

## Making Diversity Happen in ADR: *No More Lip Service*

By Noah J. Hanft

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The “D” in ADR stands for “dispute”... but that’s not enough. It needs to also stand for “diversity” and right now we are far from that. As the CEO of the CPR Institute, I lead an organization comprising corporations, law firms, mediators and arbitrators. The call for diversity comes up all the time. Many took it up with a passion long before I became active in the ADR world. So what holds us back?

When I was a GC, I and many of my colleagues in companies across the country pressed law firms to focus on hiring and retaining diverse attorneys. I can’t say the law firm community hit it out of the park, but the combined force of all our supplier diversity programs made a difference. We knew the pressure and encouragement had to come from us and that the responsibility rested with the law firms.

One of the impediments we face in ADR is that each stakeholder is not clear as to what his or her role is and that makes it quite easy to point the finger at others. We hear explanations like, “Law firms are afraid to displease their clients by not staying with proven and experienced

neutrals,” “ADR organizations don’t have qualified neutrals on their panels” and “In house counsel defer to law firms in the selection process.”

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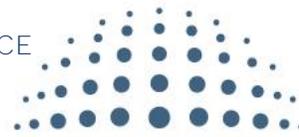
“A highly-regarded study suggests that diversity can lead to better decisions, despite the potential difficulty of interrupting homogeneity.”

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So I’d like to lay out what I think are the complementary obligations of all stakeholders to truly drive diversity in ADR. But first, a word on why I think it is so important. What would a diverse panel of arbitrators bring to evaluating a case and rendering an award?

### **THE PROMISE**

A highly-regarded study suggests that diversity can lead to better decisions, despite the potential difficulty of interrupting homogeneity. Specifically, the results demonstrated “the mere presence of socially distinct newcomers



and the social concerns their presence stimulates among oldtimers motivates behavior that can convert affective pains into cognitive gains.”<sup>1</sup> Interviewed about the study, study co-author Katherine Phillips explained, “The mere presence of diversity in a group ... leads to better group problem solving.”<sup>2</sup>

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## THE PROBLEM

And how bad is the diversity problem in ADR? Well, let’s look at the overall legal profession first. Despite a healthy “pipeline” at entry, in the law schools where enrollment is basically equal in terms of men compared to women, at some point the “pipe” seems to clog. Women account for roughly 36% of the profession, 27% of judges, 25% of Fortune 500 General Counsel and only 18% of equity law firm partners<sup>3</sup>. As figures stated later in this article will show, the numbers in ADR are even worse.

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<sup>1</sup> [“Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers,”](#) Katherine W. Phillips, Katie A. Liljenquist and Margaret A. Neale (*Personality and Social Psychology Bulletin*, Vol 35, Issue 3, pp.336-350, 2008).

<sup>2</sup> [“Better Decisions Through Diversity,”](#) Kellogg Insight (2010)

<sup>3</sup> [A Current Glance at Women in the Law,](#) American Bar Association (January 2017)

In 2016 minorities comprised eight percent of law firm partners in the country’s major firms. Only about four percent of all associates and not even two percent of partners were African American.<sup>4</sup>

Could the situation in ADR be worse? The sad answer is yes.

A 2014 snapshot survey by the ABA Dispute Resolution Section showed that the more high-stakes the case, the lower the odds that a woman would be involved. For cases with \$1 million to \$9,999,999 at issue, 82% of the neutrals (and 89% of arbitrators) were men. Male neutrals handled 93% of intellectual property disputes, 91% of insurance disputes, 82% of corporate and commercial disputes and 79% of class actions.<sup>5</sup>

As reported by a recent Law.com<sup>6</sup> article, in terms of minority numbers, “Statistics are hard to come by.” However, by its own analysis of the more than 350 neutrals affiliated with JAMS, Law.com found 25% were women and 7% minorities.

As of late 2016, of CPR’s 550 neutrals worldwide, roughly 15 percent were women and 14 percent were diverse. Out of the twenty individuals who were selected for three or more mediations or

<sup>4</sup> [National Association for Law Placement, 2016 Report on Diversity in U.S. Law Firms](#)

<sup>5</sup> [Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey](#) (January 2014)

<sup>6</sup> [“ADR Business Wakes Up to Glaring Deficit of Diversity,”](#) by Ben Hancock (Law.com, 2016)



arbitrations between 2010 and 2016, twelve in that group were white men, five were women, two were Hispanic men and one was an African American man. (Note: This data only encompassed instances in which CPR was approached by parties to help make a selection.) In addition, CPR saw an 81% increase in the selection of women and diverse neutrals in FY16, with women and minorities accounting for 26% of selections. Not good enough.

