

AMERICAN BAR ASSOCIATION EMBRACES DIVERSITY IN DISPUTE RESOLUTION

By **Frederick Hertz**

One of the most sensitive challenges facing the ADR professional community is the issue of diversity. As many observers have noted, the substantial majority, indeed, a super-majority of lawyers serving as arbitration and mediation practitioners are white and male, and the efforts to bring diverse neutrals into the profession have faced significant difficulties. Even where the intentions are the best, efforts to diversify the field have met with limited success to date.

In an effort to move this process forward, the ABA recently adopted **Resolution 105**, which states as follows:

RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services 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; and

RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.

This Resolution builds upon a similar resolution passed in 2016 (Resolution 113), which encourages providers of legal services and their clients to increase opportunities for diverse attorneys. It is significant to note that the recent Resolution specifically enumerates the categories of diversity covered by the resolution, and encourages the expansion of rosters as well as the selection of diverse neutrals.

The ABA Dispute Resolution Section has created a Steering Committee to help publicize Resolution 105, and to develop recommendations and strategies for its implementation. As the Committee member appointed to highlight the concerns of LGBT neutrals, I’ve been active in developing the policies and implementation plan. Our Committee recently issued a Summary & Suggested Action Steps, [which can be found HERE](#). The Summary describes the issues that led to the Resolution, and the Action Steps provide a variety of actions that providers of mediation and arbitration, as well as consumers of dispute resolution services, can take to further these goals.



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One important aspect of the implementation plan is the encouragement of open and thoughtful discussion of the issues involved in the goals of diversity. Is it primarily a mechanism to support the careers of non-white non-male non-majority neutrals, or is it also a recognition of the need to provide diverse neutrals to validate the concerns of non-majority parties to various disputes? What special insights and skills do women, non-white and LGBT mediators and arbitrators bring to the process, and how is the dispute resolution process improved by the participation of diverse neutrals? These are not simple questions to answer, and yet, until there is a clear understanding of the importance of this goal, making progress will be difficult.

The other key dimension involves the inter-related issues of the career paths that lead to a professional's standing in the ADR community, and the role of reciprocal referrals and social networks in the promotion of various neutrals' success in the field. If the branches of the legal profession that feed into the ADR rosters (such as commercial litigation and civil judgeships) are lacking in diversity, it's no surprise that the mediators and arbitrators emerging from those fields will be similarly non-diverse. Further complicating the situation, there are few well-established parameters of competence or success in this field, and so there is an unusually heavy reliance on personal referrals.

What can members of The Mediation Society do? Here are some suggestions, in line with the ideas summarized in the Steering Committee's report:

1. Encourage diverse lawyers to consider getting involved in the mediation and arbitration field, as a career choice.
2. Foster the careers of diverse neutrals whom you meet, by nominating them to join The Mediation Society and referring clients to them.
3. Encourage an open discussion of the benefits of diversifying the ADR profession, and reflect on how your own network of referrals and social acquaintances discourages the diversification of the field.
4. Encourage providers of ADR services to issue a pledge to diversify their rosters, and then be sure that this pledge is implemented, and that the diverse neutrals on their panels are promoted for hiring by potential clients.

ABA Resolution 105 - Diversity in ADR
Summary and Action Steps

1. **Resolution 105:** The American Bar Association recently adopted an important resolution aimed at increasing diversity in dispute resolution:

RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services 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; and

RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.

Resolution 105 expands upon ABA Resolution 113, adopted in 2016, which encourages providers of legal services and their clients to increase opportunities for diverse attorneys. Law firms and inside counsel are working hard to implement the goals of Resolution 113; for example, many inside counsel now require that outside counsel use diverse teams on their matters. Resolution 113 and the supporting report can be accessed using this link:

https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-hod-resolution-113.pdf

The ABA strongly believes that enhancing diversity in dispute resolution is an integral element of efforts to increase diversity in the legal profession as a whole. A report in support of Resolution 105, summarized here, details the problem in ADR with supporting statistics and authorities – We encourage those interested in the report to read it in full using this link:

<https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>

2. **The Problem:** The available data and materials outlined in the report show starkly that diversity in dispute resolution significantly lags the legal profession as a whole. The problem can be broken down into two areas: the “roster issue,” namely the still unrepresentative nature of the panels of the major providers despite their efforts to improve the situation; and the “selection issue,” the fact that diverse neutrals on rosters are not selected as often as their non-diverse colleagues. Both issues arise from the network-based and confidential nature of the profession, which undermine potential efforts to address the roster issue and results in selection of neutrals in relative obscurity, enabling implicit bias to play a greater role in the selection process. The limited prospects for selection in turn discourage minority attorneys from applying for acceptance on institution rosters. The lack of transparency also minimizes public awareness of lack of diversity in the field, thus reducing the incentive of stakeholders such as clients, outside counsel, institutional service providers and established neutrals to take proactive steps.

