

# LEVELING THE PLAYING FIELD for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity

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Both conscious and unconscious forms of racial and ethnic bias in our society have, not surprisingly, resulted in the underutilization of minority neutrals in union and non-union workplace disputes. The objectives of the alternative dispute resolution movement will be better served if there is greater equality in the selection and utilization of minority workplace neutrals. The authors contend that a program is needed to increase diversity in this area and that this program should have three components: (a) creating national and regional panels of minority neutrals to increase their visibility, availability and acceptability; (b) educating users of ADR services about conscious and unconscious biases in neutral selection processes; and (c) developing a system of accountability to encourage ADR users to select minority neutrals for workplace disputes.

**W**hen one considers the extent to which the appalling legacy of racial and ethnic bigotry in the United States has infected the legal system of this country since its founding, it is hardly surprising that this legacy has negatively affected the extent to which racial and ethnic minorities are being used as mediators, arbitrators and fact-finders. We are focusing primarily on the underutilization of minority neutrals in the area of labor and employment disputes, but this problem also exists in other areas of alternative dispute resolution (ADR) practice. The unfairness of this situation is

obvious. What makes the situation even more offensive and counterproductive, in the context of workplace cases, is that these disputes often involve allegations of discrimination, disparate treatment, hostile work environment, or sexual harassment.

There are similar disparities in the selection and utilization of women and other groups that are underrepresented in the ranks of workplace neutrals.<sup>1</sup> However, the purpose of this article is to focus primarily on race and ethnicity as factors, and if our conclusions are useful with regard to combating the disparities in the selection and utilization of others, we welcome additional dialogue about how to broaden the focus of our analysis and to broaden the proposed solutions.

Let us digress for a moment to tell you something about ourselves. We have been friends and colleagues for some 15 years. We come from different demographic backgrounds. David is white but his religious affiliation (Jewish) makes him personally familiar with discrimination. Lamont is African-American. We are both involved in ADR as neutrals (Lamont as a university professor, labor arbitrator, labor mediator and grievance mediator and David as a lawyer, mediator and arbitrator of private employment and other kinds of disputes). Collectively, we have almost 50 years of experience as workplace neutrals. It is through the prism of our experience that we write about the dearth of minority neutrals involved in workplace disputes. We hope that our observations and conclusions, some of which apply as well to women, will become part of the continuing dialogue about the need for greater diversity in the ADR field as a whole and, in particular, in the area of workplace conflict resolution.

### What Do We Mean by Diversity?

Fostering greater diversity in workplace ADR requires consideration of what differences are important. For example, no one argues that it is important to have proportional representation of left-handed and right-handed people. Nor is

there concern that a proper balance be maintained between people of Polish descent as compared with those of Finnish descent. The types of differences that are germane to our inquiry are those associated with a history of continuing discrimination and exclusion. For purposes of this article, we are focusing only on race and ethnicity.

With regard to workplace systems, there are essentially three types. In one type, neutrals are selected from a list maintained by the employer or by an independent ADR service provider. In the second system, the employer and labor union create a permanent panel of arbitrators. In the third type, employers and employees make *ad hoc* decisions about the selection of neutrals for individual cases as the need arises from time to time. In all three systems, minority neutrals have been underutilized. Thus, an employer could have diversity on the permanent panel, but not choose the minority arbitrator to hear cases.

This article has several goals: identifying the problem; discussing the importance, from both a public policy and ethical perspective, of addressing the problem; identifying barriers to achieving diversity; and finally, proposing some remedies and strategies that we consider not only fair and reasonable, but also practicable.

### The Problem

Two important developments over the last 50 years have converged to create the problem that we are addressing in this article. First, along with the advent of an increasingly diverse workforce in the United States, we have also seen an increasing number of discrimination claims.<sup>2</sup>

Second, employers have increased their use of mediation and arbitration, as the cost of litigation has escalated and public policy has encouraged the use of private ADR processes. One study estimates that the number of non-union employees who are obligated to take employment disputes to arbitration increased from three million in 1997 to six million in 2002.<sup>3</sup> Also well-documented is the increased use of mediation in workplace



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cases.<sup>4</sup> However, there is considerable literature demonstrating that minority neutrals are underutilized in these settings.<sup>5</sup>

At the same time, there has been a reduction in the percentage of court-filed cases going to trial. One study found that 11.5% of the cases filed in federal district court went to trial in 1962, and only 1.8% in 2002.<sup>6</sup>

In short, these statistics show that a substantial amount of conflict resolution in the United States, and in the workplace in particular, has been privatized.

