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ADR Business Wakes Up to Glaring Deficit of Diversity

It's no secret that Big Law firms and courthouses around the country have struggled with diversity. But even amid incremental progress on those fronts, alternative dispute resolution has been a stubborn enclave of homogeneity.

By Ben Hancock | October 05, 2016



Shirish Gupta, JAMS (Photo: Jason Doiy)

Something was bothering Shirish Gupta.

As a civil litigator at Mayer Brown handling class actions and IP law, he'd dealt with a fair number of arbitrations and mediations. But every time, he saw the same faces in the room.

"They were for the most part retired judges, who—given the demographics—were white males," Gupta said. "It was disconcerting that we didn't look beyond that."

It was part of a thought process that eventually led Gupta, who was born in India and raised in Los Angeles, to make a career shift and pursue a role as a neutral himself. In doing so, he joined the small but growing ranks of minorities in what is arguably the least diverse corner of the legal profession.

ADR AND DIVERSITY *This is the first article in a series examining the barriers faced by women and minority attorneys in the field of arbitration.*

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It's no secret that Big Law firms and courthouses around the country have struggled to add more women and minorities to their ranks. But even amid incremental progress on those fronts, alternative dispute resolution, or ADR, has been a stubborn enclave of homogeneity.

Statistics are hard to come by and most ADR organizations are reluctant to provide data on their panels. But according to a Law.com analysis of the more than 350 neutrals affiliated with JAMS, one of the largest national providers of ADR services, 25 percent are women and 7 percent are minorities. More than 95 percent are over the age of 50.

Diversity is especially paltry in high-stakes disputes where neutrals can command rates topping \$25,000 a day, according to interviews with nearly two dozen lawyers and neutrals. Opening the door to more women and minorities, they said, would require a mix of awareness and advocacy on the part of in-house lawyers and private attorneys that to date is largely lacking.

"Big firms and clients have not given a lot of thought to the issue of diversity in the selection of neutrals," said Patricia Gillette, a JAMS neutral who was a longtime employment litigator at Orrick, Herrington & Sutcliffe in San Francisco.

"But for employment cases, where diversity might be more of a consideration, I don't think that is a conversation that many lawyers have," she added.

Saying the ADR industry lacks diversity doesn't fully capture it. It's perhaps more precise to say the profession suffers from a chronological lag. Most neutrals selected to mediate or arbitrate disputes are retired judges or attorneys with long careers behind them, meaning the pool of individuals reflects the legal industry not as it looks today, but as it appeared a decade or more ago.

It's not just in the U.S. The gender gap in the international arbitration space is so extreme that this past spring a group of female practitioners launched a campaign calling on law firms to at least consider naming a woman to dispute panels.

The lack of diversity alters the dynamics in arbitration, and possibly the outcomes, according to the attorneys and neutrals interviewed for this article. There can be a subtle disconnect, an awkward language barrier, lack of trust—even naked biases. Or this familiar scenario:

"In new mediations, I'm often mistaken for a junior lawyer on the file rather than as a lead counsel, always because my male co-counsel or junior male lawyers from my firm are assumed by the mediator to be running the case rather than me," said Kelly Dermody, a partner at San Francisco plaintiffs firm Lieff Cabraser Heimann & Bernstein. "This happens constantly."

Gender of Neutrals by Practice Area



Source: ABA Survey, 2014

WHO WINS THE WORK

Dermody, who litigates large consumer and employment cases, said that while she has pushed to pick more women in mediations, she has had limited success getting past disagreements with opposing counsel. In her 23-year career, Dermody said, she has only worked with three private mediators who were not white men.

Law.com's review of the JAMS roster relied on profiles listed on the organization's website and used data points, including photograph, name, membership to affinity groups, and year of college graduation. JAMS neutrals were not individually surveyed and the firm declined to provide data on the diversity of its roster.

