

Smooth Moves 2019: Career Strategies for Attorneys of Color

By Colby Creedon

On May 23, 2019, the Commercial and Federal Litigation Section of NYSBA sponsored the 2019 Smooth Moves Career Strategies for Attorneys of Color CLE program held at The Lincoln Center for the Performing Arts. This evening program featured a panel discussion entitled *The Color of Neutrality: Increasing Diversity in Alternative Dispute Resolution* and an awards ceremony where Hon. Preet Bharara and Hon. Joon Kim received the Hon. George Bundy Smith Pioneer Award, while Johnny Nguyen—a student at Benjamin N. Cardozo School of Law—received the Kay Crawford Murray Commercial Division 1L Diversity Fellowship.

The “Color of Neutrality” panel, moderated by Theo Cheng, Esq., discussed the importance of diverse alternative dispute resolution (ADR) neutrals, how the lack of diversity in ADR is a problem, and strategies for increasing diversity among ADR neutrals. Panelists included Hon. Ariel Balen, Mediator and Arbitrator, JAMS; Sasha Carbone, Esq., Associate General Counsel and Assistant Corporate Secretary, American Arbitration Association (AAA); Nicole Haynes, Esq., Associate Director of Recruitment and Training, FINRA; and, Nancy Thevenin, General Counsel for the U.S. Council for International Business and Founder/Principal, Thevenin Arbitration and ADR.

Mr. Cheng started the discussion by outlining some reasons for ADR’s diversity problem, which include corporate America not including diversity as a requirement in arbitrator and mediator selection contract clauses, implicit bias by individuals making arbitrator and mediator selection decisions—including in-house counsel and outside law firms—and the confidential nature of the ADR process creating an information gap. The panel agreed with Mr. Cheng and added a chicken-and-egg problem, where to be hired as an ADR neutral, a prospective arbitrator or mediator needs ADR experience; however, the experience is gained by being an arbitrator and mediator.

The panelists agreed that diversity is essential to ADR not only for fairness, cultural competence, and legitimacy reasons but also because clients are demanding diversity. ADR neutrals need cultural competence to make sound decisions. Cultural competence is demonstrated by relating to the parties, and the ability to relate arises from having similar backgrounds. As such, when litigants are diverse, it is essential for neutrals to be diverse so that neutrals make sound decisions by relating to the parties. Additionally, diverse neutrals are necessary because a perceived unfairness may arise when neutrals

“look” more like one party versus another. That similarity may be seen to consciously or subconsciously influence outcomes. Ms. Haynes said, from FINRA’s perspective, fairness is the most important reason to provide diverse arbitrators to its members. FINRA wants its forum to reflect the communities it serves; communities are diverse, providing diverse arbitrators enhances confidence in the arbitration process. Ms. Carbone emphasized that ADR must be fair in fact and in perception, which is only possible when neutrals reflect the diversity of our communities. Regarding legitimacy, Ms. Thevenin discussed how non-diverse arbitrators deciding claims between diverse parties might result in parties questioning whether an ADR forum is appropriate for resolving claims. Parties questioning whether an ADR forum is appropriate undermines the legitimacy of ADR generally.

Despite the importance of diverse ADR neutrals, the panelists agreed that the ADR industry struggles to recruit diverse neutrals. The panel cited some abysmal diversity-related statistics. Women account for 20% of arbitrators resolving matters valued over \$1 million. Additionally, African Americans account for 7% and women account for 27% of FINRA arbitrators. These statistics can and should be improved because, as Mr. Cheng noted, ADR is the privatization of an otherwise public function; public courts have made significant diversity improvements, and the ADR industry should act in kind.

Strategies discussed to improve diversity among ADR neutrals included digital marketing, traditional networking, diversity fellowships, and setting organizational diversity targets. FINRA uses a digital media strategy, targeting advertisements specifically at diverse individuals—to become a FINRA arbitrator—via website banner ads and online platforms such as LinkedIn. The panel agreed that word-of-mouth advertising via networking with diverse bar associations—like the National Association of Women and Minority Owned Law Firms—are excellent channels for recruiting diverse neutrals. The

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AAA's Higginbotham Fellows Program has been successful in providing training, networking and mentorship to diverse early-stage ADR practitioners. Other successful strategies include organizational mandates, accompanied by metrics and transparency. The AAA has annual diversity recruitment goals, requires every roster of neutrals submitted to litigants be at least 20% diverse, and reports diversity statistics to its Board of Directors every quarter using a Diversity Scorecard. As a result of the AAA's initiatives, 42% of neutrals added to the AAA's roster were diverse in 2018. Since tracking diversity statistics, FINRA has seen 20% and 30% increases in the number of African American and women arbitrator applicants, respectively.

The panel concluded with a few takeaways: (1) diversity is essential to the legal profession, including ADR; (2) the legal profession, including ADR, has a diversity problem that is slowly improving; and (3) individuals and organizations within the legal profession should promote diversity initiatives.

Following the panel discussion, Carla Miller, Esq., Program Co-Chair, introduced then-NYSBA President-elect, Hank Greenberg, Esq. Mr. Greenberg reiterated the importance of diversity in the legal profession and high-

lighted NYSBA's requirement that every committee and section have at least one diverse officer. Mr. Greenberg closed by acknowledging attorneys are needed now more than ever to bring people together through understanding both sides of an issue and resolving issues with logic.

Following Mr. Greenberg's remarks, Hon. Preet Bharara, and Hon. Joon Kim were presented with the Hon. George Bundy Smith Pioneer Award. The Commercial and Federal Litigation Section presents this award annually to an attorney of color whose career accomplishments exemplify the high standards in legal excellence, community commitment, and mentoring illustrated by the late Judge Smith, who served on the New York State Court of Appeals.

Although Mr. Bharara and Mr. Kim gave separate remarks when accepting the award, both reminisced about their tenure at the U.S. Attorney's Office for the Southern District of New York. Mr. Bharara and Mr. Kim emphasized the importance of diversity in the legal profession and encouraged young attorneys to enter public service to do good things for the country.

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