However one views the detriments or benefits of privatizing the public justice system, it is obvious that there is considerably less public scrutiny of the selection of neutrals, the outcomes of settlements, and arbitral decisions.

It is time to make real change so that minorities have a full opportunity to participate in workplace ADR. The stakes involved are high. First, public policy supporting the enforcement of civil rights laws will be undercut if minorities are *de facto* excluded from serving as fact-finders, mediators, and arbitrators in cases alleging civil rights violations.<sup>7</sup> Second, the lack of racial and ethnic diversity in the ranks of neutrals may cause society to lose confidence in the fairness of private dispute resolution, leading legislators, regulators and the courts to reverse the policies that now support ADR.<sup>8</sup> This would be an unfortunate result because the number of forums in which workplace conflicts could be addressed in a fair, timely, and cost-effective manner would be reduced. Mediation and arbitration reduce the cost of resolving workplace disputes. Resolving workplace conflicts in court is simply too time-consuming and expensive to be the primary conflict-resolution forum.

For these reasons, there is much at stake for everyone in ensuring the inclusion of people of all races and ethnic backgrounds as workplace neutrals in ADR proceedings.

### Barriers to Achieving Diversity

So what are the barriers to greater diversity? We know of no dispute resolution providers who

## THE COST OF DISCRIMINATION

Racial and ethnic discrimination inflict great cost on society in general and the victims of discrimination in particular.<sup>1</sup>

In recent years, researchers have documented adverse health effects caused by discrimination, including increased stress and risk of heart disease and stroke. Researchers have also discovered racial disparities in the treatment of disease, with African-American patients receiving less medication for pain and less vigorous treatment of cancer.<sup>2</sup>

The criminal justice system punishes people of color more harshly than it does whites.<sup>3</sup> And the list of disparate treatment goes on, including discrimination in employment, housing and consumer purchases.<sup>4</sup>

Discrimination is back in the air as “hangman noose” incidents are reported on the Columbia University campus.<sup>5</sup> Hate crimes also seem to be on the rise.<sup>6</sup>

The costs of discrimination are not just out-of-pocket costs, but lost opportunity costs. Numerous sources document increased productivity in diverse workplaces,<sup>7</sup> and improved deliberations and decision-making by racially diverse juries.<sup>8</sup>

<sup>1</sup> Madeline Drexler, “How Racism Hurts—Literally,” *Boston Globe* (July 15, 2007).

<sup>2</sup> Hugh F. Butts, “The Black Mask of Humanity: Racial/Ethnic Discrimination and Post-Traumatic Stress Disorder,” 30 (3) *J. Amer. Acad. of Psychiatry & the Law* 336-39 (2002). Vickie L. Shavers, Martin L. Brown, “Racial and Ethnic Disparities in the Receipt of Cancer Treatment,” *J. of Cancer Instit.* 334 (March 2002); Jason Zell et al., “Race, Socioeconomic Status, Treatment, and Survival Time Among Pancreatic Cancer Cases in California,” *Cancer Epidemiology Biomarkers & Prevention* 546 (March 1, 2007).

<sup>3</sup> For a comparison of the mean length of felony sentences imposed in state courts by offense and race of felons, see U.S. Bureau of Justice Statistics, 2004, at [www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04207tab.htm](http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04207tab.htm).

<sup>4</sup> Marianne Bertrand & Sendhil Mullainathan, “Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” *Amer. Econ. Rev.* (Sept. 2004); Ian Ayres, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* (2001).

<sup>5</sup> See Rich Schapiro et al., “Noose Found on Professor’s Door at Columbia University,” *N.Y. Daily News* (Oct. 10, 2007).

