

A RESOURCE GUIDE FOR THE SELECTION OF DIVERSE
ARBITRATORS AND MEDIATORS



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I. Introduction

For the legal profession and the communities it serves, diversity, equity and inclusion in the selection of diverse arbitrators and mediators is an ethical, business and moral imperative which can no longer be overlooked. Acknowledging that current trends in the selection of neutrals too often exclude diverse arbitrators and mediators, the authors provide data, tools, resources, and suggestions for the cultivation, inclusion, selection and sustainability of diverse arbitrators and mediators. Embedded within this Resource Guide is the important accord that a commitment to diverse arbitrators and mediators benefits any organization’s performance, production, and risk portfolio. This resource uses “diverse” in the same manner defined by relevant ABA actions and other industry measures, to include women, people of color, persons with disabilities, and persons of differing sexual orientations and gender identities.

The Resource Guide is created in collaboration with the American Bar Association (ABA) Section of Dispute Resolution, the Section’s Women In Dispute Resolution Committee, the Section’s Diversity Committee, the Chartered Institute of Arbitrators (CIArb) North America Branch, the Federal Bar Association (FBA) Alternative Dispute Resolution Section and its Diversity and Inclusion Committee, the Institute for Inclusion in the Legal Profession (IILP), and the National Association of Minority and Women Owned Law Firms (NAMWOLF). Combined, these five organizations reach tens of thousands of legal professionals in 150 countries with a shared mission of creating a more fair and just society that celebrates, is reflective of, and protects all persons.

This Resource Guide does not constitute legal advice and is the product of voluntary efforts.¹

II. The State of Diversity & Inclusion in The Legal Profession (2019-2020)

According to the Institute for Inclusion in the Legal Profession (IILP), the legal profession is one of the world’s least diverse. Only 16.5% of the legal profession is diverse as of 2018, an increase from 11.3% from 2006-2008, compared to 27.8% of the professional and management labor force as a whole.² Despite the benefits of diversity and the annual increase in diversity in the United States, progress to increase diversity in the legal profession has been slow, with only small gains for women and almost none for most minority groups over the last decade.³

¹In particular, American Bar Association Section of Dispute Resolution WIDR Fellow, Jo Colbert Stanley, Stanley Legal Services, and Bryan J. Branon, Principal, Branon’s ADR and Chartered Institute of Arbitrators Regional Relationship Manager for the Americas, drafted this document under the guidance of Felicia Boyd, Partner, Norton Rose Fulbright, June Brown, June Brown ADR, Suzanne Cochran, Suzanne Cochran ADR and Deborah Hylton, Hylton ADR Services LLC, in partnership with Sandra Yamate, Executive Director, IILP, Leslie Davis, Executive Director, The National Association of Minority and Women Owned Law Firms, The Federal Bar Association (FBA) ADR Section and the FBA Diversity and Inclusion Committee and The Chartered Institute of Arbitrators North America Branch.

² U.S.A. Bureau of Labor Statistics featured in the IILP 2019-2020 State of Diversity and Inclusion in the Legal Profession Review, “IILP Review.”

³ https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/

A. Gender

According to the United States of America Bureau of Labor Statistics, women represented 37.4% of the legal profession in 2018—an increase from 28.5% in 1998 but well below women in management, professional and related occupations overall, 51.5% (2018), 50.8% (2008), 49.0% (1998).⁴ Women’s entry into private practice has increased. In 2016, white female law graduates comprised 52.1% of private practice entrants and minority female law graduates comprised 49.3%, compared to 48.8% white women law graduates and 43.5% women minority graduates in 2011. The National Association of Women Lawyer’s Retention and Promotion Survey indicates 50% of law students are women, yet a mere 20% are equity partners at law firms.⁵ Women who qualify as additionally diverse account for 3.2% of law firm partners nationally — 0.7% African American, 0.8% Hispanic, and 1.4% Asian American.⁶

Women comprised 49.5% of in-house attorneys in 2015, up from 39.0% in 2006. However, the typical general counsel in the U.S. is a white male who earns approximately 29% more, on average, than his female counterparts.⁷

One study is notable for analyzing gender in ADR. In 2017, the New York State Bar Association’s Women’s Initiative Task Force published findings on women’s participation in court rooms and in neutral appointments, both in New York State and nationally. The survey was repeated three years later, with comparative data published in 2020 titled “The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR.” The 2020 report found “there is still significant need for improvement in achieving gender equity in the courtroom.” Since leading ADR providers elected to provide individual statistics rather than use the task force’s uniform survey, comparative data is less uniform. Generally, providers reported significant efforts to increase diversity with some improvement in national results over the years compared:

- The percentage of women on FINRA’s roster increased from 24% to 29%.
- Resolute Systems, LLC, reported that 39% of its roster were women, and a 14% increase in the selection of women for cases.
- AAA reported a 4% increase in women on its rosters nationally with an increased percentage of women appointed to cases.
- JAMS had an increase of 34 women on its roster, an improvement of 34%, and an increase in appointments for women from 29% to 35%.
- CPR reported that 39% of its cases commenced in 2019 included a woman neutral.

⁴ U.S.A. Bureau of Labor Statistics featured in the IILP 2019-2020 State of Diversity and Inclusion in the Legal Profession Review, “IILP Review.”

