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Increasing Diversity Among Arbitrators

A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal

By **Sasha A. Carbone** and **Jeffrey T. Zaino**

Introduction

This article is primarily for women and minority arbitrators who are looking to establish their careers. The path to success is not always clear, and there are different approaches to consider. However, there are fundamental guidelines that we think every new arbitrator, whether diverse or not, should consider. To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace. This article seeks to provide a basic reference on the subject of establishing a career in arbitration, keeping in mind that the challenges to becoming successful as a neutral can be even more acute for women and minorities.

Becoming a neutral can be rewarding and fulfilling, providing an opportunity to perform a crucial function necessary for this country's dispute resolution system. From incorporating alternative dispute resolution clauses in national and state legislation to court-mandated alternative dispute resolution (ADR) programs, ADR is increasingly a mainstay of our justice system. It is critical, therefore, that ADR neutrals reflect the diverse cultural makeup of its market. Diversity, as we see it, includes cultural, racial, geographic, language and gender differences.

Why is diversity important to ADR? Gwynne A. Wilcox, Esq., of Levy Ratner, P.C., in New York City, notes the following:

I believe that increasing the diversity among arbitrators is extremely important to the process. While the diversity of the workforce has drastically changed over the years, it is evident that the arbitrator pool has not evolved to the same extent. The majority of arbitrators do not reflect the workers who appear before them and cannot identify with their realities as workers. Diversity among arbitrators will provide more credibility to the process in the eyes of the grievants. Also, a more diverse panel of arbitrators will provide a wider range of perspective and experiences that are often lacking among arbitrators who have had life experiences that differ greatly from those of the grievants.

A Look at the Numbers, a Greater Need for Diversity

There is no question that the ADR community is lacking in diversity. This can be attributed to a number of factors, including a lack or perceived lack of access for diverse candidates, failure by arbitral organizations to reach out to diverse candidates, and an arbitrator selection process that relies upon users to select neutrals to serve on their cases. And while corporations have been increasingly

vigilant in their employee diversity initiatives and require that their outside law firms employ and utilize diverse lawyers, they have not addressed the diversity issue in any coherent way when it comes to selecting neutrals to hear their disputes in arbitration. Arbitral associations continue to improve the diversity of the pool of arbitrators, but it is incumbent upon corporations to be mindful of diversity relative to the ADR process.

At the American Arbitration Association (AAA), creating and maintaining the diversity of our neutrals roster is part of our mission. While the AAA has made great strides, it recognizes that more work is needed. At the AAA, our overall Roster of Neutrals is approximately 23% diverse for gender and race. For the AAA's major

Yet, there is much a new arbitrator can do in this interim or transitional period to increase visibility and gain training and practical experience. We list four examples below. While none of these elements assures success, taken together they provide best practices for positioning a neutral to leverage opportunities, which usually expand as the neutral becomes more active.

1. Mentoring

Mentoring should start when a professional is considering the ADR practice, and it should never end. Successful mentoring relationships can provide invaluable aid to building and managing an ADR practice. Mentorship is a tradition in many areas of alternative dispute resolution

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divisions, the diversity varies depending upon the caseload: labor (27%), employment (42%), commercial (17%), construction (10%), and insurance (20%).

Despite the ongoing efforts to assist new arbitrators, certain fields have particular challenges. For example, breaking into the labor arbitration field is difficult because in order to be considered on most labor panels, you must be a truly neutral decision maker (i.e., a full-time decision maker or one in a profession considered neutral), which is not the case for other arbitration disciplines such as commercial, construction, international, or insurance. To be on the AAA's labor panel, an arbitrator cannot be an advocate for either unions or employers, or be employed by a government agency, company or union involved in labor-management disputes. Since the only source of income for many new labor arbitrators is their labor arbitration practice, this can pose significant financial and professional risks. Consequently, these arbitrators depend more on networking and visibility than arbitrators in other disciplines. In short, the need to network and develop a caseload, always critical for arbitrators, is even more important for nascent labor arbitrators.

Getting on a Panel Is Just the Beginning

Appointment to an arbitral panel or selection to become a neutral for an arbitral sponsoring organization is a significant achievement for a young arbitrator. The fact of selection means that the neutral has attained a high level of industry expertise or knowledge and has reached the point where that expertise can translate into the young arbitrator's selection as a panelist on arbitration cases. However, the new arbitrators may be unpleasantly surprised that acceptance as a member of an arbitral association's panel does not mean he or she will be selected for cases right away.

— for example, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides that one of the obligations an experienced arbitrator has to the profession is to cooperate in training new arbitrators.

When working with a mentor, it is useful to establish from the start goals and guidelines for how the relationship will work. Is the purpose of the mentorship to gain contacts, shadow the mentor in arbitration hearings, obtain advice or a combination of these goals? A new arbitrator should consider how often the mentor can reasonably be expected to be available and whether that fits the mentee's needs. These should be set early and communicated to the mentor to ensure that both parties start off on the right note.