<sup>6</sup> Howard Witt, “Justice Department May Probe Bias in Jena,” *Chicago Trib.* (Oct. 16, 2007).

<sup>7</sup> See Derede McAlpin, “Firms that Prove their Diversity Commitment Win,” *Nat’l L.J.* (Oct. 8, 2007); Shankar Vedentam, “In Boardrooms and in Courtrooms, Diversity Makes a Difference,” *Wash. Post* (Jan. 15, 2007).

<sup>8</sup> See Hilary MacGregor, “When Diversity Adds Fairness,” *LA Times* (April 17, 2006); Mustafa El-Farra, “Race and the Jury: Racial Influences on Jury Decision-Making in Death Penalty Cases,” *Hastings Race & Poverty L.J.* (Fall 2006).

have an explicit policy of excluding racial and ethnic minorities as neutrals. On the contrary, we know of several providers who have announced diversity goals and taken steps to affirmatively seek to increase the ranks of minority neutrals.<sup>9</sup>

We conclude that for the most part, the barriers to diversity are not intentional, and are the result of unconscious bias. However, we do not mean to suggest that pernicious intentional discrimination and genuine racial prejudice do not exist. But with an increasing public awareness of anti-discrimination laws, much overt discrimination has gone underground, so to speak.

Unintentional barriers to diversity in the use of minority neutrals can be subtle or obvious. Here we discuss both kinds.

### *Obvious Barriers*

One of the major obvious barriers is the perception that the pool of so-called “acceptable” candidates to serve as labor and employment neutrals is small, coming mainly from the ranks of senior lawyers, retired judges, academics, and other professions. Until recent years, entry into those occupations by racial and ethnic minorities was limited. Even today, only 3.9% of lawyers in the United States are African-American (as compared with 12.3% of the U.S. population), and only 3.3% are Hispanic (as compared with 12.5% of the U.S. population).<sup>10</sup> This is not entirely surprising when one considers how recently the most blatant forms of racial and ethnic discrimination were dismantled. It was not until 1943 that non-white lawyers were permitted to join the American Bar Association, and not until 1986 that a concerted effort was made to increase their membership and involvement in the ABA.

ADR providers seek to add to their rosters of arbitrators, mediators and fact finders the type of people they think their customers want to use, or with whom they feel more “comfortable.” Thus, the preference that many ADR users have for selecting mediators and arbitrators who are lawyers or former judges compounds the problem for minority candidates. With minorities entering the legal profession in larger numbers only in recent years, it will be many years before the racial and ethnic composition of the pool of lawyers and judges includes a representative cross-section of the U.S. population. Minority judges still are a tiny minority. This does not mean that there are no minorities at all on the rosters of ADR providers. It just means that they are a minority there as well.

Where permanent panels are used by large employers to hear workplace disputes, those who are named are there at the discretion of the employer and the union. Some employers and unions have named minorities to their permanent panels, making them more proportional with the general population. But this is just an illusion of progress if minority arbitrators are consistently not selected. This is the obvious and pernicious barrier of disparate selection (*de facto* exclusion) from service. The experience of many minority neutrals is that even though they are “qualified”

and on the permanent panel, they are either not selected or picked less often than white neutrals to hear actual cases.

The preference for neutrals who have extensive experience as arbitrators and mediators or who do arbitration or mediation full time, sounds reasonable and are the rationales often given for disparate selection. It is true that many minority neutrals may have less experience and (like many white neutrals) work only part time as a neutral. Yet a significant reason for the lack of experience is disparate selection. The reason they do not have full-time ADR practices is because not enough time has elapsed since the professional ranks have opened to minorities.

Disparate selection is difficult to document because the process of selecting neutrals is private and decentralized.<sup>11</sup> When a non-unionized company finds itself in a dispute with an employee, such as over an employment termination claim, no regulatory agency monitors the designation of the arbitrator or mediator. There are no record-keeping requirements concerning the rationale for neutral selection. There is no accountability to the public or anyone else for these decisions. This also holds true for disputes that arise in the unionized setting.

