

May 17, 2019

ARTICLE

Gender Diversity with Mediators, Arbitrators, and Expert Witnesses

We can all add diverse neutrals to our personal rosters of “go-to” mediators we propose to opposing counsel.

By Naomi M. Berry

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As litigators, we’ve all heard these familiar phrases—“We need a mediator who can really beat up on the other side” or “ISO tough mediator recommendations.” Unfortunately, too many of us who have suggested a woman for the job have been met with skepticism or outright rejection. This type of implicit bias is not only hurting business opportunities for women in alternative dispute resolution (ADR) but also potentially diminishing the chances of a successful mediation.



Anne Bloom has been mediating cases for nearly 20 years and has been hearing about these stereotypes throughout her career. Friends have recommended her as a mediator, and their partners have rejected the idea, thinking their clients won’t listen to a woman. But when she does get hired, she’s had great success in reaching settlements with the most difficult male clients. “I can work really well with the toughest of men because I’m not combative to them,” Bloom said. “Beating up on someone can take many different forms.”

If you search online for “gender diversity in mediation,” the disparity in hiring female mediators is clear. Studies, such as [a 2014 study by the ABA Section of Dispute Resolution](#), have shown that women are hired for about 36 percent of mediations and far more often for cases with no money in dispute or smaller dollar amounts. Last year, the ABA passed Resolution 105 to urge ADR providers to “expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities” and to “encourage the selection of diverse neutrals.”

So how do you encourage the parties to select diverse neutrals? Unlike in hiring departments that track diversity, there typically is no centralized process for tracking who is retained as mediators, arbitrators, and expert witnesses. Decisions are left up to individual attorneys who often turn to their personal networks. Male attorneys hire male mediators more often (as found in the ABA study mentioned above), then tend to keep using those same male mediators when those mediations are successful. I would be willing to bet that even firms that have a great track record for diversity in hiring and promotion would be shocked if they studied the statistics of the ADR professionals they have used.

April Walker, a mediator with Upchurch Watson White & Max, told me:

As with all diversity and inclusion issues we face in the legal profession, there must be a willingness to engage and work with new and different people. There must also be a sincere commitment by members of the bar to individually take steps in the direction of change. If we are all honest, it is commonplace for human nature to repeat (or revert to) what is familiar because it requires less energy and time, and it is comfortable.

Walker added, “Additionally, in my own experience, we lawyers can be creatures of habit. As an advocate, I also used mediators more than once when they were successful in helping me get a case resolved.”

Bloom thinks the situation is improving and that attorneys are realizing that often women can be more effective mediators. She is happy to report that she is frequently hired by male partners and often gets repeat business. But she thinks the first step in bridging the industrywide gap is opening up minds to other possibilities and building upon them.

I recently stopped myself from falling into complacency when opposing counsel proposed names of a couple of white male mediators who I knew were well regarded. It would have been quick and easy to just agree to one of them, but I made a point of sending back my own list of two women and one man. We ended up agreeing to use one of the women, which I considered to be a victory for this cause. But even if we had chosen a man, I would not have deemed it a failure because at least I nudged both opposing counsel and our clients to consider these highly qualified female mediators.

Walker recommends that, as practicing attorneys, we can all make it a goal to add diverse neutrals to our personal rosters of “go-to” mediators we propose to opposing counsel. Walker suggests scheduling time to grab coffee or lunch with a diverse neutral you may consider using in the future,

just as you would with other lawyer friends or clients, in order to diversify your network. When you find that “go-to” female mediator, talk her up to colleagues and friends. Make a point of sharing your success stories.

It is also important to include younger attorneys in the mediator selection process. Talk about your goal of presenting a diverse slate of mediators and the reasons why you are including some names over others to convey the importance of diverse choices and open-mindedness in the selection process. Moreover, you may stop yourself from making the quick and easy choice if you have to explain your reasoning out loud to another attorney.

If you obtain recommendations from friends and colleagues and find yourself with a homogeneous list, explore resources like the ADR section of your local bar association. The ABA’s Dispute Resolution Section study showed that diverse mediators tend to get hired more often when the parties choose from a roster of mediators created by an ADR provider or a court, rather than personal networks.

Women have made a lot of strides in the legal profession over the past several decades, but there’s still work to be done. It doesn’t take a lot of work to ensure that you consider female candidates when searching for the right neutral or expert for every case. As Madeleine Albright said, “There is a special place in hell for women who don’t help other women.”

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