⁵ National Association of Women Lawyer’s Retention and Promotion Survey as featured in the IILP Review available at: www.nawl.org/page/2018survey

⁶ *Id.*

⁷ Association of Corporate Counsel General Counsel Landscape (2019).

B. Race/Ethnicity

Among U.S. Lawyers, African Americans comprise 5.0% of the lawyer population, a statistic unchanged since 2009. Hispanic Americans comprised 5.0% of the lawyer population in both 2009 and 2019 and Asian Americans comprised 2.0% of the lawyer population in both 2009 and 2019. The population identifying as, “Multiracial,” a population group descriptor introduced in 2016, shows an increase from 1.0% of the profession in 2016 to 2% in 2019.⁸

As of 2016, data showed initial employment in private practice for all African American lawyers at: 38.9%, Asian Americans: 57.6%, Hispanic Americans: 54.9%, Native Americans: 41.2% and White Americans: 53.7%.⁹ Despite these encouraging private practice employment numbers for diverse associates, the percentage of total diverse associates in law firms as of 2018 was: African Americans - 4.5%, Asian Americas - 11.7% (majority women) and Hispanic Americans - 4.7%.¹⁰

Diverse law firm partners comprise 8.4% of all law firm partners, with 6.1% being equity partners. In particular, African Americans: 1.8%, Asian Americans: 3.6% and Hispanic Americans: 2.5%.¹¹

Further, as of 2019 attorneys of color made up only 10.2% of Fortune 500 General Counsels, with only 4% of Fortune 500 General Counsels being women of color. Hispanic Americans comprise 1.8%, and only 3.8% are African American.¹² Law school admission of racial/ethnic minorities has increased: African Americans rose from 7.0% (2010-2011) to 8.0% (2013-2014) (an all-time high)); Hispanic American representation rose from 7.1% (2010-2011) to 8.7% (2013-2014), Multiracial law students rose from 1.4% (2010-2011) to 2.4% (2013-2014) and Asian American enrollment dropped from 6.9% (2010-2011) to 6.8% (2013-2014).¹³

C. Ability/Disability

Only 0.54% of lawyers identified as having a disability, 0.60% of all associates, 0.43% of all partners.¹⁴ It is recognized that some disabilities are not readily apparent and lawyers may choose not to disclose them presenting further challenges to promoting inclusion.

⁸ American Bar Association National Lawyer Population Survey (2009-2019) available at: www.americanbar.org/about_the_aba/profession_statistics

⁹ National Association of Law Placement Diversity Report (2016) as provided by the IILP Review available at: www.nalp.org/reportondiversity

¹⁰ National Association of Law Placement Diversity Report (2019) as provided by the IILP Review available at www.nalp.org/reportondiversity

¹¹ *Id.*

¹² Nathaniel Vitan, Cameron A. Smith, and Ephraim J. Pierre, “ACC Docket, Increasing Diversity and Inclusion Through Engaged Corporate Counsel” (July- August 2019) available at: https://www.accdigitaldocket.com/accdocket/july-august_2019/MobilePagedArticle.action?articleId=1507594#articleId1507594

¹³ ABA Section of Legal Education & Admission to the Bar Statistics 2010-2014 as provided by the IILP Review available at: www.americanbar.org/groups/legal_education/resources/standards/standards_archives

¹⁴ IILP Review

D. LGBTQIA

Attorneys who identify as LGBTQIA increased from 2.48% of the profession in 2016 to 2.64% of the profession in 2017. In 2018, 3.8% of associates, and 2.1% of partners identified as LGBTQIA compared to 2.3% and 1.4% in 2009.¹⁵ Interestingly, four cities—New York, Washington, D.C., Los Angeles, and San Francisco—account for 56% of those lawyers who identify as LGBTQIA and for 40.0% of law firms that reported employing at least one LGBTQIA partner or associate.¹⁶

III. Diversity and Inclusion Accountability Measures

In recent years, numerous market accountability measures have been introduced to promote and test the efficacy and outcomes of proposed diversity, equity, and inclusion efforts within organizations. Below is a sampling of existing protocols, resources for finding diverse neutrals, and data-gathering tools.

A. American Bar Association Resolution 105

According to data analyzed by the ABA, diversity levels within the dispute resolution profession fall significantly below those in the legal profession. On February 9, 2018, the ABA House of Delegates adopted Resolution 105, which is based on an initiative designed by Women In Dispute Resolution a committee of the ABA’s Dispute Resolution Section. Aimed at a broader base of constituencies, Resolution 105 pointedly issues a call to action for the increased selection of diverse neutrals. To promote this goal, the ABA has provided guidance and directed actions for each class of participants in the dispute resolution ecosystem.

In pertinent part, Resolution 105 “urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities (‘diverse neutrals’) and to encourage the selection of diverse neutrals. Additionally, through its adoption of Resolution 105, the ABA asks “all users of domestic and international legal and neutral services to select and use diverse neutrals.” The ABA’s summary of Resolution 105 includes specific action steps that can be taken by each member of the ADR ecosystem.¹⁷ The Diversity Committee of the ABA Dispute Resolution Section is responsible for the implementation of Resolution 105.