3. Why Diversity in ADR Matters: Diverse neutrals may not be chosen or recommended for the wrong reasons – including implicit bias about their capabilities compared to neutrals who are more “like” those choosing them, and the wholly inaccurate impression that experienced and qualified diverse neutrals are not available – thereby reducing options for parties as the same individuals are selected again and again. Clients lose out because they are not made aware of potentially valuable alternatives for particular cases. As shown in many studies, diverse teams can improve decision-making – by bringing new perspectives, and, potentially, more informed decisions, to the table. In addition, alternative dispute resolution will lose relevance, credibility and respect if neutrals do not reflect the diversity of the parties and our communities, particularly among those who feel their views and circumstances are not being fairly represented.

4. How You Can Help Solve the Problem:

What Clients/Inside Counsel Can Do:

- (a) Initiate discussions within your own firm regarding the value of diversity in arbitration and mediation.
- (b) Select diverse neutrals whenever possible.
- (c) Insert language in contractual dispute resolution clauses that directly encourages the selection of diverse neutrals. For example, include language such as the JAMS diversity inclusion language in dispute resolution clauses: “The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and lists of potential arbitrator appointees.”
- (d) Take public diversity pledges available from various institutions. The International Institute for Conflict Prevention and Resolution (CPR) provides a diversity pledge for clients and law firms: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose. We will do the same in lists we provide.” Another pledge, the Equal Representation in Arbitration Pledge, focusing on women in international arbitration, is available here: <http://www.arbitrationpledge.com>.
- (e) Raise ADR diversity issue at internal and industry association meetings.
- (f) Raise issue with outside counsel:
 - (i) Circulate Resolution 105 and the Report to outside counsel with a note supporting the resolution.
 - (ii) Revise outside counsel guidelines to include a requirement that outside counsel present lists of diverse neutrals, tying this effort directly to efforts to increase diverse attorneys on teams pursuant to ABA 113.

- (iii) Ask outside counsel to use JAMS diversity inclusion rider or similar language in contractual dispute resolution clauses (see (c) above).
- (iv) Encourage outside counsel to take diversity pledges (see (d) above).
- (g) Raise ADR diversity issue with providers such as AAA, JAMS, CPR and others:
 - (i) Require providers to explain and maintain diversity policies and practices that aim to increase diversity on their rosters and encourage selection of diverse neutrals by users; consider using such policies as one criterion in the selection of providers.
 - (ii) Ask for diverse neutrals to be included on selection lists.
 - (iii) Ask for opportunities to meet or otherwise become familiar with diverse neutrals on the panels of major providers.

What Outside Counsel Can Do:

- (a) Promote Resolution 105 and the Report in internal firm meetings and with women's and other firm diversity initiatives.
- (b) Take diversity pledges (see above).
- (c) Initiate discussions regarding ADR diversity in your law firm.
- (d) Include JAMS diversity inclusion rider or similar language in contracts (see above).
- (e) Require providers to explain and maintain diversity policies and practices that aim to increase diversity on their rosters and encourage selection of diverse neutrals by users; consider using such policies as one criterion in the selection of providers.
- (f) Ask providers to provide diverse lists.
- (g) Ask that providers create opportunities to meet or otherwise become familiar with diverse neutrals on their panels.

What Providers of Dispute Resolution Services Can Do:

- (a) Initiate discussions on the importance of diversity in ADR within the organization.
- (b) Invite diverse neutrals who are not on their rosters to speak with the organization.
- (c) Promote Resolution 105 and the Report to management and case managers.
- (d) Promote Resolution 105 and the Report to clients and create client communications encouraging selection of diverse neutrals.
- (e) Continue efforts to identify and promote diverse neutrals, including performing outreach to diversity bar associations, etc.
- (f) Encourage or require case managers to include qualified diverse neutrals on lists.
- (g) Create opportunities for users to learn about and meet diverse neutrals through profiles, events, etc.
- (h) Track annual progress regarding increased roster diversity and selection of those neutrals, and publicize the results of those efforts.

What Neutrals Can Do:

- (a) Select or appoint diverse neutrals as chairs of arbitration panels.
- (b) Nominate and sponsor diverse neutrals for membership in ADR organizations that require nominations or sponsorships.
- (c) Mentor diverse neutrals in their practice development.
- (d) Initiate discussions within neutral organizations and social gatherings on the topic of diversity in ADR.

What Other Stakeholders Can Do:

- (a) Neutral organizations: Examine membership requirements, including length of neutral service requirements to ensure that they do not adversely affect inclusion of qualified diverse neutrals.
- (b) Law schools: Encourage diverse students to become actively involved in dispute resolution professional work and organizations.
- (c) Industry organizations (such as construction and franchise): Request that members increase their use of diverse neutrals and take diversity pledges.

The ABA welcomes your suggestions, questions or comments. Please contact the Director of the Section on Dispute Resolution, Linda Seely, with your feedback: (202) 662-1685, linda.seely@americanbar.org