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Expert Analysis

RBG and Jay-Z: A 12-Step Recovery Plan For Increasing Diversity in ADR

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Arbitration is under fire again. In the past few years, questions about its fairness focused on consumer and class actions. 2018 will be remembered as the year Jay-Z forced a media spotlight on the lack of diversity in Alternative Dispute Resolution (ADR). Jay-Z's complaint drives home the fact that meaningful change on this front depends on clients and their lawyers—the ultimate selectors, the purchasers of arbitration services.

Increasing diversity in ADR has progressed incrementally—as constructive change generally does. As Supreme Court Justice Ruth Bader Ginsburg, who has broken many barriers for minorities, has stated, "real change, enduring change happens one step at a time." Ginsburg has also noted that in keeping those steps going, "unconscious bias is one of the hardest things to get at." Her favorite example is the symphony orchestra. Ginsburg recounts that when she was growing up, there were no women in orchestras (and likely no minority musicians either), yet after an experiment of blind auditions, women began to get jobs in the symphony orchestra.

Unconscious biases are prejudices that are automatic, often unintentional, deeply engrained, and universal. Harvard has created a test which everyone can take (at www.implicit.harvard.edu) to test their unconscious biases. Those of us who think we are free of bias will discover otherwise. At the core of Jay-Z's motion is the lurking issue of unconscious bias in ADR.

In November 2018, Jay-Z won an initial court battle to temporarily halt arbitration proceedings on the grounds that there were not enough African-American arbitrators eligible to rule on his case, though he withdrew the motion before scheduled oral argument on whether the court should permanently stay the arbitration proceedings. The dispute concerns Jay-Z's sale of his clothing brand in 2007 to Iconix Brand Group. After the sale, he created a new entertainment company called Roc Nation. Iconix sued Jay-Z alleging that Roc Nation's agreement with Major League Baseball to sell New Era baseball caps with the Roc Nation airplane logo violated their sale agreement. Jay-Z countersued, alleging the agreement only applied to Rocawear. Iconix filed an arbitration demand based on a separate 2015 agreement which provided that each side was to pick four arbitrators from the American Arbitration Association's (AAA) "Large and Complex Cases" database, with the AAA supplying another four. Each side would eliminate names from the list until one arbitrator was agreed upon. Out of a list of 200 arbitrators, only three identified themselves as African American. Jay-Z argued that the dearth of

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black arbitrators "deprives parties of color of any meaningful opportunity to have claims heard by a panel of arbitrators reflecting their backgrounds and life experiences."

The odds of Jay-Z winning the motion were minimal, and many felt it was a less than candid tactic because his legal team was devoid of any diversity. Having an arbitration clause allows for party autonomy but it is not a carte blanche for picking the exact prototype and ethnic profile of your decision maker. Jay Z's motion, however, was the first time that the question of diversity in arbitration has been focused on the role that clients and their lawyers play in determining whether diversity will increase or not. Dropping a curtain and picking an arbitrator is not a viable solution because the driving force of ADR is party autonomy and the ability to select a neutral. What other tools, then, can help increase diversity in the selection of ADR neutrals?

ADR provider organizations have taken steps to increase panel diversity. They are doing their best to recruit and seat diverse neutrals and are publishing the data. 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 percent female neutrals, which is pretty consistent with the upper range of statistics posted by law firms. The statistics for other minorities mirror the abysmal pattern found in law firms.

In the past few years, incremental change has taken place with the help of thought leaders, court administrators and ADR provider organizations. By far the biggest change has been in recordkeeping and transparency. If you do not have benchmarks, change—incremental or otherwise—will not happen. Initial steps include a number of tools produced by ADR provider organizations to help raise consciousness and make progress on the pipeline (the panel rosters).

In 2015, perhaps the first big step taken by members of the arbitration community was drawing a pledge to take action (the Pledge—www.arbitrationpledge.com). The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.

Following the Pledge, many other initiatives have taken place to increase diversity. It seems each year a new initiative has been added to the menu.