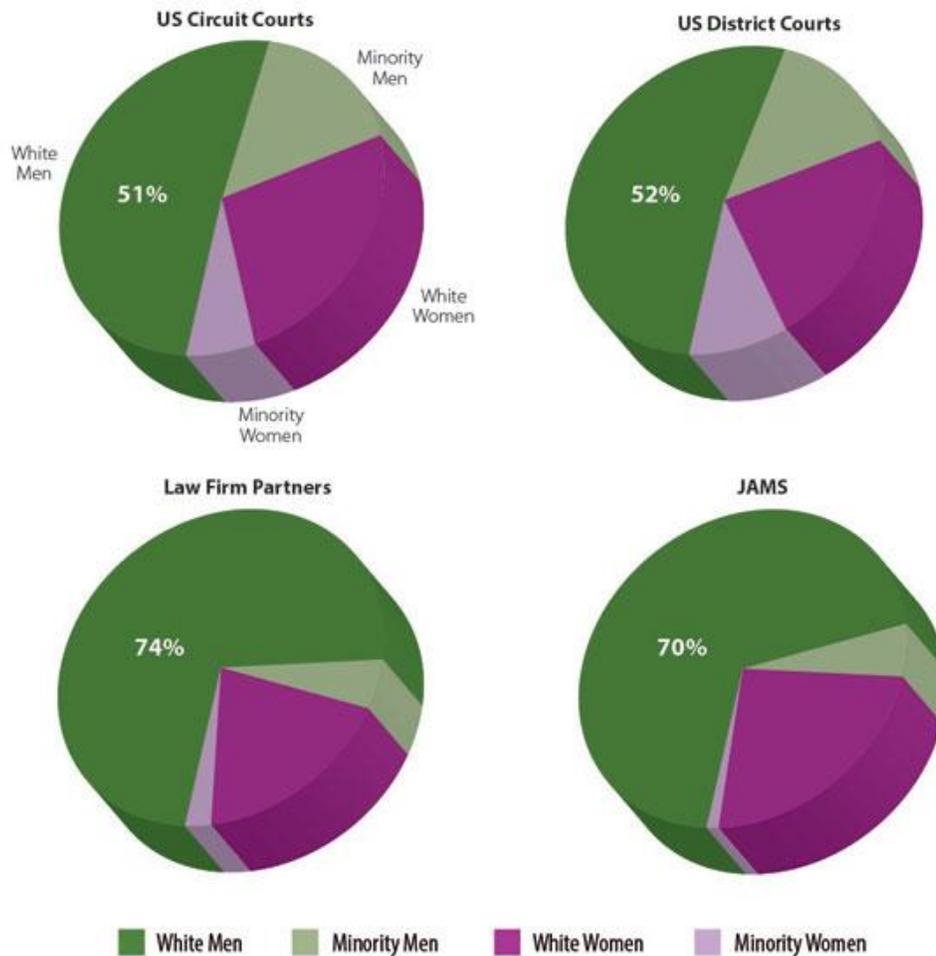
The American Arbitration Association does not publicly list information about the roughly 7,000 neutrals registered on its rosters. But in business disputes last year, AAA reported that 22 percent of arbitrators selected were either a woman or a minority.

Those numbers show the profession falling significantly short of federal courts in terms of diversity, and coming up on par with the ranks of law firm partners.

But neutrals and attorneys interviewed for this article agreed that available statistics mask the true extent of the problem. Even if providers have a diverse roster of people to choose from, what matters is who ultimately wins work from attorneys and their clients. Many sources agreed that, within the realm of business disputes, there is a small pool of "repeat players" who are predominantly white and male.

Women also miss out when big dollar amounts are at stake. A survey by the American Bar Association’s Section of Dispute Resolution published in 2014 found an inverse relationship between the amount of money in dispute and the likelihood that a woman would be chosen as the arbitrator or mediator to help resolve the matter. The study shores up the perception among neutrals that even when capable women are available, they are seldom chosen for the big-ticket cases that make their practice economically viable.

