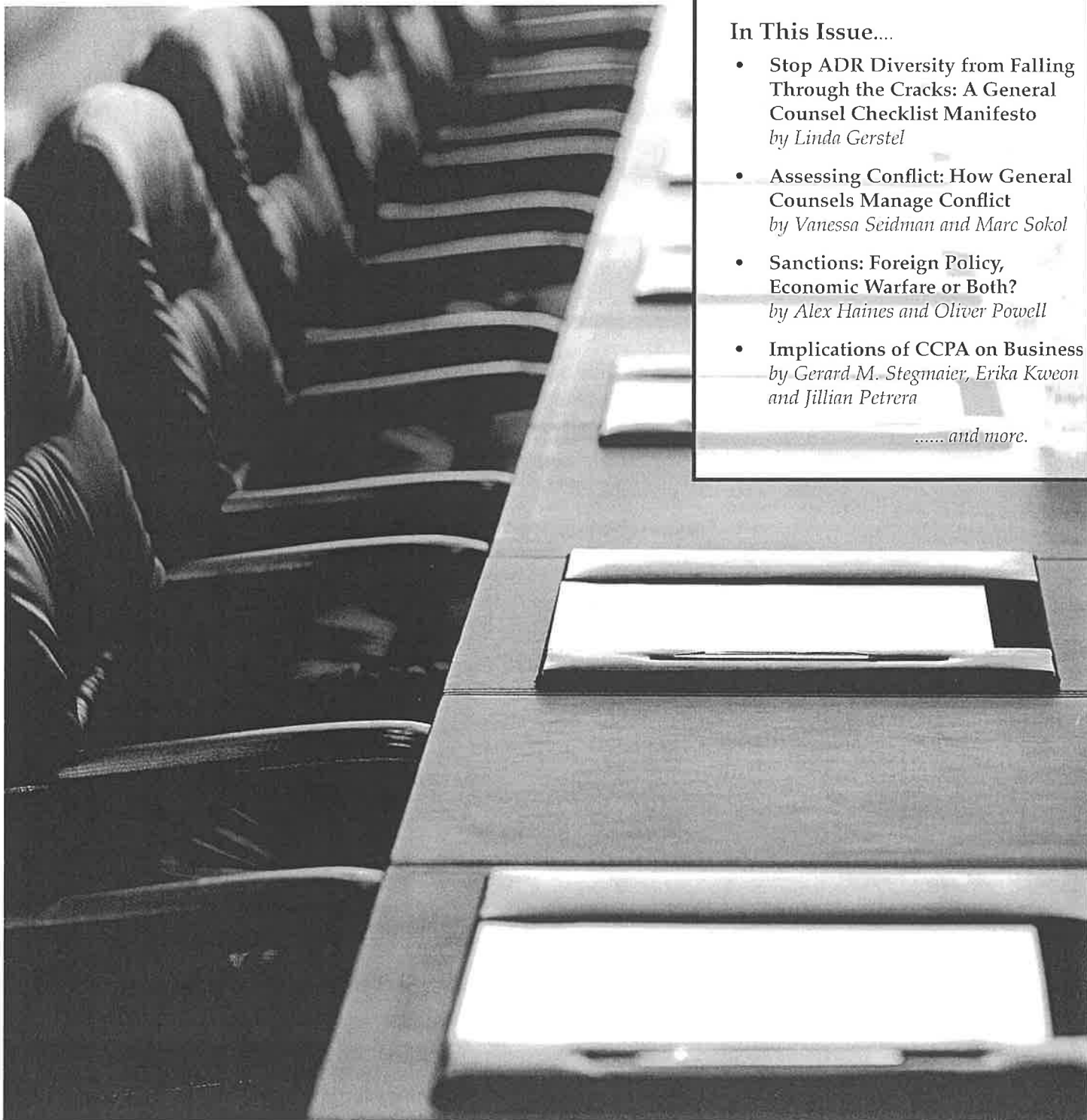


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Stop ADR Diversity from Falling Through the Cracks: A General Counsel Checklist Manifesto

