

# Article

## Notes from the United States on Diversity in ADR (Opinion)

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As a woman who has devoted her professional life solely to Alternative Dispute Resolution over the last two decades, and litigated business disputes for 15 years before that, I am still shocked when I serve as a mediator or as an arbitrator to find that I am the only woman in the room. I can count on my fingers the number of times all counsel are female. I can also count on my fingers the number of African American senior lawyers who have appeared before me, and, for that matter, the number of African American neutrals I know. With disturbing frequency, the only women present at an arbitration or a mediation with a woman presiding may be clients, paralegals or younger associates assisting male, first chair lawyers. Data from 1990 showed that fewer than 5% of arbitrators in international arbitrations were women. In 2010, that number increased to 6%, then 10% in 2012 and then it moved to 15% in 2016. An American Arbitration Association 2010 report found that women were appointed in only 15% of cases involving large monetary claims, represented only 25% of the prestigious *National Roster*, and were selected only 13% of the time. Domestically, in the United States, I can anecdotally report – and my female colleagues confirm my experience – the statistics are still grim. We are still frequently the only women in the room. And, thankfully, we are not the only ones who notice.

Appropriately, and perhaps courageously, the American Bar Association (ABA) at its August 2018 annual conference unanimously adopted Resolution 105, urging *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. The resolution also urges all *users* of domestic and international legal and neutral services to select and use diverse neutrals.

By way of background, for years, the ABA had as a goal, promoting the full and equal participation in the profession by diverse neutrals. In 2008, the ABA expanded its goal to eliminate bias and enhance diversity in the ABA, the legal profession and the justice system. In 2016, the ABA adopted a resolution urging ‘all providers of legal services, including law firms and corporations [to] expand and create opportunities at all levels of responsibility for diverse attorneys’ and further urged ‘clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys’.

Law firms and corporations with in-house counsel have long committed to diversity and have achieved some success in diversifying their workplaces. But, in July 2017, the *New York Times* reported that

[e]ven as more women add a law degree to their résumés, carving out a successful career at a law firm remains an uphill endeavor... progress for women is, at best, static, according to the “2017 Law360 Glass Ceiling Report”... Women are 50.3 percent of current law school graduates, yet they still make up just under 35 percent of lawyers at law firms, the report found. Most important, their share of equity partnerships – where the highest compensation and leader-

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ship positions are lodged – remains at 20 percent and has not changed in recent years, the report found.<sup>1</sup>

Comparing ADR data and Law360 data, women are having more success in practising traditional law than in the newer field of ADR. Perhaps not unexpectedly, women lawyers have found their greatest success in public service in the judiciary, where 33% of state and federal judges are female.<sup>2</sup> Notably, the U.S. Supreme Court in 2019 has three sitting female justices.

While democratic societies have long promoted the equal rights of women in the workforce, the field of ADR has not been on the radar. Because arbitration and mediation processes are private – one of ADR's highly prized virtues – the process for the selection of neutrals has not been transparent. Typically, neutrals are chosen by law firm partners with the input of clients, the vast majority of whom are men, and implicit or explicit bias kicks in. Men are more likely to know men, and, when it comes to high stakes, bet-the-ranch arbitrations, more likely to want to put their trust in a known quantity. Aside from explicit bias, implicit bias is real. Data gathered from scores on tests measuring implicit gender bias

reveal that 75% of people who have taken the IAT [Implicit Association Test] have correlated men more strongly with work roles and women more strongly with family positions. A recent study showed that hiring managers whose scores on the IAT indicated gender bias tended to favor men over women in their hiring decisions.<sup>3</sup>

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No surprises there, and, presumably, at least some of those 75% of test takers are women. It is not unusual for women to select men over women for critical assignments, because women may suffer from the same implicit bias as men and because the performance of a woman arbitrator or mediator may be subjected to far more rigorous scrutiny than that of a man in the same role.

I was one of 16 women in a law school class of 160. My class had one African American male. The statistics have not changed much in the field of ADR. The ABA acknowledged this absence of diversity in passing Resolution 105. The many women and the few diverse neutrals who have ventured into ADR are passionate, demanding of themselves, disciplined and skilled. Their selection as neutrals can only enhance the reputation of ADR, and the skills they provide will bring ADR practice to a new level.

1. <https://www.nytimes.com/2017/07/24/business/dealbook/women-law-firm-partners.html>.
2. <https://www.americaquarterly.org/women-in-robos>.
3. <https://www.psychologicalscience.org/observer/the-bias-beneath-two-decades-of-measuring-implicit-associations>.