How JAMS stacks up on diversity

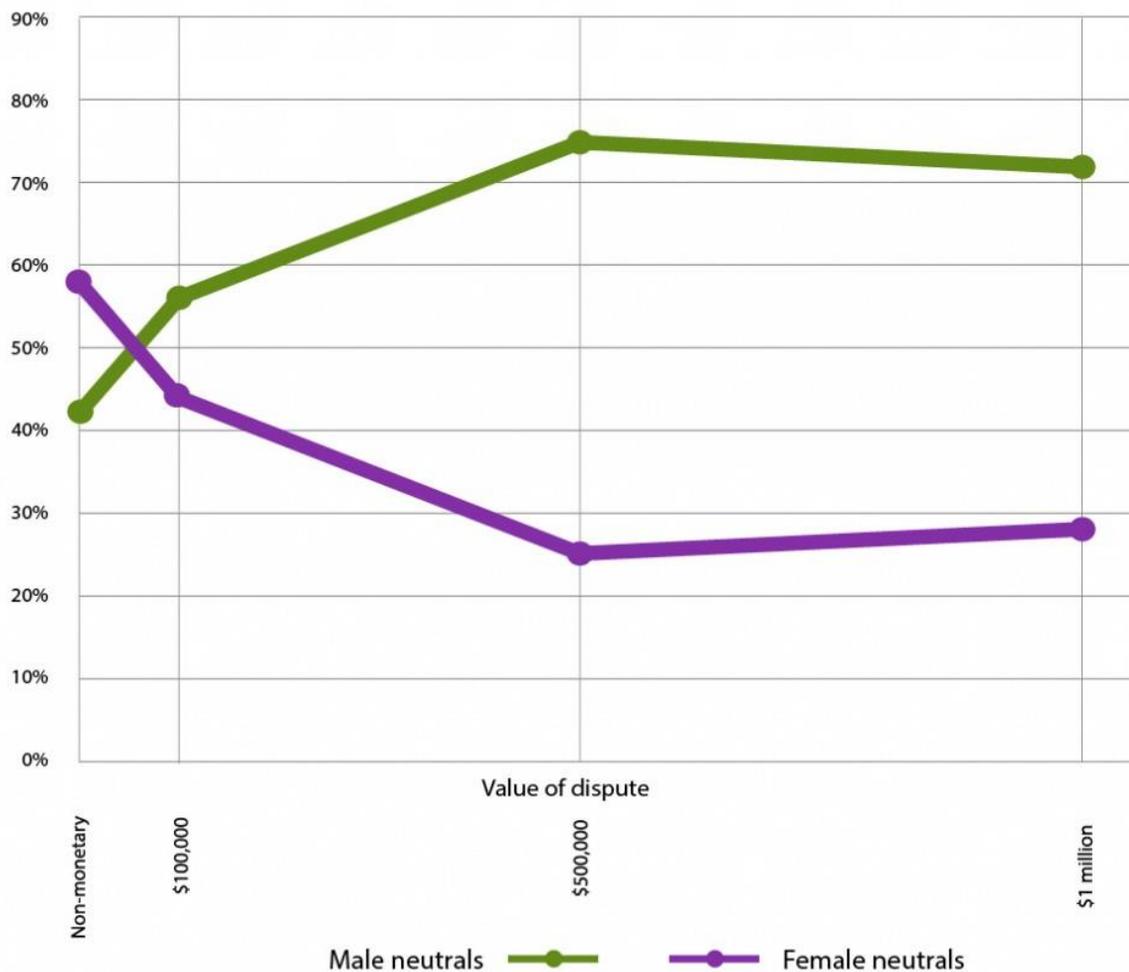


Sources: U.S. Congressional Research Service, National Association for Law Placement, Law.com analysis

“It’s not that we don’t have trained and accomplished female and minority arbitrators and mediators,” said Linda Singer, who was among the early women pioneers in the mediation industry starting in the early 1990s and is now with JAMS. “The problem is getting people work.”