B. ABA Diversity & Inclusion Survey

In 2018, the ABA formed its Diversity and Inclusion Center to further the Association’s goal of eliminating bias and enhancing diversity and inclusion throughout its membership, the legal profession, and the justice system. The Center created the Model Diversity Survey in furtherance of ABA’s Resolution 113. For law firms reporting diversity metrics, the complementary survey

¹⁵ See National Association for Law Place Report on Diversity (2017) featured in the IILP Review, p.17

¹⁶ *Id.*

¹⁷ https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf

affords an efficient method of aggregating data uniformly such that annual trends within individual firms and the industry-wide can be observed and monitored.

Some 135 corporations have added their names as Survey Signatories, and over 90 General Counsels of Fortune 500 companies have committed to asking their law firms to participate. Once analyzed, the aggregated data will be presented in a report, “providing a snapshot of diversity and inclusion in law firms.”¹⁸

Signatory corporations and General Counsels have real-time access to participating law firms’ diversity demographic data. In addition to offering a benchmarking tool by which firms can measure their diversity and inclusion efforts, the survey results can be used by corporate clients to evaluate legal service providers in advance.¹⁹

C. The Equal Representation in Arbitration Pledge

Similarly, the Equal Representation in Arbitration Pledge aims to improve the profile and representation of women in arbitration and appoint women as arbitrators on an equal opportunity basis. The pledge was launched in 2015 by organizations and individuals involved in international arbitration, in recognition of the under-representation of women as arbitrators and mediators with the goal of achieving full parity to men. As of December 16, 2020, 4,471 entities have signed onto the Pledge, with the organization awarding a Pledge winner each year. Signatories include British Petroleum, Shell Oil, Omni Bridgeway, Chevron, Burford Capital, Standard Chartered Bank, and Airbus, among others.²⁰

D. The Diversity Lab’s Mansfield Rule

Launched in 2017 with the goal of promoting diversity in the legal industry, the Mansfield Rule “measures whether law firms have affirmatively considered at least 30 percent women, lawyers of color, LGBTQIA lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.”²¹ The 30 percent metric is based on published behavioral science research²² which showed employment diversity initiatives are thwarted when the pool of potential candidates is overly homogenous. During a 12-month review period, firms seeking Mansfield Certification must show they have considered diverse lawyers for 70 percent or more of their available leadership committees/roles. To monitor the companies’ commitment, Diversity Lab connects with participating firms twice a year to collect and analyze data on the firms’ progress toward the stated diversity goals.

¹⁸ See <https://www.americanbar.org/groups/diversity/resources/>

¹⁹ See www.americanbar.org/groups/diversity/DiversityCommission/model-diversity-survey

²⁰ See <http://www.arbitrationpledge.com/take-the-pledge>

²¹ See www.diversitylab.com/mansfield-reul-4.0

²² See www.hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired

On September 15, 2020, Diversity Lab released its list of 100 leading law firms that qualified for Mansfield Rule Certification during the most recent review period. Having proven their concerted efforts toward greater inclusion and diversity, certified firms have the opportunity to formally network with and learn from in-house counsel at over 80 legal departments within major corporations.

In July 2020, the Diversity Lab launched the project's latest iteration, the Mansfield Rule 4.0. The chairpersons and managing partners of 117 major law firms have affirmed their commitment to increasing and sustaining a diverse and inclusive workforce in the legal profession.

E. Minority Corporate Counsel Association (“MCCA”) Inclusion Index Survey

MCCA's confidential survey “enables organizations to measure and improve inclusion in regard to company leadership, practices, and culture”²³ by aggregating employee responses to questions about their respective organizations' diversity and inclusion efforts. Key factors measured in the survey include workplace respect, organizational fairness, and leadership commitment to diversity and inclusion.²⁴

More than 600 law firm and corporate legal department attorneys responded to the inaugural survey in 2018. According to the data gathered by MCCA, inclusive leaders can expect “more creative and higher-performing teams.”²⁵ Attorneys responding to the study also reported higher job satisfaction and optimism surrounding career development opportunities.

The 2020 survey included responses from nearly 300 attorneys and, while legal departments have demonstrated some improvements, leadership diversity and cultural inclusion efforts have failed to advance at the hoped-for pace.²⁶

F. Law 360 Diversity Snapshot

This annual headcount survey collects demographic data from U.S. law firms and affiliates and ranks firms based on their diversity and percentage of minority lawyers in equity partner roles. In 2019, more than 300 firms responded to the survey, including 87 of the 100 largest U.S.-based firms and representing more than 117,000 attorneys. Using race, gender, and ethnicity categories listed by the Equal Employment Opportunity Commission, the survey provides a comprehensive analysis of the results of diversity and inclusion efforts in the legal industry.

Recent survey results showed a nominal increase from previous years in the representation of minority attorneys at law firms. However, that incremental growth does not correspond with

²³ Available at: www.mcca.com/resources/reports/2019-inclusion-index

²⁴ Available at: www.mcca.com/wp-content/uploads/2019/05/MCCA-RRA-Inclusion-Index-Report-Executive-Summary.pdf

²⁵ Available at: www.mcca.com/wp-content/uploads/2019/05/MCCA-RRA-Inclusion-Index-Report-Executive-Summary.pdf

²⁶ Minority Corporate Counsel Association survey available at: Available at: www.mcca.com/resources/surveys/2019-inclusion-index

diversity percentages at U.S. law schools. Indeed, “in the partnership ranks, diversity fades significantly.”