ADR provider organizations and court administrators began to up their game by broadening the pipeline—making sure each year there would be conscious steps taken to add more diverse candidates. The AAA commits to provide arbitrator lists that are at least 20 percent diverse where party qualifications are met. In 2009, the AAA began a Higginbotham Fellows program to provide training and mentorship to minority candidates with the ultimate goal of bringing those individuals into the AAA pipeline. Last year, JAMS added guidelines for suggested diversity language for parties to consider when drafting arbitration clauses, e.g., "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 list of potential arbitrator appointees."

Other organizations, such as the American Bar Association (ABA), the New York-based ADR Inclusion Network and most recently, Arbitral Women (AW) through its Diversity Toolkit have offered additional tools to help promote diversity. The ADR Inclusion Network (adrdiversity.org), recently created the "mindbug" sheet, a one-page slip sheet to hand out to counsel involved in the selection of Arbitrators and alert counsel highlighting the benefits of diversity in the selection of ADR neutrals.

Last year, the ABA passed Resolution 105, urging providers to expand their rosters and users of ADR to select and use diverse neutrals. It provides a clear action plan, essentially a checklist of the sort espoused by Atul Gawande in *The Checklist Manifesto* as a critical tool to improve outcomes—whether in the operating room or in a business setting.

Resolution 105 lays out a multistep process for clients and their lawyers. *First*, initiate discussions within your own firm regarding the value of diversity. *Second*, ask prospective neutral panels about policies and practices regarding

diversity. *Third*, select diverse neutrals whenever practicable. *Fourth*, consider adding the JAMS diversity inclusion language in your dispute resolution clauses. *Fifth*, take public diversity pledges available from various institutions and tell your friends and family to do so. *Sixth*, implement a multi-pronged awareness-raising campaign—at internal meetings and in industry association meetings, with outside counsel, and with ADR providers.

To build out that awareness campaign, the checklist might be expanded to a 12-step program. Picking up where we left off: *Seventh*, consider distributing the ADR Inclusion Network Mindbug sheet. *Eighth*, host seminars that educate lawyers about tools to increase diversity either through the AW Diversity Tool Kit or the ADR Inclusion Network. *Ninth*, when you host panels of speakers make sure that diversity is represented. *Tenth*, consider offering young lawyers (age is another measure of diversity) opportunities to participate in shadowing neutrals. *Eleventh*, host elimination of bias programs at Bar Association continuing legal education series. *Twelfth* and finally, keep data—both to measure your firm's progress and to put on tap the institutional knowledge upon which recommendations to in-house counsel can be made.

Tools are needed because it's difficult to overcome our natural biases and our natural tendency as humans to make decisions based upon what appears to be easier. Richard Thaler, the Nobel Prize winning economist, found that people often make decisions on that basis rather than what might be in their best interest.

Increasing diversity is not simply a matter of equity. 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. 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.

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If the usual panel selection process were a dating app, it would be a business version of Hinge. The process typically amounts to a firm wide email asking lawyers "do you know or have any experience with any of these arbitrators?" Operating within our own "bubbles," most law firm attorneys are unfamiliar with diverse neutrals—to seek them out, we need to take affirmative steps. The will is there: Surveys from Arbitrator Intelligence indicate that 92 percent of arbitrator practitioners want more information about more diverse arbitrators.

The difficulty of gaining more information is that many arbitral awards are confidential. Yet, other information on diverse arbitrators is increasingly available for those willing to do the research.

Ultimately, the marketplace—law firms and in-house counsel—decide which arbitrator a particular party selects. ADR provider organizations focus on the supply side—and admittedly, sometimes despite best efforts to recruit candidates, they come up short. Jay-Z demanded that his lawyers seek out diverse candidates. Incremental change sometimes needs a kick to stay on track. Transformative change will only happen when clients like Jay-Z say that diversity matters. Will law firms follow his lead and encourage users to think about the importance of diversity in reaching good outcomes?