The dynamic flows, at least partly, from a sense among attorneys that retired judges and veteran litigators, a largely older, white and male cohort, are the most palatable figures to clients when pursuing a dispute outside of the courtroom.

Who's handling big-money cases?



“When lawyers have to make a risky recommendation to their clients, my observation is that they are cautious,” said James Ware, a retired federal judge who numbers among the few African-American neutrals on JAMS’ roster. That sense of caution can often drive attorneys to select not only neutrals who are retired judges or former litigators with established track records, Ware said, but more to the point, individuals who share their own background.

“They want a neutral who is a mirror image of themselves,” he said.

But even senior female or minority attorneys frequently turn to retired judges when handling arbitrations or mediations. Diversity rarely, if ever, factors into their thinking during the selection process.

“In a number of cases, when I have spoken with women partners who are quite sympathetic to diversity issues generally, I will point out that the lists that they see circulated by some of the providers are often substantially nondiverse,” said Conna Weiner, who is co-chairwoman of the

ABA's Women in Dispute Resolution Committee. "And they will say, 'You know what, I've never thought of that.'"

"It's not nefarious ... or insurmountable," she added. "It's just that people haven't focused on the problem."

A PUBLIC PLEDGE

In a 2012 editorial published by Law360, Mark Smalls, vice president and chief marketing officer at JAMS, encouraged law firms, corporations and in-house counsel to develop metrics to track their neutral selection, pushing them to be more transparent and conscious of their choices.

"So how do we accelerate progress regarding diversity as it relates to ADR?" wrote Smalls. "It starts with continuing to shine a light on the issue."

But while ADR providers have on one hand publicly called to diversify the profession, they have been largely unwilling to pull back the curtain. Representatives of JAMS and AAA both declined to provide detailed demographic information on their panels, or to disclose the gender and racial breakdown of the neutrals most frequently selected.

In response to a request for that information, JAMS, instead, provided a breakdown of the neutrals who have joined the organization since 2010. Of those 151 individuals, 28 percent are women and 10 percent are minorities, according to Victoria Walsh, a spokeswoman for the company. The numbers show that the company's more recent additions are generally more diverse than its roster overall.

Michael Clark, spokesman for AAA, pointed to a report on business disputes arbitrated by the organization and its international branch, the International Centre for Dispute Resolution, in 2015. According to the report, 26 percent of cases had either a woman or a minority arbitrator assigned.

Another nationwide ADR provider, New York-based National Arbitration and Mediation, last conducted a survey of its 2,000-member roster in 2012. It found that 16 percent were women and 14 percent were nonwhite, but did not render any data on the neutrals that are most frequently selected.

The most detailed information came from the Institute for Conflict Prevention and Resolution, or CPR. Of more than 550 neutrals worldwide, roughly 15 percent are women and 14 percent are non-white, according to the organization.

Helena Tavares Erickson, senior vice-president for dispute resolution services at CPR, said 20 individuals were selected for three or more mediations or arbitrations between 2010 and 2016. Of that group, 12 were white men, five were women, two were Hispanic men, and one was African-American man. But CPR's data only encompasses instances in which the organization was approached by parties to help make a selection, Erickson explained, and not disputes where litigants conduct the selection independently.

Andrea Schneider, a law professor at Marquette University in Milwaukee, said a lack of data about the demographics of the industry has hindered efforts to make the field more diverse because it makes it harder to illustrate the scope of the problem.

That was one of the driving ideas behind a study that Schneider and Gina Brown of the ABA's Dispute Resolution Section undertook in 2012 and published in 2014. "We were really hoping that this report was the beginning of trying to get those changes," Schneider said.