Another consideration is the length of the mentorship period. Ideally, the mentoring relationship should have a timeline to help both parties manage expectations and goals.

There is no rule that arbitrators can only have one mentor. Using multiple mentors can provide increased exposure for the new arbitrator. For example, a mentor could be a highly experienced and work regularly but have a caseload limited to a few large ADR users or industry sectors (i.e., only private or public). Such exposure is valuable to the new arbitrator, but it could be limited. By researching the caseloads of mentors and using multiple mentors, the new arbitrator has a better chance of gaining exposure to different industries. Also, by using only one mentor the new arbitrator could run the risk of being negatively identified with one arbitrator or sector of an industry.

Shadowing experienced neutrals gives an inexperienced neutral the opportunity to observe peers' style and conduct. While the new arbitrator is not permitted to weigh in on any issues in the arbitration, shadowing

provides the additional benefit of allowing the new arbitrator the opportunity to consider how he or she would handle the issues if presiding over the case. Of course, the arbitrator hearing the case would need to obtain permission from the parties and the administrator.

Writing mock decisions is also a good way to hone skills. New arbitrators can write decisions of the case being observed for review by the arbitrator hearing the case. There are also many case scenarios available either through sponsoring organizations or, generally, on the Internet. New arbitrators can utilize these case scenarios to draft mock decisions, and have them reviewed by more seasoned arbitrators.

2. Pro Bono or Reduced Fee Work

Getting the first arbitration case can be difficult for the new practitioner, but there are opportunities to serve on a pro bono basis or on reduced fee cases that may provide future opportunities.

Court-Sponsored ADR Programs

There are numerous court-sponsored ADR programs nationwide. Many of these programs require neutrals to serve pro bono on a minimum number of cases per year. Some programs allow a neutral who has completed his or her pro bono requirement to accept payment from the parties, provided they agree to the terms in writing in advance.

Bar Associations

The American Bar Association Section of Dispute Resolution urges arbitrators to devote at least 50 hours of pro bono ADR services annually. It has established a Pro Bono Committee to assist neutrals with locating opportunities. For example, many state and city bar associations have pro bono fee-dispute programs, which offer excellent experience.

Private ADR Providers

If an arbitrator is a member of a roster of neutrals for a private ADR provider, he or she should inquire as to whether there are opportunities to serve on a pro bono basis for hardship cases or on reduced fee cases, such as for expedited caseloads. While pro bono opportunities may be limited, expedited caseloads are gaining popularity for small-dollar disputes. These cases are often on a documents-only basis and provide a new neutral with an opportunity to handle a case on a smaller scale.

In addition to opportunities in arbitration, the new practitioner should not foreclose other readily available ADR opportunities. Many local community mediation programs offer opportunities to mediate with the attractive benefit that they also often provide no-cost or low-cost training in exchange for a commitment to volunteer. This often enables the candidate to obtain experience in

mediating disputes and to meet others embarking on similar careers.

3. Exposure – Networking Through Professional Organizations and Publishing Opportunities

Bar Associations

Almost every bar association in the United States has an alternative dispute resolution section, a mediation section and/or an international dispute resolution section. It is very important for those new to the field to get involved in these associations. The profession's leading thinkers are often members of these committees and involvement with them presents an unparalleled opportunity to network and learn about developments in the field.

Industry-Specific Organizations

Industry-specific organizations may provide new arbitrators opportunities for growth and development. For example, some of the 122 regional offices of the Better Business Bureau (BBB) have pro bono or modest honorarium ADR programs to handle consumer-to-business complaints and certain business-to-business disputes. The pro bono arbitrators receive internal training and observe a set amount of BBB arbitrations before being assigned a case.

Many state associations of realtors also have established ADR programs that use both mediators and arbitrators. These associations could provide opportunities for a new arbitrator to receive training and hear actual cases. Specifically in the area of labor law, most states have public employment relations boards that are quasi-judicial agencies that oversee public sector collective bargaining and adjudicate disputes using labor arbitrators who work pro bono or for a minimal fee.

Join Committees, Subcommittees

There are numerous opportunities to get involved by joining committees and subcommittees of bar associations and industry-specific organizations. Because of ADR's ever-evolving nature, there is always legislation to consider, case law to review, and best practices to create and evaluate. Joining these committees and subcommittees creates a real opportunity to shape the thinking on these topics, as well as to learn from colleagues.

Run for Office Within the Organization

Running for office within an organization provides opportunities not only to lead, but to learn and grow as a neutral. These offices are generally high profile, and the committees do substantive work and analysis that impacts the profession. Haydee Rosario, a new labor and employment arbitrator, notes the following:

Gaining the acceptance of advocates on both sides of the aisle takes time, discipline and hard work. It does not happen overnight because each side needs to trust you before they select you to hear their cases.

There is a process that needs to take place before you become acceptable as an arbitrator. Your participation in organizations such as the New York City Labor and Employment Relations Association (LERA) is an essential part of that process. LERA offers you the opportunity to network with other professionals and to learn about new developments, issues and practices in the field. Being part of LERA's Executive Committee has given me the opportunity to learn about changes in the labor and employment arena while working directly with many of the labor and management representatives in New York and New Jersey. This experience may prove to be invaluable in gaining the trust and credibility that I need as an arbitrator.