By Linda Gerstel

I thought the last quarter of 2018 was a news-worthy year for showcasing the lack of diversity in Alternative Dispute Resolution (ADR), between the mainstream media coverage of Jay-Z's motion spot-lighting the lack of African Americans arbitrators and the passage of ABA Resolution 105 urging providers to expand their rosters and users of ADR to select and use diverse neutrals. But only a month into 2019, the front-page *New York Times* headline is "12 White Faces Reflect Blind Spot in Big Law." A post first appeared in early December on LinkedIn when Paul Weiss was "pleased to announce its new partner class" which displayed all white male images with the exception of one white female. The LinkedIn images were a stark illustration of what can happen when promotion decisions are relationship-driven and concentrated in the hands of white male rainmakers, even in workplaces with a commitment to diversity. Ditto with the selection of neutrals in ADR. Perhaps for many readers this news was

not entirely shocking (recent studies show that gender parity in partner promotions will not be achieved until 2032), but the response

from over 170 General Counsel was unprecedented and needs to expand to ADR diversity ("GC Letter"). The GC Letter hit all the right notes: underscoring the power of the purse, the millions of dollars spent annually on legal services, the expectation that law firms reflect the legal community's diversity and the companies served and the disappointment that partnership promotions do not reflect the demographic composition of the entering classes. Put simply, "it is not enough to commit your firm to diversity during the recruiting process or to hire a diversity and inclusion officer and expect that the person can effect change without the full commitment of each member of the firm." How does the GC Letter fall short? For one, the signatories are ethnically diverse, but only 17% of the signatures are men. (Many "Laurens" and "Kates," not enough "Andrews" or "Toms"). Second, few Fortune 500 companies are represented (despite the growing percentage of women general counsels at Fortune 500s). Third, it needs to

"The Jay-Z motion, much like the GC Letter, focuses on the role that clients play in determining whether diversity will increase or not. Meaningful change for ADR diversity depends on clients and their lawyers—the ultimate selectors, the purchasers of arbitration services."

be circulated more widely—more General Counsels need to sign the GC Letter, including more white males. Finally, the GC Letter desperately needs to be amended to include the selection of diverse neutrals, and above all, there needs to be follow-up with a practical checklist to effect meaningful change.



Linda Gerstel

The GC Letter also captures the reason why diversity in ADR has been falling through the cracks. There is not a responsible person, team or leader tasked with managing the issue. It is not on the radar or part of the job description for a diversity and inclusion officer. In many firms there may not be a central "Arbitra-

tion or Mediation Practice" so no one is really tracking data of litigators from various practice groups who may have matters in arbitration or mediation. For those firms that do have an official arbitration practice, often falling under the heading of "International Arbitration," the number of diverse neutrals selected is worse than the domestic statistics. The selection of diverse arbitrators will be harder to attack than the partnership promotions, even though the latter might eventually impact the former, because ADR is cloaked with a veil of confidentiality—one of its major selling points. Yet, in order for in-house counsel to have an impact, recordkeeping needs to improve in the selection of diverse neutrals. ADR providers have been tracking and publishing data and it is time for in-house counsel to work with their outside counsel and do the same. The Jay-Z motion, much like the GC Letter, focuses on the role that clients play in determining whether diversity will increase or not. Meaningful change for ADR diversity depends on clients

and their lawyers—the ultimate selectors, the purchasers of arbitration services.

Resolution 105 provides an important starting point and an action plan, essentially a checklist of the sort espoused by Atul Gawande in *The Checklist Manifesto* as a critical tool to improve outcomes. Gawande espouses that organizations need to take a critical look at how checklists can be used to dramatically reduce errors and increase discipline in an organization, whether in the operating room or in a business setting as he describes its application to other industries like construction, finance and aviation. The author, a surgeon, chronicles his successful introduction of a checklist to radically improve surgical outcomes globally through the World Health Organization. We need to use a checklist to increase partnership promotions of minorities and the selection of diverse ADR neutrals. Good checklists are explicit; offering the possibility of verification but also instilling discipline and high performance. Most important, implementing a checklist is an important tool to behavioral change. *Checklists can be used to force key players to speak to each other as a strategy to foster teamwork.* Key items for any checklist include (1) clearly defined objectives; (2) cannot be lengthy; (3) ideally fits on one page and wording needs to be simple; and (4) needs to be tested in the real world and measured. It is not simply an exercise in checking boxes but embracing a culture of teamwork and discipline. It may be the key to moving the needle for ADR diversity.

Keeping Gawande's principles in mind, apply an "Action"-based checklist: **Account, Awareness, Access, Ask, and Appoint.** These are five basic categories with specific suggestions for General Counsel to implement in coordination with outside counsel, ADR provider organizations and administrators of local court panels.