The study, which focused on gender diversity, is still one of the most in-depth available. Drawing on a poll of ABA members, including attorneys and neutrals, it mapped the relationships between the gender of the neutral, the amount of money in dispute, the subject matter, and whether the forum was an arbitration or a mediation.

The data showed a clear inverse relationship between the amount of money at stake and the likelihood that a woman would be involved in resolving the matter. Of the neutrals who were involved in primarily nonmonetary cases, 42 percent were men. For disputes with more than \$1 million at issue, 80 percent of the neutrals were men, the survey found.

Other litigation areas were almost entirely the arena of male neutrals. In corporate and commercial matters, 82 percent of the neutrals were men; in class actions, 79 percent of the neutrals were men.

Providers do not publish data about compensation for arbitration and mediation services, making it hard to assess how or whether pay differs for women and minorities in the industry.

The profession can be lucrative for those in the inner circle. Attorneys and neutrals say that the most in-demand figures handling large business cases can charge up to \$30,000 a day. Getting into the upper echelons, though, generally requires being affiliated with one of the major providers.

For those who are just breaking in, working high-value cases is rare, said Gupta, who was a solo mediator for several years before joining JAMS. "I likely would not have been hired for a billion-dollar case as a solo," he said. "There were some folks who had known me for years who did not use me until I joined JAMS."

The fact that the major organizations act as gatekeepers for big-ticket work underlines the role they can play in making the field more diverse by bringing more women and minorities onto their rosters, he added. "That's crucial," he said.

WIDENING THE POOL

Ruth Glick is a Silicon Valley-based attorney who started arbitrating cases back in 1987. Then, she recalled, the proportion of women on AAA's roster was probably 12 or 13 percent. Around 2011, she was dismayed to find the needle had barely moved.

The slow pace of change was what spurred Glick to create the ABA's Women in Dispute Resolution Committee, known as WIDR. She said she realized that while diversity had been made a priority in law firms and in corporate law departments because of advocates pushing from within, when it came to arbitrations and mediations, nobody was pushing for it.

"If you're a litigator or a corporation, you want to win the case," Glick said. "I don't think you're thinking diversity. You're thinking, 'Who will understand my point of view?'"

Part of the problem, too, is that the ranks of senior law firm partners aren't diverse, said Terrance Evans, a partner at Duane Morris who litigates financial and insurance disputes and was recently named a member on the Minority Corporate Counsel Association's Next Generation advisory board.

"I don't think that the majority of partners at firms are intentionally trying to exclude diverse neutrals," said Evans. "It has to do with relationships. If we have a more diverse group of lawyers who are in a position to make those decisions ... then I think they will have more diverse relationships and then expand those opportunities."

Smalls said JAMS tries to ensure that women and ethnically diverse neutrals are included on lists issued to parties in a new dispute. But he also said that diversity in arbitrating and mediating disputes has simply not been on the radar screen of many in-house counsel and litigators.

Sasha Carbone, associate general counsel of AAA, pointed to several recruitment and promotional efforts aimed at increasing the representation of minority and women arbitrators. Under an initiative within the last three years, 20 percent of the AAA's arbitrators suggested to parties are women or minority candidates who meet the parties' qualifications, said Carbone.

About a third of AAA's new panelists this year are women and minorities as a result of a recruitment goal, Carbone said.

“It’s incremental,” she said. “It’s not one thing that’s going to fix this. Part of the process is making sure the panel is more diverse and we are seeing that happen.” She added: “In terms of the parties selecting diverse arbitrators, there’s still work to be done.”

Glick credits the institutions for making efforts to diversify their rosters in the intervening years. But she sees change as needing to come from the demand side. “I think they’re trying,” she said, “but you can’t force someone to choose the arbitrator. It has to be a party selection.”

“The parties and lawyers on the case have to care,” echoed Bijal Vakil, a partner at White & Case in Silicon Valley who is also a court-registered neutral at the U.S. District Court for the Northern District of California. “Right now, the issue doesn’t come up. There’s a complete lack of awareness.”

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