Considering recent events (*e.g.*, the global pandemic, economic downturn, and renewed demands for racial equality), Law360 noted law firms are now placing greater emphasis on new initiatives and alliances, including addressing inclusivity questions more proactively.²⁷

G. Leadership Council on Legal Diversity

Formed in May 2009, this organization unites over 350 corporate chief legal officers and law firm managing partners “who have dedicated themselves to creating a truly diverse U.S. legal profession.”²⁸ Corporate members include business and financial leaders such as 3M Company, Amazon, General Motors Company, Bank of America, IBM, The Walt Disney Company, and Wells Fargo.²⁹

With a view to harnessing their collective influence within their respective corporations, law firms, and departments, members of the Leadership Council on Legal Diversity (LCLD) pledge their efforts towards building programs that train, develop, and mentor minority talent. Additionally, LCLD members commit to building “incentives that reward the law-related entities with whom [they] do business and who positively distinguish themselves on diversity.”³⁰

Through its outreach and data gathering, LCLD ranks member corporations and law firms based on their success in diversity and inclusion of minorities. The organization also regularly conducts and publishes surveys to assess how members embrace its mission and deliver on shared commitments.³¹

H. Arbitrator Intelligence

Arbitrator Intelligence (AI) is an online platform that collects and publishes critical data and analytics about international arbitration cases.³² Using a confidential survey of as many as 1,200 arbitrators, AI has overcome the restrictions that previously made data collection and analysis of arbitrators and awards impossible. While preserving party confidentiality, the reports generated by AI “empower users to make better-informed decisions about arbitrator selection and case strategy.”³³ As such, registered users of the platform can narrow the pool of potential arbitrators and even glean information about arbitrators appointed by opposing parties or institutions.

²⁷ Law 360’s Diversity Snapshot available at: www.law360.com/articles/1054624/the-2018-law360-diversity-snapshot

²⁸ See www.lclldnet.org/about/our-mission

²⁹ See www.lclldnet.org/about/corporation-membership

³⁰ See www.lclldnet.org/media/uploads/resource/Member-Commitment-2015F.pdf

³¹ See www.lclldnet.org/resources/impact

³² See www.arbitratorintelligence.com

³³ See www.arbitratorintelligence/order-reports

Members and partners of AI gain access to the reports “in exchange for submitting or encouraging submissions” of responses to AI’s questionnaire.

The United Nations Commission on International Trade Law recently cited AI as an available tool for “evidence of the efforts made towards inclusiveness”³⁴ in its reform efforts regarding the selection and appointment of tribunal members. In addition, in its report on Gender Diversity in Arbitral Appointments and Proceedings, the International Council for Commercial Arbitration listed AI as a useful resource towards enhancing diversity in the selection of neutrals.³⁵

I. State Bar Continuing Legal Education Requirements

The ABA Model Rules of Professional Conduct Rule 2.1 and Oregon, California, Minnesota, Illinois, Washington, and New York have Diversity & Inclusion CLE requirements. Other state bar associations are currently considering the same.³⁶

J. ArbitralWomen

ArbitralWomen is an international non-governmental organization that since 2000 has been actively advancing the interests of female practitioners and promoting women and diversity in international dispute resolution. Among other activities, it raises awareness about the role of women, fosters networks, offers mentoring, and assists in professional development. Its partners and sponsors include leading global arbitral institutions and law firms. In 2021 Arbitral Women conducted a [Questionnaire](#) for the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings.³⁷

K. Racial Equality for Arbitration Lawyers

Racial Equality for Arbitration Lawyers, or R.E.A.L., a group of global lawyers practicing in international arbitration and striving to achieve racial equality for arbitration lawyers. Launched on January 18, 2021, Martin Luther King, Jr. Day in the U.S., it is the newest voice in the field promoting diversity in arbitration. Its initiatives are geared around promoting awareness, ensuring access, and promoting community building with stakeholders. Its partners and supporters include leading global arbitral institutions and centers.³⁸

³⁴ See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_wg.iii_wp.203.pdf

³⁵ See www.cdn.arbitration-icca/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf at p. 65.

³⁶ See www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor

³⁷ Available at: www.arbitralwomen.org/attention-women-who-have-or-are-serving-as-arbitrators

³⁸ See www.letsgetrealarbitration.org

L. The Ray Corollary Initiative™

Since the publication of a seminal Law Review article³⁹, and the launch of the Ray Corollary Initiative™, interested practitioners have focused on the metrics that advance or deter selection of diverse neutrals—persons of color, women, persons with disabilities, and persons with differing sexual orientation and gender identities. Research has demonstrated that when 30% or more of a final slate of candidates is diverse, the statistical chance of selecting a diverse neutral is disproportionately higher, and the converse is true: when less than 30% of the slate is diverse, the odds of selecting the diverse candidate are disproportionately lower.