### *Subtle Barriers*

Our experience and observations tell us that there are subtle barriers on both the supply side of the market for workplace neutrals as well as on the demand side. There is empirical evidence of the existence of unconscious bias in our society that affects minority neutrals as well as the people who make decisions about neutral selection.<sup>12</sup>

On the supply side, one finds that many minorities suffer from self-doubt as a result of being told throughout their lives that they are less worthy (whether it be with regard to intelligence, social grace, integrity, or work ethic).

Malcolm Gladwell, in his book *Blink*, reported some interesting research that documents how one’s attitude toward one’s race can affect performance.<sup>13</sup> The research involved two groups of African-American test-takers. The people in one group were asked to indicate their race on the test, while the people in the other group were not. The group asked to state their race performed substantially worse on the test than the

***Fostering greater diversity in the selection of workplace neutrals requires consideration of what differences are important.***

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other group. In other words, just reminding someone of a racial difference can negatively affect performance. And in a society still infected by obvious, subtle, and unconscious racism, if one is African-American, Hispanic, or of another non-white background, it is difficult to avoid the constant reminders of one's race.

In addition to concerns about their innate value, minorities also have legitimate concerns about whether an "alternative" career in ADR would provide a solid path for achieving success and economic security. They may eventually decide that a more traditional path to success (such as a conventional career in law or teaching) is preferable.

On the demand side of the market, there are also subtle barriers. First, there is the continued importance of the "old boy" network in the referral of business. Another problem is that people who hire professionals tend to choose those they already know, or who are friends of friends, or recommended by friends—people who seem to be "like them" or belong to the same social clubs and religious communities.

Particularly when this choice is made by employers, there is a tendency to make what they consider a "safe" choice—namely, someone who is not controversial or noticeably different in order to protect their position and that of their client. However, those choices are not conducive to increasing diversity.

Second, lawyers act as gatekeepers and manage the disputes that go to mediation, arbitration or fact finding, and, as noted above, they are disproportionately white. Thus, when lawyers are tasked with appointing a neutral in a case, they tend to appoint someone like themselves, someone white, a lawyer, and usually male.<sup>14</sup>

Lawyers have a duty of loyalty to their clients and thus a duty to advance their clients' goals. How does this affect their selection of a mediator or arbitrator in a race discrimination case? Are they concerned that choosing an African-American, Hispanic, or other minority neutral would tip the playing field in the minority employee's favor? Or to put it more bluntly, are they concerned that the minority neutral will not or cannot be neutral, thereby enhancing the likelihood of a victory for the employee?<sup>15</sup>

There might be more cause for concern in the arena of arbitration, where the arbitrator makes a binding decision, as opposed to mediation, where the neutral acts as a facilitator of negotiation. But the evidence suggests there is no cause for concern for believing that neutrals of color cannot be as impartial as white neutrals. Studies of the decisions of African-American judges show little, if

any, difference between their decisions and those of their non-minority colleagues.<sup>16</sup>

Third, the unconscious mind sends subtle messages about people who are different. This can be insidious. Research by Harvard professor Mahzarin Banaji indicates that on a subliminal level the human mind is imprinted by culture with messages about race and gender—and not surprisingly the messages about people of color are strongly negative.<sup>17</sup>

That the lens of race is also a persistent filter for conscious thought can be seen in how different races viewed O.J. Simpson after the murder of his wife. Numerous polls showed that a majority of African-Americans believed that he was innocent, while a majority of whites thought he was guilty.<sup>18</sup>

### **Why Is Overcoming These Barriers Important?**

The full potential of the ADR movement will not be realized until the use of ADR reaches a broader community than it does today. ADR techniques and processes are beginning to be understood, respected, and widely used by large businesses, universities, and other institutions. ADR is a common form of dispute resolution among the educated and affluent. But particularly in minority communities, where average annual income is lower than in white communities, there is a need for more outreach panels and programs in order for ADR to achieve the legitimacy and trust it deserves.

