

The President's Page

by Jane Cohen and Melvin Kennedy

Editor's Note: The authors of the piece below approached the St. Louis Bar Journal and proposed an article on increasing diversity in the field of Alternative Dispute Resolution. The Hon. Glenn Norton, president of BAMSL, graciously agreed to provide his President's Page space so that this important matter can be presented to BAMSL membership.

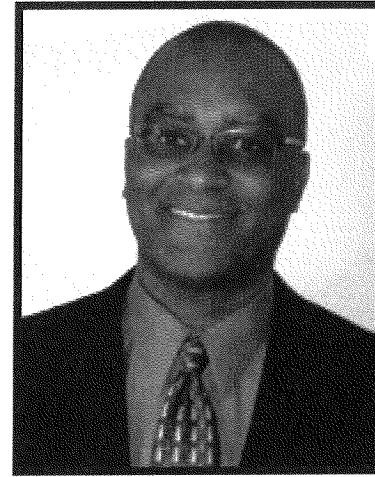
This issue of the *St. Louis Bar Journal*, focused on Alternative Dispute Resolution, will present a broad range of perspectives on, and applications of, ADR in the modern legal world. It is appropriate to take this opportunity to raise awareness of the importance of diversity in ADR, and our responsibility as ADR professionals and lawyers to increase diversity in this area. As with diversity among judges and juries, increased diversity in ADR will lead to increased credibility in the process as well as better decision-making and better outcomes.

The American Bar Association Section on Dispute Resolution has been consistently working to further the ABA's goal to "eliminate bias and enhance diversity." In 2018, the ABA passed Resolution 105, which "urges providers of domestic and international dispute resolution services (1) to expand their rosters with minorities, women, persons with disabilities and persons of differing sexual orientation and gender identities ("diverse neutrals"); and (2) to encourage the selection of diverse neutrals. It also "urges users of domestic and international dispute resolution services to select and use diverse neutrals." This resolution addresses the two diversity problems in ADR: the "roster" problem and the "selection" problem.

An example of the roster problem became national news in 2019 when rapper/businessman Jay-Z claimed that the arbitration agreement governing a trademark dispute he had related to the sale of his business was void as racially discriminatory under New York law, because only two of the more than 200 arbitrators proposed who had no conflicts identified as African-American. As this case demonstrates, diversity, like beauty, is in the eye of the beholder.

Each ADR service provider must first assess what its ADR consumer base looks like, from diverse perspectives, to make sure its ADR roster includes a fair representation of the consumers of its services, including gender, race, disability, ethnicity, age, religion, sexual orientation, or other characterization. This applies equally to mediation and arbitration. Once the consumer profile has been established, the service provider should then obtain input from the groups it serves about what a diverse panel would look like to them. Creating a more diverse roster, however, means nothing if diverse neutrals are not selected to serve as mediators or arbitrators.

The two largest national ADR service providers have implemented different measures to increase the selection of diverse neutrals. The American Arbitration Association has implemented initiatives to increase panel diversity and diverse selection. Among them are the Higginbotham Fellows program, established in 2009, whose purpose is "training, mentorship and networking opportunities to up-and-coming diverse alternative dispute resolution professionals who have not historically been included in meaningful participation the field of alternative dispute resolution." AAA has also committed to provide, where possible, lists of qualified arbitrators to parties, comprised of at least 20% diverse panelists. JAMS has crafted a




sample diversity and inclusion clause for use by parties that provides "[t]he parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation)."

Unfortunately, the tracking and reporting by national ADR service providers of statistics about the selection of diverse neutrals is in its infancy. We are not aware of any organizations that presently track the ADR consumer population.

This mission is important to all of us. The legal community is a stakeholder, as are individuals, families, communities, businesses, and the courts. Most civil disputes are resolved by means other than trial. Civil courts rely heavily on litigants' ability to resolve disputes through mediation, arbitration, and traditional settlement negotiation. In fact, in 2020, the U.S. District Court for the Eastern District of Missouri reported that 98.8% of civil lawsuits were resolved other than by jury verdict.

The first step of change is to acknowledge that ADR panels need to be more diverse for the benefit of ADR consumers. The next step is to create awareness about the lack of diversity in the ADR field (which is what this column is intended to do). Finally, we as lawyers need to make a commitment not only to work to increase diversity in the rosters available to consumers, but also for those who are involved in the selection of ADR professionals (primarily in-house and outside counsel) to consider using diverse neutrals and demand diversity in lists they receive.

BAMSL, through its seasoned ADR professionals, as well as St. Louis-based ADR service providers such as Alaris Alternative Dispute Resolution and USA&M, should be included in the conversation when developing programs to train, mentor, and provide networking opportunities for up-and-coming, diverse ADR professionals who want to develop practices in the ADR field.

Several training opportunities in the St. Louis community immediately come to mind, such as the Landlord-Tenant Mediation Program in the St. Louis City and St. Louis County courts. The Conflict Resolution Center and Community Mediation Services of St. Louis both provide opportunities for mediators to gain valuable volunteer mediation experience while serving the community. 

Jane Cohen serves as an arbitrator for AAA; FINRA; Alaris Alternative Dispute Resolution, and other panels. She also serves as a mediator. She is an active member of the ABA Section on Dispute Resolution and is the regional chair (for Missouri) of the Women in Dispute Resolution Committee. She is the current secretary of the Association of Attorney Mediators and is a member of the Association of Missouri Mediators and the BAMSL and Missouri Bar ADR Committees.

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