The Ray Corollary Initiative was launched to encourage ADR providers and selectors to ensure lists of proposed neutrals for any given matter include at least 30% of diverse candidates and measure accountability. In the spring of 2021, the ABA’s Section of Dispute Resolution launched a Task Force to develop a comprehensive plan to drive adoption of the 30% metric. The plan is being developed now with key components of pledges for each participant in the ADR ecosystem to adopt the 30% metric and accountability; a proposal to the ABA’s House of Delegates to expand ABA’s Resolution 105 to include the 30% metric and accountability; conduct an outreach campaign through existing and new channels to encourage adoption of the pledges, and an effort for a national certification and reporting comparable to the Mansfield Rule for selection of diverse neutrals.⁴⁰

M. International Council for Commercial Arbitration Task Force on Gender Diversity in Arbitral Appointments and Proceedings

The Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings has released its Report, its eighth Volume which publishes recent statistics on the appointment of female arbitrators, opportunities and best practices to promote gender diversity in international dispute resolution to advance gender equality and inclusion.⁴¹

N. Defense Research Institute Center for Law and Public Policy ADR Diversity, Equity & Inclusion Initiative

The DRI Center for Law and Public Policy ADR Diversity, Equity & Inclusion Initiative has developed a “DRI Diversity Survey” for insurers, self-insureds, managing general agents (MGAs) and outside law firms to voluntarily record diversity demographics of arbitrators and mediators appointed to their dispute. The aggregated data will serve as a benchmark to improve upon the training, recruitment and appointment of diverse arbitrators and mediators within insurance-related industry disputes.⁴²

³⁹ Homer C. La Rue and Alan A. Symonette, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63-2 HOWARD LJ 215 (Wint. 2020). See also Homer C. La Rue, *A Call—A Blueprint for Change—For Change*, 27-1 ABA DISPUTE RESOLUTION MAGAZINE 6 (Jan. 2021)

⁴⁰ See www.raycorollaryinitiative.org

⁴¹ Available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf

⁴² See <https://www.dri.org/news/news-detail/2022/01/25/dri-adr-diversity-equity-inclusion-initiative>

IV. Strategies to Select Diverse Arbitrators and Mediators to Manage Risk

A. Users

Users of alternative dispute resolution have developed sophisticated accountability measures to ensure their legal teams are diverse internally and their external counsel, as well as their outside ADR provider organizations, meet the organizations' culture, standards and accountability measures pertaining to diversity, equity, and inclusion.

Snapshot: Microsoft

According to Microsoft General Counsel, Dev Stahlkopf, research demonstrates that diversity makes us more innovative and more creative, enables better decision making, and results in deeper, more effective engagement with customers.⁴³ Said Stahlkopf, “[f]or those of us in corporate legal departments, one way in which we can do this is by dedicating a percentage of our outside counsel budget to women and minority-owned law firms. Another is by working with our outside counsel to increase the diversity at their firms, to increase the number of diverse attorneys who are working on our legal matters, and to continuously innovate on diversity initiatives and programs. While the lack of diversity in the profession is by no means a law firm problem alone, law firm diversity is an important area of focus, given that most attorneys in the United States practice in law firms. It is only by working together that we will be able to unlock the opportunity to accelerate progress at scale.”⁴⁴

Microsoft's Law Firm Diversity Program was launched in 2008 with the goal of improving partner firms' diversity.⁴⁵ Participating firms receive a bonus at the end of their fiscal year if they reach a quantifiable diversity goal. In 2015, the company updated its law firm diversity program to tie bonuses to the diversity of 1) a firm's management committee, 2) partners, 3) Microsoft relationship partners and the partners doing work on behalf of Microsoft. The Program has seen diversity increases within partner firms and internal measures have improved decision-making, creativity, innovation, win-loss litigation records and business success has followed.⁴⁶

⁴³ Available at: https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/

⁴⁴ Available at: https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/

⁴⁵ “The Demand for Diversity in Federal Practice: What We Know, Where To Go, How To Grow,” featuring Tara Norgard, Partner, Carlson, Caspers, Vandenburg & Lindquist, P.A., Steve Baker, Partner, Quintairios, Priotor, Wood & Boyer, P.A., Charbel J. Barakat, Chief Counsel, Florida Region, D.R. Horton, Inc., Barbara Stevens, Vice President and Corporate Counsel, Prudential Financial, Federal Bar Association Annual Meeting and Convention, Tampa, Florida, September 5-7, 2019, overview available at: <https://www.fedbar.org/wp-content/uploads/2019/12/AM19-CLE-Programming-pdf.pdf>

⁴⁶ *Id.*

Snapshot: Prudential Financial

Prudential Financial's top billing firms are expected to report D&I practices in Vault/MCCA surveys, track diversity metrics of associates who work on Prudential matters and implement programs to develop diverse associates within each firm.⁴⁷ Prudential Financial also sets annual targets for minority and women owned law firms spend for its law departments and individual teams. It also leverages strategic relationships with organizations such as the National Association of Minority and Women Owned Law Firms, National Association of Women Lawyers, National Association of Gay and Lesbian Corporate Counsel and Minority Bar Associations.⁴⁸ Further, Prudential provides feedback to law firms including individual associate evaluations geared toward diversity and inclusion. Of note, Prudential Financial was a founding member of the "Inclusion Initiative," a group of 31 companies who joined together to promote the use of Minority and Women Owned Law Firms. In the last ten years these companies have spent more than \$1.6 billion utilizing minority and women owned law firms.⁴⁹

Microsoft and Prudential Financial offer valuable leadership in regard to corporate accounting for diversity, equity, and inclusion. Specific measures in relation to the selection of diverse arbitrators and mediators further include the following, and the resource at footnote 19 *supra* includes a comprehensive list of specific actions for each participant in the ADR ecosystem.