ADR services can be more effective when the panels providing the services are more racially and ethnically diverse. While we are not advocating that every mediation and arbitration involving a claim of race discrimination have a neutral who is a person of color, we believe that the opportunity to choose a neutral of color will instill a higher degree of confidence in the process and the outcome. Moreover, we believe that some workplace disputes—such as those where the stakes are high or where the parties fear that the race or ethnicity of the neutral will be dispositive—should be co-mediated or heard by a three-arbitrator panel using mediators and arbitrators from different demographic backgrounds to make it plain, right from the start, that the playing field is level.<sup>19</sup>

Finally, as a simple matter of fairness, ethics, social and racial justice, the under-representation of racial and ethnic minorities in any field of endeavor is pernicious and arguably unlawful. This imperative of diversity is even more compelling in a field in which the professionals' job is to help the parties reach a fair and just resolution—particularly in cases where their civil rights are at stake.

### Proposed Remedies and Strategies

In our view, there are three primary components of the effort needed to overcome the barriers to achieving a level playing field for minority workplace neutrals: (a) creating national and regional panels that expand the opportunities for minority mediators and arbitrators and assist with recruitment and mentoring; (b) increasing the awareness of those who choose ADR neutrals about the phenomenon of unconscious bias in selecting neutrals; and (c) instituting programs of accountability that will motivate people to select mediators and arbitrators of color in order to obtain a broader range of experience and demographic background.

#### *Create National and Regional Panels with Minority Neutrals*

When the parties to a conflict are looking for a mediator, arbitrator, or fact finder, they often consider those who are local and therefore closest at hand.

For example, people in Boston who are looking for a mediator are going to focus on whoever is available in Boston, or at best New England. If, on the other hand, they had easy access to a national or regional panel that represented the population at large, including neutrals who are willing to travel to Boston or wherever they are needed (within reason) to hear a case, broader possibilities emerge.

Access ADR, a program pioneered by mediators and arbitrators Marvin Johnson and Homer LaRue, screens, selects, recruits and mentors minority ADR professionals so as to increase the cadre of experienced mediators and arbitrators of diverse backgrounds.

Lamont Stallworth proposes a broader initiative—a National Consortium of Minority Workplace Neutrals. The goal is to develop a corps of “panel qualified” labor and employment neutrals residing or available in most major U.S. cities. Having such a corps would greatly blunt the contention that there are few, if any, minority neutrals to choose from in various geographic areas.

In addition to creating more capacity, there is a need to train the next generation of minority mediators and arbitrators. The Center for Alternative Dispute Resolution (CADR), founded by Marvin Johnson, fosters diversity in its panel of dispute resolvers and provides dispute resolution education and training to diverse audiences from across the country and around the world. The

CADR recently conducted its 20th annual conference with ADR professionals—a conference in which there was more racial and ethnic diversity among the attendees and presenters than in any other national conference of ADR professionals that we have ever seen.

Finally, it is important to recruit the next generation of minority neutrals. One technique for achieving that goal is to locate more community mediation programs, which provide low-cost mediation services, in communities with substantial minority populations. Community mediation centers provide mentoring by using a “co-mediation” model that often matches more experienced mediators with newcomers to the field. Many of today’s accomplished ADR professionals—including minority professionals—were given their first opportunity to mediate in such centers.

We also want to mention that some of the major ADR providers are working to increase the supply side of the market by taking steps to increase the diversity of their panels. For example, the American Arbitration Association has established a national Advisory Committee on Diversity, whose members include representatives of major corporations and law firms. Other providers have also created diversity committees including the International Institute for Conflict Prevention and Resolution (CPR). They are all seeking to expand the opportunities for minority workplace neutrals.

#### *Increase Awareness on the Demand Side of the Market*

Diversity training and diversity awareness programs have become nearly ubiquitous in government and large companies, especially those that do business with the federal government. These programs are valuable but just scratch the surface of our awareness about issues of race and ethnicity. In the United States, 400 years of racial discrimination have left a thick residue of mistrust and misgiving that cannot be wiped away with a diversity training program. There is also a need for diversity education with regard to the hiring of ADR neutrals by law firms, business and government. Those who do the selection must be made aware of their patterns in selecting neutrals and how their unconscious or conscious biases affect their decisions.