“In 2015, CPR formed a partnership with LCLD and FINRA, combining LCLD’s Fellows Program and FINRA’s highly regarded arbitration training, as well as mentoring by and networking with skilled CPR neutrals, with the goal of getting diverse neutrals included on rosters offering actual paid work opportunities.”

As for those who would insist they rely solely on “experience” and “reputation” when selecting neutrals, as former CPR SVP F. Peter Phillips once put it: “For every established and influential lawyer who advocates for diversity there is another established and influential lawyer who voices concern about maintaining ‘quality’ if ethnicity or gender is a criterion for hiring ADR neutrals. That concern may arise from

<sup>7</sup> F. Peter Phillips, “[Diversity in ADR: More Difficult to Accomplish than First Thought](#)” (*Business Conflict Management*, 2009)

ignorance, or prejudice, or experience, or all three—but the question is still embedded in the ethos of the business legal community.”<sup>7</sup>

## **SOME PROGRESS, BUT MORE NEEDS TO BE DONE**

Many of the ADR organizations have been trying to tackle this problem. In 2006, CPR convened the [National Task Force on Diversity in ADR](#) aimed at improving awareness and encouraging conscious choices to include diversity as a factor in neutral selection. Next came CPR’s [Diversity Matters Pledge](#), allowing companies to state that they recognize the value of diversity and inclusion not only in their workforce, but in providers of services including arbitration and mediation.

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## **OUR RESPECTIVE ASSIGNMENTS**

### Law Firms and Senior Partners

Recommendations are risky. You place your own reputation on the line, when you even impliedly endorse another. It may seem the safer route to stick to only the people you already know of and have recommended before.



Try to learn of neutrals that you have not used. What would be the harm when sending out the typical law firm memo asking whether anyone knows a good mediator in a copyright case, to specifically ask about diverse neutrals in that space? Be brave enough to do what your clients have told you they expect you to do in your own firm.

### Corporations and General Counsel

Corporations perhaps play the most important role here. You need not only to say that diversity is important to you, but to *show* that it is. Extend your diversity supplier programs to indirect suppliers like mediators and arbitrators and look at metrics. Reassure your outside law firms that you're serious and expect to see a real effort.

While many companies offer incentives, such as greater likelihood of winning business, or even bonuses, for meeting diversity standards, one CPR member, HP, recently went a step further, announcing that they would actually withhold fees from law firms that failed to comply with diversity requirements.<sup>8</sup>

### ADR Organizations

With greater transparency, CPR and our fellow ADR organizations need to intensify our efforts to provide the very best education and mentorship. Next, we need to recruit diverse individuals and get them on our rosters. But, most important, we must utilize our very best efforts to put those diverse candidates

on slates; remind decision-makers of the benefits of diversity on the quality of the decision-making process; and then actively encourage the selection of diverse candidates.

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### Parties

If your opposing party pushes for a diverse neutral, consider it—and your own possible prejudices—with an open mind.

One final major stakeholder is the legal and business community generally. Every one of us, including our future diverse neutrals themselves, can affect positive change. Whether for ourselves or on behalf of others, we can all initiate or make the introductions that are so critical, help to support substantive training, participate in the networking process, ask to be mentored, or (especially if you are a white male), offer to mentor.

As stated in a recent ABA report on corporate legal departments, “[L]ack of access to networks, the inability to obtain quality work assignments, and

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<sup>8</sup> [“HP, Mandating Diversity, Will Withhold Fees from Some Firms”](#) (*Corporate Counsel*, 2017)



limited opportunities for advancement may be the ‘critical differentiating factors in the career of men and women, and especially women of color.’”<sup>9</sup> Almost two-thirds of women of color in law firms have previously reported being excluded from formal and informal networking opportunities, as compared to only four percent of white men.<sup>10</sup>

Diverse neutrals need experience to show quality, build their reputations and earn their selections—but, in order to gain that all important experience and develop their skills, they first need to get selected. The riddle is circular but *not* impossible to solve, and those who prevent, or at least fail to support, the latter cannot in good conscious unequivocally demand the former. We can, and must, do better—not out of any sort of charity, but because this next generation of talented individuals is poised to make a real difference, if we will only recognize our roles and do our part.

—By Noah Hanft, International Institute for Conflict Prevention & Resolution Inc.

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<sup>9</sup> “[Visible Invisibility-Women of Color in Fortune 500 Legal Departments](#)” (ABA Commission on Women in the Profession, 2012)

<sup>10</sup> “[Visible Invisibility-Women of Color in Law Firms](#)” (ABA Commission on Women in the Profession, 2006)



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## ABOUT CPR

CPR is the only independent nonprofit organization whose mission is to help global business and their lawyers resolve commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

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