1. Direct ADR Providers to Include Qualified Diverse Arbitrators and Mediators on Proposed Slates

Despite efforts on the part of institutional providers of dispute resolution services to increase roster diversity and modest improvements over time, diverse neutrals remain underrepresented on rosters. Diverse neutrals are also less likely to be selected.

To preserve the benefits of ADR as a quick, cost-effective, confidential alternative to traditional litigation, users of ADR services must be active partners with ADR provider organizations on the importance of selection of diverse neutrals. Appointing counsel should request that ADR providers include a specified percentage of a slate as qualified diverse arbitrators and mediators. Much publicized failures have been documented within the legal community in recent years. Users of ADR services should encourage and hold ADR provider organizations accountable for cultivating, including, promoting, and sustaining qualified diverse arbitrators and mediators.

2. Budget and Account for Diversity and Inclusion in the Selection of Arbitrators and Mediators.

Similar to Microsoft and Prudential Financial, users of alternative dispute resolution services should budget and account for the use of diverse arbitrators and mediators. Provide incentives to outside firms for the selection of qualified diverse arbitrators and mediators as they solicit lists of prospective arbitrators and mediators from provider organizations. Include this measurement in

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

assessing “bonuses” for outside counsel and keep an open dialogue to ensure a balanced relationship target number of diverse arbitrators and mediators are being selected. To the extent diverse arbitrators and mediators are not handling these matters, initiate conversations with outside counsel to find solutions which allow for qualified diverse arbitrators’ and mediators’ selection.

3. Champion

There are many internal and external actions that can be taken to advance this cause. Incorporating a budget and accounting for the selection of diverse arbitrators and mediators, users should communicate their progress to the aforementioned organizations instilling a diverse industry culture, competition, and accomplishment to improve diversity in the selection of arbitrators and mediators. Similarly, encouraging decision-makers who actually select arbitrators and mediators to attend and spend time meeting and getting to know diverse lawyers in ADR, whether that be at a national minority bar convention or an ADR group meeting or event. Relationships and familiarity will make it more likely that diverse mediators and arbitrators will be selected.

B. Providers

The ABA has provided a number of actions provider organizations may take. See footnote 17 *supra*. Actions to consider include:

1. Expand the Definition of Diversity Within ADR Provider Organizations

Diversity is difficult to define and takes many shapes and forms. Utilizing a broad definition of diversity is critical to include the full range of the legal community as active neutrals. In addition to gender and ethnicity, diversity measures may include geography, disability, veteran status, LGBTQIA, diversity of practice and more. Optional self-identification and additional categories of diversity open opportunities and the field of ADR to underrepresented practitioners who are poised, capable and ready to make an immediate, positive impact on the profession. With an expanded definition of diversity, it is critical to continue collecting data on a disaggregated basis to ensure inclusion of racial/ethnic minorities.

2. Identify and Recruit Diverse Arbitrators and Mediators

Following Prudential Financial and Microsoft’s examples, provider organizations should continue and improve relationships with specialty organizations, affinity Bar associations, and other groups focused on improving diversity in the legal profession to identify well-qualified arbitrators and mediators who can either be trained or included on their rosters.

3. Train Diverse Arbitrators and Mediators

While provider organizations invest heavily in continuing legal education, there are limited training opportunities provided to qualify diverse arbitrators and mediators to be included on their rosters. Accreditor organizations such as the Chartered Institute of Arbitrators “CIArb” provide accreditation opportunities. By partnering with accreditor organizations such as CIArb or

developing qualifying training of their own, provider organizations will grow the availability of well-qualified, diverse arbitrators and mediators to be provided to users of their services.

Training can take the form of ADR apprenticeships in local conflict resolution organizations. Practitioners can also seek to include new diverse arbitrators and mediators on expedited matters or lower dollar amounts in controversy. The compensation on expedited cases tends to be fixed amounts assigned to cases which are not considered large or complex. By providing lists of arbitrators and mediators who are either completely or majority diverse and, perhaps, new practitioners, provider organizations are providing invaluable opportunities for diverse arbitrators and mediators to gain requisite experience to learn, grow and mature their practice.

4. Include and Encourage the Appointment of Diverse Arbitrators and Mediators

While providing a quota of diverse arbitrators and mediators to users of ADR services is helpful and practiced currently by provider organizations, encouraging actual appointment of diverse arbitrators and mediators increases the likelihood that diverse arbitrators and mediators can develop a self-sustaining ADR practice.

Additional specific strategies could include:

a. Majority-Diverse Lists

Again, many providers are supplying a percentage of diverse arbitrators and mediators, however, two out of ten choices creates less than a 20 percent chance of appointment under the research cited in the Ray Corollary Initiative; see footnote 40 *supra* and accompanying text. Including eight of ten diverse arbitrators on a proposed slate greatly increases the likelihood that diverse arbitrators and mediators are actually selected.

b. Provide Incentives for Users Who Choose Diverse Arbitrators and Mediators

For provider organizations' clients, reducing administrative costs for cases where the parties choose diverse arbitrators and mediators promotes their selection. These incentives might benefit both provider organizations as well as the clients they serve in regard to the growing number of accountability measures.

c. Require Tribunals Comprised of Three Arbitrators Include One Diverse

For large, complex cases where parties may elect for a panel of three arbitrators, provider organizations might include a policy that one arbitrator be appointed who qualifies as diverse. CPR's diversity commitment discussed above illustrates this type of institutional policy.