The major ADR provider organizations, such

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as the AAA, CPR, and the Federal Mediation and Conciliation Service (FMCS), have undertaken efforts in this direction. For example, during the past five years, the ABA Dispute Resolution Section has organized an annual Forum on Opportunities for Minorities and Women in Dispute Resolution, in order to bring together minority ADR neutrals and the representatives of business and government who hire neutrals.<sup>20</sup> CPR and the AAA are both reaching out to the business community, emphasizing the value of using diverse panels of mediators and arbitrators—especially for workplace conflicts. Similarly, Cornell’s Scheinman Institute on Conflict Resolution has adopted as one of its primary missions to increase the number and use of minority workplace neutrals.<sup>21</sup>

While these programs are important, they are not sufficient. We need an ongoing commitment by the people and organizations involved in workplace matters—and in society generally—to examine the sources of continuing prejudice in each of us.

Minorities can also be prejudiced against others and themselves. In the research that Professor Banaji conducted at Harvard, she discovered that she too—despite being a person of color—exhibited racial prejudice in her reactions to subliminal images of people of color. She discovered that she could reduce these reactions in herself by displaying in her office images of people of color who have occupied positions of importance, leadership, and responsibility in the world. In other words, she could modify her negative associations by intentionally creating positive associations.<sup>22</sup> This research suggests the depth of consciousness that requires penetration in order to root out prejudice and suggests the magnitude of the task of changing the visceral reactions that racial and ethnic difference cause.

### *Accountability*

Diversity training and even increasing awareness of unconscious bias will not be enough to change behavior in the use of minority neutrals without accountability—i.e., a means of holding accountable those who make the selection decisions. The effectiveness of accountability can be

seen in a study published in 2006 analyzing data on Equal Employment Opportunity (EEO) initiatives designed to increase diversity in 708 workplaces, as well as the retention and promotion of women and minority employees. The initiatives covered the period 1971-2002.<sup>23</sup> The researchers examined three types of initiatives: (a) those establishing accountability for diversity; (b) those seeking to reduce bias through training or feedback; and (c) those attempting to enhance the social connections of women and minority workers.

The researchers concluded that the only initiatives that produced consistent results were the ones that established accountability for diversity outcomes. These included affirmative action plans, diversity committees, and diversity managers. They all experienced diversity increases “across the board.”<sup>24</sup>

Legislation and court decisions have played a prime role in bringing about social change and eliminating discrimination in particular. Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Executive Order 11246, among others, have changed the landscape of employment relations in the United States because of legal accountability for decision making regarding diversity. Likewise, Supreme Court decisions, such as *Brown v. Board of*

*Education*, have played a critical role in the desegregation of public schools and served as the basis for the civil rights movement of the 1960s, which in turn desegregated public accommodations, the armed services, and the world of sports.

How can accountability be created in the privatized world of dispute resolution? First, with respect to the use of ADR neutrals by federal, state, and local government, and recipients of public funds (such as federal and state contractors), existing anti-discrimination laws and constitutional principles of equal protection could be used to promote and enforce unbiased selection of mediators and arbitrators, even to the point of bringing a test case in the courts.

Private companies whose selections of ADR professionals are subject to regulation could be asked to provide data concerning (a) the racial and ethnic composition of their permanent panels, if any, and (b) their selection of minority neu-

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trials, to such organizations as the ABA Section of Dispute Resolution, ADR service providers, or a research organization. This type of information-based model of accountability could have a substantial impact on corporate behavior.

We predict that this would be very effective because if a permanent panel or ADR roster came to be viewed as discriminatory, the employer or ADR provider would have difficulty recruiting new neutrals. Also, with increased visibility of their decisions, the people responsible for hiring neutrals for commercial and governmental organizations are more likely to honor the principle of inclusion and diversity in the use of workplace neutrals.

Many national law firms now submit statistics on hiring, retention, and promotion of minorities and women to publisher Martindale-Hubbell, where the data helps the firms attract clients and recruit new lawyers. If statistics on the use of neutrals by law firms, companies and the government were to be published, that might foster a healthy competition among ADR providers and employers to excel in the area of minority recruitment and selection. This would be especially important for groups and organizations that heavily use ADR, such as labor unions and large-scale employers. Publication could motivate shareholder and union activism to seek greater use of minority neutrals.

