, as of July 31, 2015, President Barack Obama had appointed more women and minorities in total than any other president before him (with the
exception of President Clinton with respect to people of color). Notwithstanding these accomplishments, the federal courts still have a long way to go if they are truly to reflect the communities they serve.

In alternative dispute resolution, precise empirical data is missing due to its principally private and confidential nature. But a recent Law.com article sets out some helpful and troubling statistics for ADR. When cases involve disputes over $500,000, fewer than 20% of selected neutrals are women and in international disputes well under 20% women are selected to serve. Special Report: ADR and Diversity, http://www.law.com/sites/almstaff/2016/10/07/special-report-adr-and-diversity/?slreturn=20170118162558. The author talks about a time lag, stating that a large number of selected neutrals are retired judges or attorneys, which results in a smaller pool of diverse neutrals because that pool “reflects the legal industry not as it looks today, but as it appeared a decade or more ago.” This statement, even if true, by itself reflects the operation of implicit bias. There is no reason that neutrals need to attain some abstract august retirement age, and many lawyers – indeed, many diverse lawyers – have a great deal of practice and other experience before they reach retirement and are highly capable neutrals. In many cases, they have enough experience to be appointed to the judiciary themselves, even to the U.S. Supreme Court, long before they contemplate retirement. The pipeline argument that the article posits is simply false. If there are enough women and minorities to make-up respectable percentages in the judiciary, then there are just as many accomplished lawyers who can ably serve as neutrals.
What may be missing is the firm belief that diversity matters not just for basic fairness and social equity but also for better judgment. But the truth is that particularly when arbitration involves a panel of three, the parties are likely to have harder working panelists and more focused judgment from the neutrals if the panel is diverse. Scientific American recently republished a 2014 article: How Diversity Makes us Smarter by Katherine W. Phillips https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/. The article summarizes and collects information and studies on the impact of diversity on decision-making. It concludes that judgmental mistakes can occur when the group making a decision is not diverse because of assumptions made about shared belief or information:

> Being with similar others leads us to think we all hold the same information and share the same perspective. This perspective, which stopped the all-white groups from effectively processing the information, is what hinders creativity and innovation. *Id.*

This is not a novel proposition; it is a reflection of the kind of groupthink that Irving Janis found operated in formulating the strategy for the Bay of Pigs. Janis, Irving L., *Victims of groupthink; a psychological study of foreign-policy decisions and fiascoes.* (Boston: Houghton, Mifflin 1972).

So there is a downside to sameness. But, more interestingly, the article relies on multiple studies to conclude that there is an upside to diversity:

> when members of a group notice that they are socially different from one another, they change their expectations. They anticipate differences of opinion and perspective. They assume they will need to work harder to come to a consensus. This logic helps to explain both the upside and the downside of social diversity: people work harder in diverse environments both cognitively and socially. They might not like it, but the hard work can lead to better outcomes. *Id.*
There are good reasons to extend your corporate diversity policy to the selection of neutrals to resolve your disputes. Ask your counsel to seek out a diverse panel of neutrals and consider measuring their efforts to meet diversity policies by metrics you would otherwise impose.

Several years ago, the Institute for Conflict Prevention and Resolution – CPR Institute promulgated a Commitment on Diversity, calling upon companies and law firms, neutrals and providers to implement a commitment to diversity and inclusion in the selection of neutrals by asking outside law firms and their counterparties to “include qualified diverse neutrals among any list of mediators or arbitrators they propose” and providers doing the same in lists they provide. [https://www.cpradr.org/strategy/committees/diversity-task-force-adr/index/_res/id=Attachments/index=0/Diversity%20Commitment.pdf](https://www.cpradr.org/strategy/committees/diversity-task-force-adr/index/_res/id=Attachments/index=0/Diversity%20Commitment.pdf). In 2015, the Equal Representation in Arbitration pledge was devised to address the underrepresentation of women on international arbitral tribunals. It “seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity.” [http://www.arbitrationpledge.com/](http://www.arbitrationpledge.com/). The pledge now has nearly 1,500 signatories, of which over 260 are corporations, law firms, and other organizations, including a growing list of U.S. firms, institutions, and companies. Notably, arbitral institutions and associations have also signed on, including the Chartered Institute of Arbitrators, the CPR Institute, the Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution, the ICC International Court of Arbitration, JAMS, the London Court of International
Arbitration, the Silicon Valley Arbitration and Mediation Center, and the Singapore International Arbitration Centre.

You have a choice and you can assure better deliberations, better judgments and social equity by seeking diversity in alternative dispute resolution.

Laura A. Kaster received the 2014 NJSBA Boskey Award for the ADR Practitioner of the year. She is a Fellow in the College of Commercial Arbitrators. She serves as an arbitrator and mediator for CPR, the American Arbitration Association, ICDR, FINRA and the New Jersey and New York Courts. She is a member of the CEDR global panel of Mediators and an American Arbitration Association Master Mediator.