5. Champion and Promote Diverse Arbitrators and Mediators

Once a provider organization has identified, recruited, included roster-eligible training, and provided client incentives, provider organizations should champion and promote diverse arbitrators and mediators. For example, rather than having a provider organization's internal staff presenting on behalf of the provider organization at training or publishing opportunities, enlist affiliated diverse arbitrators and mediators instead. Develop, showcase, and publish diverse industry rosters on provider organizations websites, publications and continuing legal education opportunities. Provider organizations' recognition business development might be improved if messaging is, at least in part, communicated through diverse arbitrators and mediators, again increasing the visibility and potential selection of well-qualified diverse practitioners.

C. Practitioners

Practitioners of any background, whether diverse or not, similarly have a role to play to encourage the selection of diverse arbitrators or mediators.

1. Mentor, Shadow, Co-Arbitrate, Co-Mediate

Mentorship programs for diverse arbitrators and mediators which might include mentorship within provider organizations, mentorship with young practitioners, mentorship with law students and the like, introduce diverse practitioners to the process, profession, and responsibility of serving as an arbitrator or mediator. Mentorship requires real, meaningful connections, championing mentees and mentees, in turn championing mentors. Mentorship is a mutually beneficial and mutually important relationship with real responsibilities for both or all individuals involved.

Shadow opportunities where a diverse aspiring arbitrator or mediator can attend an arbitration or mediation proceeding, with party consent, additionally introduce the process, profession, and responsibility of being an arbitrator or mediator. Even better, it provides opportunities to co-arbitrate and co-mediate.

2. Speaking and Publication Partnership

Many seasoned arbitrators and mediators participate on many high-profile continuing legal education panels, publish in important journals, periodicals, newsletters and similar publications. For diverse arbitrators and mediators, an invitation to join these opportunities, either in organizing, moderating, editing or similar, offers valuable insight, and provides important platforms by which to contribute and build an improved profile.

3. Case Referrals to Diverse Arbitrators and Mediators

Seasoned practitioners experience situations where they choose to decline an appointment. In these situations, a referral to a diverse arbitrator or mediator rather than back to a non-diverse pool communicates to users the trust of the declining practitioner in the diverse practitioner and offers an opportunity for the diverse practitioner to showcase their abilities while users are offered greater choice.

D. Academia

Academia contributes significantly to the diversification of alternative dispute resolution. In acknowledging the lack of diversity which currently impairs the profession, law schools should ensure their ADR curriculum includes and showcases diverse students of ADR.

1. Include and Showcase Diverse Students

a. Diversity of Clinical Learning Opportunities

Most law schools offer an ADR curriculum, and many have ADR clinics which partner with outside courts, provider organizations and similar for clinical opportunities to study, practice and possibly become accredited practitioners. An importance should be placed on including diverse students in these opportunities.

b. Diversity in ADR Competitions

Law schools should ensure the teams which represent their schools include diversity of students but, also importantly, diversity of coaches, judges, and competitions.

c. Diversity of Law School Faculty

If law students are not offered diversity in faculty, the profession is negatively impacted. Non-diverse faculty reflect the crisis of lack of diversity in the profession. Law schools should seek, train, hire and include diverse faculty to improve curriculums and encourage more diverse law students to gain interest, participate and pursue professions in ADR.

V. Resources to Select Diverse Arbitrators and Mediators

All too often, those engaged in the appointment of arbitrators and mediators say they cannot find qualified diverse candidates. The following resources are readily available to find qualified diverse arbitrators and mediators while additional resources are often developed and updated.

A. ABA Section of Dispute Resolution WIDR Directory

WIDR annually prepares a directory of its member women and diverse arbitrators and mediators who choose to be included in the directory. The directory includes names, specific practice areas, types of practice, and geographic location along with links to practitioner websites.⁵⁰

B. The New List: Arbitrators of African Descent with a U.S. Nexus

This publication—first issued in June 2020 and subsequently updated in August—provides the biographies, websites, and contact information for some 123 arbitration professionals of African

⁵⁰ The directory can be found at: www.americanbar.org/groups/dispute_resolution/committees_task_forces
See also: www.americanbar.org/content/dam/aba/marketing/dispute-resolution/2021-women-in-dispute-resolution-directory.pdf

descent.⁵¹ Compiled by arbitrators Nancy M. Thevenin and Katherine Simpson, the directory is based on peer recommendations and referrals from attorneys and organizations.

C. National Bar Association Certified Panels of Neutrals

The National Bar Association is the oldest and largest national network of predominantly African American attorneys, judges, law students and legal professionals in the world. In 2020, the NBA Alternative Dispute Resolution Section published its rosters of annually trained and skilled mediators and arbitrators across subject matters, who have met the criteria set by the section to be certified through the NBA.⁵²

D. NAMWOLF Arbitrators & Mediators Directory

NAMWOLF maintains a directory of its law firm members who are licensed as arbitrators and mediators.⁵³

E. ArbitralWomen Dispute Resolution Practitioners

ArbitralWomen maintains a database of women and diverse practitioners and arbitrators in international arbitration that can be searched by practice area, legal system, languages and other relevant factors.⁵⁴