A further method of fostering accountability is research. There is much we do not know about the use of minority neutrals. For example, are there stiffer headwinds for them to weather in arbitration as opposed to mediation, or is the opposite the case? Are minority neutrals getting repeat business from the parties for whom they provide ADR services? Are there disparities in compensation for minority neutrals that are not related to seniority or other factors? Are minority neutrals less likely to be selected again (as compared with non-minority neutrals) by a party who receives an adverse decision from them? Research of this kind may help bring to light hidden disparate treatment of minority neutrals.

### Conclusion

Some commentators have suggested that there is an inherent tension between diversity and

impartiality—that if ADR professionals view cases differently because of their demographic background, those differences must, of necessity, detract from the neutrals' duty of impartiality. Our view is the opposite. We believe that more diversity provides people with more choice and more experience, especially where having more perspectives would be useful. Dispute resolver and teacher Ken Cloke has described the duty of mediators as being “omnipartial,” and we believe that duty is no less true for arbitrators.<sup>25</sup>

There is no data showing that minority neutrals are not fair and impartial, or that they will favor a party who is also a person of color. To the contrary, the evidence, as previously shown, is that minority judges do not decide cases differently from their white counterparts.

The fair resolution of employment disputes is a vital concern for all. Our economy depends on the peaceful and prompt resolution of workplace conflict, and this is no less true for the individuals and families affected by such disputes. Bringing equal

opportunity to the arenas in which these disputes are resolved will enhance the confidence of employees, employers, labor organizations, and the public in the use of ADR processes.

Our suggestion is for a systematic effort to be made, on the supply side, by creating national and regional panels to expand the ability to find minority neutrals, and encourage the recruitment and training of the next generation of minority neutrals through mentoring and other efforts. On the demand side, we suggest training companies, labor unions, governmental agencies, and others who use ADR services to recognize unconscious bias and its affect on neutral selection. Most importantly, we urge the development of systems of “top-down” accountability for decisions regarding neutral selection for panels and utilization.

The ADR community consists of uniquely idealistic people, many of whom were actively involved in the civil rights movement. These people bring to their work a commitment to fairness and a willingness to act in a manner that is consistent with their ideals. They are no doubt at the vanguard of the diversity efforts in ADR.

We hope that this article helps to continue what some may experience as a “difficult conver-

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sation” about the role of race and ethnicity in the ADR field. We also hope it will galvanize the ADR community and users of ADR services to

achieve greater equality, fairness and inclusion of minorities in our society. We all deserve nothing less. ■

## ENDNOTES

<sup>1</sup> Cynthia Alkon, “Women Members of the National Academy of Arbitrators Speak About the Barriers of Entry Into the Field,” *Appalachian J.L.* (Spring 2007).

<sup>2</sup> See, e.g., Suzy Fox & Lamont Stallworth, “Racial/Ethnic Bullying: Exploring Links Between Bullying and Racism in the U.S. Workplace,” *J. Vocational Behavior* (June 2003).

<sup>3</sup> Douglas M. McCabe, “Alternative Dispute Resolution and Employee Voice in Nonunion Employment: An Ethical Analysis of Organizational Due Process Procedures and Mechanisms – The Case of the United States,” 16(3) *J. Bus. Ethics* (Feb. 1997).

<sup>4</sup> See, e.g., Adrienne Eaton & Jeffrey Keefe, *Employment Dispute Resolution and Worker Rights* 207 (Cornell Univ. Press 1999).

<sup>5</sup> Floyd Weatherspoon, “Eliminating Barriers for Minority ADR Neutrals,” *ACResolution* 32 (Spring 2006); Michael Green, “An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits,” *J. Amer. Arbitration* (2005).

<sup>6</sup> See John Lande, “The Vanishing Trial’ Report: An Alternative View of the Data,” *Disp. Resol. Mag.* 19 (Summer 2004).

<sup>7</sup> Steven A. Holmes, “Securities Arbiters Mostly White Men Over 60,” *N.Y. Times* (April 5, 1995).