Account

Simply put, this is the most critical "A" on the checklist. First, create a committee which will be accountable for establishing goals, benchmarks and time periods to reach those goals. This committee should include an executive committee member, chief diversity and inclusion officer, and leaders of your Dispute Resolution Practice or Litigation practices and various affinity group leaders at your firm. Designate a member in the group to (1) act as a liaison to private ADR provider panels and to administrators of local court panels; (2) establish and lead a mentoring and shadowing program; (3) create and host CLE and social gatherings to meet diverse neutrals; and (4) collect resources on diverse neutrals. Second, staying on track often requires that we take measured steps: journaling, setting up spreadsheets and, yes, checklists! Also have quarterly meetings with outside counsel for checking in on progress. Third, designate a person on the committee to keep data, both to measure your firm's progress and to put on tap—and make sure outside counsel maintains

—the institutional knowledge upon which recommendations to in-house counsel can be made. ADR provider organizations have increased panel diversity and, by far, the biggest change has been in recordkeeping and transparency by publishing the data. In his *New York Times* bestseller, *Measure What Matters*, John Doerr recounts his introduction of the concept of "Objectives and Key Results" (OKR), principles adopted by some of the most successful organizations, including Google and the Gates Foundation, as a proven approach to operating excellence. In the OKR model, "Objectives" define what we seek to achieve and "Key Results" are how the top priorities goals will be attained with specific measurable actions and within a set time frame.

Awareness

We cannot get jaded by the ubiquity of awareness campaigns because they are reminders to set goals and measure benchmarks whether that is diverse partnership promotions or selection of ADR neutrals. Members of the arbitration community circulated a pledge to take action in 2015 (www.arbitrationpledge.com) seeking to increase the number of women appointed as arbitrators with the ultimate goal of full parity. The ADR Inclusion Network expanded the pledge to extend to all diverse candidates (www.adrdiversity.org) and the Alliance for Equality in Dispute Resolution is a newly launched initiative that seeks to bring awareness and workshops to the international community (www.allianceequality.com). ABA Resolution 105 continues an awareness campaign but begins to address meaningful follow-through steps, including expanding the awareness programs. First, initiate discussions within your own firm and your outside counsel regarding the value of diversity. Second, take public diversity pledges available from various institutions and tell your friends and family to do so. Third, implement a multi-pronged awareness-raising campaign at internal meetings and in industry association meetings, with outside counsel and with ADR providers. Fourth, together with your outside counsel, host and attend programs such as FINRA's annual "Diversity Summit" (www.finra.org) that seek to educate lawyers about elimination of bias and provide tools to increase diversity either through the Arbitral Women (AW) Diversity Tool Kit or the ADR Inclusion Network's resources. For example, Women in Dispute Resolution (WIDR) has an online directory of members who speak on ADR panels nationally so that panel organizers can make sure that diversity is represented. Fifth, consider distributing the ADR Inclusion Network "Mindbug" sheet, a one-page slip sheet to hand out to counsel involved in the selection of neutrals to alert counsel to the benefits of diversity. Increasing diversity is not simply a matter of equity.

Access

The pipeline has been improving through conscious steps by ADR providers (1) to add more diverse candidates; (2) to commit, like the AAA, to provide arbitrator lists that are at least 20% diverse (the percentage should not stay static); and (3) to establish mentorship and training programs for minority candidates with the ultimate goal of bringing those individuals into the roster pipeline. The issue, in part, is a supply and demand problem. Arbitration panels reflect the demographics of the partnership ranks at a typical law firm. Most ADR panels have about 25% female neutrals, which is pretty consistent with the upper range of law firm partners. The statistics for other minorities mirror the abysmal pattern found in law firms. The lack of partnership promotions for minority candidates is inextricably tied to the lack of selection of diverse neutrals, but the pipeline has vastly improved for the former group. One of the ways that court administrators of mediation programs in New York are trying to tackle the pipeline issue is by establishing shadowing opportunities and most recently mediator incubation models. Private law firms should establish their own shadowing and mentorship programs and consider, subject to confidentiality agreements, having young diverse neutrals shadow the proceeding or act in the role as a secretary to the panel. None other than Sheryl Sandberg of Facebook underscored the importance of sponsors who did not fit her gender prototype.