F. African Arbitration Association's Directory

The African Arbitration Association maintains a directory of African international Arbitrators who have citizenship in an African country.⁵⁵

G. National Asian Pacific American Bar Association ADR Directory

The National Asian Pacific American Bar Association "NAPABA," the largest national Asian Pacific American membership organization in the country with over 60,000 attorneys, judges, law professors and law student members, has an ADR Directory for its members.⁵⁶

H. New York Diversity Equity and Inclusion Neutral Directory

A joint initiative of the New York City Bar ADR Committee and the New York State Bar Dispute Resolution Section, the Directory was created to increase the visibility and selection of ADR professionals from historically underrepresented communities and was established in partnership

⁵¹ See www.uscib.org/uscib-content/uploads/2021/06/Arbitrators-of-African-Descent-August-2020-Final.pdf

⁵² Available at:

https://nationalbar.org/NBAR/about/Resources/ADR_RESOURCES/NBAR/content/ADR_Resources.aspx?hkey=646eda8a-d9a5-4450-b8ff-dcaa07a1d136

⁵³ Available at: www.namwolf.org/law-firm-members/arbitrators-mediators-guide

⁵⁴ Available at: www.arbitralwomen.org/find-practitioners/

⁵⁵ Available at: www.africanarbitrationatlas.org/arbitrator-directory/

⁵⁶ Available to Members at: <https://www.napaba.org/page/Membership>

with at least 17 specialty bar associations. It includes individuals who have self-identified as a neutral and as a member of a historically underrepresented community.⁵⁷

I. ADR Provider Organization Resources

Some U.S. and international ADR provider organizations maintain lists of their roster members who are women or other diverse neutrals that may be made available generally or on a case-by-case basis. The leading ADR provider organizations maintain fellowship programs to encourage diversity among their rosters and lists of fellows may be available. Case participants are encouraged to request specific diverse characteristics for panels when making appointments.

VI. Conclusion

Given the undeniable benefits of diversity, equity, and inclusion overall, we must redouble our efforts to generate meaningful and sustained progress throughout the legal industry. We must craft accessible strategies, driving positive outcomes through innovation and collaboration. This process starts with each of us focusing on expanding diversity and inclusion within our respective organizations. We must share ideas and protocols from successful D, E, & I programs with each other to further this global initiative for our mutual benefit.⁵⁸

⁵⁷ Available at: <https://sites.google.com/view/ny-dei-neutral-directory/home>

⁵⁸ Available at: https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/

About the Authors

The American Bar Association Section of Dispute Resolution, the WIDR Committee and the Diversity Committee

The ABA Section of Dispute Resolution “provides members with accessible, relevant and cutting-edge information, practice tips, and skill-building opportunities. The ABA Section of Dispute Resolution is a vibrant forum for networking, professional development, and research that bridges together unique and diverse perspectives.”⁵⁹

The Women in Dispute Resolution (“WIDR”) Committee of the ABA Section of Dispute Resolution was formed in response to the low rates of women being selected as neutrals. Since its formation, WIDR has been a champion of promoting the selection of women and other diverse neutrals in ADR. WIDR was a leader in initiating the development of Resolution 105 and continues to publish an annual directory of members.

The Diversity Committee of the ABA Section of Dispute Resolution strives for equity, inclusivity, and respect for all manners of diversity groups. It aims to increase diversity within the dispute resolution profession and to increase access to dispute resolution within diverse communities. Activities include those designed to increase representation as well as those designed to integrate diverse perspectives into practices.

The Institute for Inclusion in the Legal Profession

In its mission statement, the Institute for Inclusion in the Legal Profession (IILP) expresses its goal of driving “real progress through comprehensive outreach and original programming to replace barriers with bridges between legal, judicial, professional, educational and governmental institutions.” To achieve this goal, the IILP “gives law firms, bar associations, corporations and government agencies insights for business development and tools to eliminate bias.”⁶⁰

The Chartered Institute of Arbitrators

The Chartered Institute of Arbitrators is the world’s leading qualifications and professional body for dispute avoidance and dispute management. CIArb promotes societal harmony by helping people and organizations avoid, manage and resolve conflict through their global network of over 17,000 members across 150 countries in 42 branches. As a not-for-profit UK registered charity, CIArb works in the public interest for the promotion, facilitation and development of all ADR methods and provides education and training for arbitrators, mediators, adjudicators and users of ADR services.⁶¹

⁵⁹ www.americanbar.org/groups/dispute_resolution/

⁶⁰ www.theiilp.com/

⁶¹ www.ciarb.org

The Federal Bar Association Section of Alternative Dispute Resolution and Diversity and Inclusion Committee

The Federal Bar Association (FBA) “is dedicated to promoting the welfare, interests, education, and professional development of attorneys involved in federal law. With more than 19,000 members—including 1,500 federal judges—its members run the gamut of federal practice, from small to large firms, corporations, and federal agencies. The FBA serves as the catalyst for communication between the bar and the bench, as well as the private and public sectors.”⁶²

The National Association of Minority and Women Owned Law Firms

Founded in 2001, NAMWOLF is a nonprofit trade association of minority and women owned law firms that promotes “diversity in the legal profession by fostering successful relationships among preeminent minority and women owned law firms and private/public entities.”⁶³

⁶² <https://www.fedbar.org/membership/>

⁶³ <https://namwolf.org/about-namwolf/>