<sup>8</sup> For an example of such concerns, see Margaret A. Jacobs, “A Woman Claims that Arbiters of Bias Are Themselves Biased,” *Wall St. J.* (Sept. 19, 1994).

<sup>9</sup> For example, the Scheinman Institute on Conflict Resolution at Cornell University has made a commitment to increasing opportunities for minority neutrals. In addition, the AAA, CPR,

and JAMS have expanded their efforts to include women and minorities on their panels.

<sup>10</sup> David Hoffman, “Why Do We Care About Diversity?,” *Disp. Resol. Mag.* (Winter 2005). See also Jill Schachner Chanen, “Early Exits,” *ABA J.* 33 (Aug. 2006) (noting that women of color at large law firms often leave because they are treated unfairly).

<sup>11</sup> Sarah Rudolph Cole & E. Gary Spitko, “Arbitration and the Batson Principle,” 38 *Ga. L. Rev.* (2004).

<sup>12</sup> William Cromie, “Brain Shows Unconscious Prejudices: Fear Center Is Activated,” *Harv. Univ. Gazette* (June 17, 2003).

<sup>13</sup> Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* 56 (Little Brown 2005), citing Claude Steele & Joshua Aronson, “Stereotype Threat and Intellectual Test Performance of African-Americans,” 69(5) *J. Personality & Soc. Psychol.* 797-811 (1995).

<sup>14</sup> Maria R. Volpe *et al.*, “Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field,” 35 *Fordham L. Rev.* 119, 139 (2008).

<sup>15</sup> Lamont E. Stallworth *et al.*, “Discrimination in the Workplace: How Mediation Can Help,” 56(2) *Disp. Resol. J.* 35 (Feb.-April 2001).

<sup>16</sup> Thomas M. Uhlman, “Black Elite Decision Making: The Case of Trial Judges,” 22 *Amer. J. Polit. Sci.* (Nov. 1978).

<sup>17</sup> Cromie, *supra* n. 12.

<sup>18</sup> Thulani Davis, “You Learn to be Skeptical—O.J. Simpson Case,” *Sporting News*, Aug. 15, 1994 (noting that *Newsweek* found that 60% of blacks thought O.J. Simpson was innocent, as opposed

to 23% of whites; a *USA Today/CNN/Gallup* poll said that 60% of blacks think he is innocent and 68% of whites think he is guilty; and an ABC News survey came up with 63% of whites saying guilty and only 22% of blacks).

<sup>19</sup> See David Hoffman, “The Future of ADR Practice: Three Hopes, Three Fears, and Three Predictions,” 467 *Negotiation J.* (Oct. 2006) (describing an employment co-mediation involving an African-American and a white mediator); Fred D. Butler, “The Question of Race, Gender,” 55(4) *Disp. Resol. J.*, 36, 38 (Nov. 2000/Jan. 2001) (advocating for the use of co-mediation with mediators or different genders or races). For an excellent description of the mediation of a racially charged dispute, involving the use of two mediators—one African-American and one white—see Carol Liebman, “Mediation as Parallel Seminars: Lessons from the Takeover of Columbia University’s Hamilton Hall,” 157 *Negotiation J.* (April 2000).

<sup>20</sup> See Marvin Johnson & Homer LaRue, “Creating Access to Enhance Diversity,” *Just Resolutions* (Aug. 2005).

<sup>21</sup> See [www.ilr.cornell.edu/icr](http://www.ilr.cornell.edu/icr).

<sup>22</sup> Shilpa Banerji, “Who Do You Think You Are?” available at [www.diverseeducation.com/artman/publish/printer\\_4706.shtml](http://www.diverseeducation.com/artman/publish/printer_4706.shtml) (Sept. 8, 2005).

<sup>23</sup> This study is reported in “Dispute Resolution in Action: Examining the Reality of Employment Discrimination Cases: Proceedings of the 2007 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination and Alternative Dispute Resolution,” 11 *Empl. Rights & Empl. Pol. J.* 139, 143 (2007).

<sup>24</sup> *Id.* at 144.

<sup>25</sup> Kenneth Cloke, *Mediating Dangerously* 13 (Jossey-Bass, 2001).

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