Ask

First, *ask* ADR provider organizations about policies and practices regarding diversity and how they can be improved and ask them to stretch their benchmarks. Second, *ask* your corporate outside counsel to consider adding the JAMS diversity inclusion language in your dispute resolution clauses. Third, *ask* outside counsel to have a program offering young lawyers (age is another measure of diversity) opportunities to shadow neutrals and buddy systems. Fourth, *ask* your ADR provider organizations and your outside counsel to have programs to meet diverse neutrals. Fifth, *ask* and research information about diverse neutrals outside of your bubble. Do not stop at one email circulated within the firm. Sixth, *ask* your outside counsel what steps were taken to research diverse neutrals before settling on a name brand.

Appoint

Select diverse neutrals whenever practicable. This step is not simply a goal of being able to appoint any neutral simply because of diversity. Appointing needs to take place under a new and improved model that consists of doing better research into diverse neutrals, trying to meet diverse neutrals and ensuring that ADR provider organizations have diverse neutrals represented in all matters. Our natural tendency as humans is to make decisions often through a biased lens based upon what ap-

pears to be easier, and behavioral economic theories confirm that people often make decisions on that basis rather than what might be in their best interest. When choosing an arbitrator, we have to set a nudge to remind ourselves to consider diversity and do the necessary research to make an informed decision. We are programmed to go with what is familiar to us, what we consider safe, someone who is in our social and business network. Recent startups such as Humu have created a "nudge engine" to deliver personal suggestions for making better decisions in the workplace. The current process typically amounts to a firm-wide email asking lawyers "do you know or have any experience with any of these arbitrators?" (not terribly scientific). A handful of individuals have developed name recognition and it seems easiest and safest to go with a name brand. As litigators, would we ever stop after finding a few cases on point? Never. Operating within our own "bubbles," most law firm attorneys are unfamiliar with diverse neutrals. To seek them out, we need to take affirmative steps. Surveys from Arbitrator Intelligence indicate that 92% of arbitrator practitioners want more information about more diverse arbitrators. While many arbitral awards are confidential, other information on diverse arbitrators is increasingly available for those willing to do the research.

Conclusion

Ultimately, the marketplace—law firms and in-house counsel—decide which arbitrator a particular party selects. The GC Letter and Jay-Z's motion both highlight how critical the role is for the client to drive the process. Transformative change will only happen when clients and their General Counsel make clear that diversity matters and despite law firms' best intentions of hiring chief diversity officers and hiring a class of first years who are diverse, something is broken when it comes to partnership promotions and the selection of diverse neutrals in ADR. The GC Letter unmistakably delivers the message to align with us, get on board and achieve tangible results, and hints that each GC has the freedom to fashion business incentives, or switch to a competitor law firm if goals are not being achieved or a system for change with benchmarks is not implemented.

In-house counsel should customize a checklist manifesto in conjunction with outside counsel to set an action plan with accountability and business incentives. Let's get on the same page and work with a checklist to track OKR in partnership promotions and selection of diverse neutrals and it needs to start at the top—at every firm, the executive committee and include the all the right stakeholders.

For a one-page checklist, see page 13.

Endnotes

1. See Deb Sopan, Jay-Z Criticizes Lack of Black Arbitrators (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/arts/music/jay-z-roc-nation-arbitrators.html>; Rekha Rangachari, Can't Knock the Hustle ... [To Broaden Diversity in Arbitration], Kluwer Arbitration Blog, Jan. 15, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/01/15/cant-knock-the-hustle-to-broaden-diversity-in-arbitration>.
2. <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>.
3. See Noam Scheiber & John Eligon, 12 White Faces Reflect Blind Spot in Big Law (January 27, 2019) (Note: Headline subsequently edited for online access: Elite Law Firm's All-White Partner Class Stirs Debate on Diversity) <https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html?module=inline>.
4. See Aebera Coe, Firms Crawl to Gender Diversity Shows Long Road Ahead (Jan. 22, 2019), Law360, <https://www.law360.com/articles/1119398/firms-crawl-to-gender-diversity-shows-long-road-ahead.html>.
5. See Christine Simmons, 170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business (January 27, 2019), <https://www.law.com/newyorklawjournal/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business>.
6. Michelle Fang, Posts [LinkedIn page] retrieved Feb. 4, 2019 from <https://www.linkedin.com/feed/update/urn:li:activity:6495355575147335680>.
7. Although the percentage of women and minority General Counsel has seen a growing trend, women are still earning 30% less than their male counterparts. See Experience Preferred: The State of Today's Fortune 500 General Counsel (November 2018), <https://www.spencerstuart.com/research-and-insight/the-state-of-todays-fortune-500-general-counsel>; Melissa, Heelan-Stanzione, Women General Counsel Make \$125K Less Than Male Colleagues (November 27, 2018), <https://news.bloomberglaw.com/us-law-week/women-general-counsel-make-125k-less-than-male-colleagues.html>.
8. Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Henry Holt & Co. 2009).
9. John Doerr, *Measure What Matters* (Penguin Random House 2017).
10. At the end of 2018, there were over 3,250 organization and individual signatories to the Pledge and the list grows.
11. www.arbitralwomen.org (In commemoration of its jubilee anniversary of bringing together global women in dispute resolution, AW created a toolkit and training module whereby trainers lead participants through various exercise to recognize moral, equal access, and business cases for diversity, problem solve in dialogue and brainstorm ideas for change).
12. Research from Northwestern's Kellogg School of Management indicates that homogeneity can "hamper the exchange of ideas" and stifle the intellectual ferment generated when people from different backgrounds interact, and that better decisions are reached through diversity. See Kellogg Insight, Better Decisions Through Diversity (Oct. 1, 2010), http://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity.
13. See Southern District of New York programs for mediators (<http://nysd.uscourts.gov/mediation>) and the Eastern District of New York mediator program (<https://www.nyed.uscourts.gov/alternative-dispute-resolution>).
14. www.jams.com.
15. See Catherine A. Rogers, The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence (December 27, 2017), Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators>.

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ADR Diversity Checklist Agenda for General Counsel and Outside Lawyers

By Linda Gerstel

- Define “Objectives and Key Results” (OKR¹) to be achieved with realistic timelines.
- LAMSTAIH² Work with Outside Counsel to set annual goals for some of the suggested measures (Awareness, Account, Ask and Appoint) to increase ADR Diversity

Awareness:

- Track, sign and circulate ADR diversity pledges (www.arbitrationpledge.com);
- ADR Diversity and Inclusion Pledge; (www.adrdiversity.org); and
- Circulate ABA Resolution 105 (<https://www.americanbar.org>).
- Raise the ADR Diversity Pledge at industry meetings and internal meetings;
- Gather and update regularly data, lists and resources on diverse arbitration neutrals;

Account:

- Establish ADR Diversity Committee composed of executive committee member; D&I leader, arbitration practice/litigation practice group leaders; and diverse attorneys and General Counsel/clients with arbitration clauses in most contracts,
- Establish liaison between Committee members and ADR providers, organizations promoting ADR Diversity, court mediation panels;
- Establish/maintain database of diverse neutrals to form basis of future recommendations;
- Ensure that ADR Diversity guidelines are incorporated in handbooks and procedures;
- Require lawyers to attend at least two [2] elimination of bias/ADR events each year;
- Track hosting/attendance of lawyers at elimination of bias/ADR events/meet and greets;
- Track opportunities offered to diverse candidates to co-author ADR articles;
- Track number of diverse attorneys afforded ADR shadowing opportunities;
- Track cases (by type and damages) where neutrals are appointed and note the following:
 - whether ADR provider list was diverse and if so, what percentage was diverse;
 - whether after strike/rank procedures a diverse neutral was selected.

Ask:

- ADR providers for lists of diverse neutrals and opportunities to meet diverse neutrals;
- corporate/real estate departments to include the JAMS diversity rider in agreements;
- neutrals that you are familiar with for recommendations of diverse neutrals;
- City/State Bar Association to hire a Diversity and Inclusion Manager to help track progress and benchmarks of Pledge signatories for public reporting.

Appoint:

- Introduce the use of diverse neutrals by first appointing them to cases with lower thresholds of dollars at stake
- A mediator and suggest opportunities for a diverse neutral to co-mediate.

Endnotes

1. OKR, “Measure What Matters: How Google, Bono, and the Gates Foundation Rock the World with OKRs” Doerr, J.
2. LAMSTAIH - Look At More Stuff, Think About It Harder, “Look at More: A Proven Approach to Innovation, Growth, and Change”. Stefanovich, A.