Attend Events: Speaking Events, Educational Programs, CLE Courses, Luncheons, and Other Networking Events

Bar associations, sponsoring organizations and law firms all provide ample opportunities for novice arbitrators to network at events and educational programs. To the extent that a neutral has a particular expertise in a noteworthy topic, speaking at an event is another way to gain exposure in the field. Start by approaching your sponsoring organization or bar association committee with an idea for a panel and topic, then work with more seasoned arbitrators to craft the presentation. Many sponsoring organizations law firms, and bar associations offer online seminars that have the added benefit of sharing your thoughts with potentially large audiences.

Publishing Articles

Publishing articles is another way to show the marketplace your subject matter expertise. Many organizations and journals have an ongoing need for articles, including those that focus on ADR. The field of ADR is ripe for articles covering recent case law developments. Whether it is a split among the Circuits on an ADR issue or best practices for limiting discovery in arbitration, neutrals should look for topics that interest them and that may provide an opportunity to get published. Aside from ADR specific topics, new arbitrators should also consider publishing on a topic specific to their area of expertise. Once published, obtain reprints and circulate.

Ongoing Evaluation and Review

Marketing yourself as a neutral is an ongoing process. New neutrals often lament that they are not being selected for cases as often as they think they should, despite their experience. New arbitrators should review their resume quarterly to make sure that it is current. Having your resume reviewed by other arbitrators or mentors is very important.

Give an honest assessment of your per diem, cancellation fee and study time fees. A new neutral should consider whether his or her rate is reasonable and competitive.

Neutrals should also consider taking advantage of opportunities for ongoing review of technique, style and writing skills through refresher and ADR training courses.

New arbitrators should not be afraid to take a stand. Neutrality and respect should be a primary concern; timidity, however, can hurt your reputation. The most successful arbitrators have strong personalities and make tough decisions without worrying about alienating individual ADR users or advocates.

4. What ADR Providers and Users Should Do and What They Are Doing

Sponsoring organizations that administer arbitrations bear a great degree of responsibility in both the recruitment and maintenance of diverse neutrals. It is not enough to have diverse neutrals on the roster; sponsoring organizations must ensure that there are opportunities for advancement in the field.

There are numerous ways that sponsoring organizations can provide assistance to diverse neutrals starting out in the field. At the outset, it is important for sponsoring organizations to commit to investing in diverse neutrals. This means that sponsoring organizations commit to provide resources to diverse neutrals early on in their careers, and continue that commitment. Many of the resources are readily available to sponsoring organizations, and are often utilized, albeit in a piecemeal way. In order to have a substantial impact on the profession, there needs to be a systematic way to provide these resources to those trying to establish themselves in the field.

Publish Written Opinions; Allow Easy Access by ADR Users

When researching unknown or new arbitrators, most ADR users seek written opinions. This can be challenging. LexisNexis and Westlaw offer some redacted arbitration opinions, but the majority of these opinions come from experienced arbitrators. Published opinions are usually selected from complicated, unusual and/or extraordinary cases. New arbitrators' opinions are rarely selected, which limits exposure.

Some ADR providers publish opinions but mostly by experienced arbitrators. So if a new arbitrator has published opinions, there needs to be a vehicle for easy access. Both ADR providers and users should collectively determine a method for publishing and widely distributing opinions of new arbitrators, possibly by developing easily accessible web pages and other electronic tools. ADR users need such a resource to obtain information about unknown and new arbitrators. Parties want a substantive reason for selecting the new arbitrator – whether obtained from referrals, resumes or published opinions.

Opportunities for Arbitrators to Publish and Showcasing New Arbitrators With Photographs and Q&A

One way for sponsoring organizations to provide exposure to diverse neutrals is to encourage publication in

their journals or newsletters. This is a low cost, high impact way to provide advancement opportunities.

Putting a “name to a face” is vital in the arbitration industry, especially for new arbitrators. Many new arbitrators are now developing web pages with pictures, testimonials and other useful information. ADR providers should assist with this effort by developing methods and/or better vehicles for showcasing new arbitrators. For new arbitrators in the labor field, the AAA implemented a pilot program in 2010 in which five labor arbitrators were spotlighted in an electronic publication that used a Q&A format and included photographs. Many of the questions were provided by ADR users, such as:

- What past professional and/or personal experiences have you had that make you a better arbitrator?
- What is the most difficult decision you had to make on a case that you presided over?

The *AAA Arbitrator Spotlights* were sent, via an email blast, to hundreds of ADR users.

Review of Ranking to Provide Guidance to Arbitrators

Once neutrals become members of a roster, they don't know if they are being listed on actual panels presented to the parties or what their level of acceptability is unless they are being selected for cases. For some, there is a long period – sometimes six months to a year – before being selected for a case. We propose that sponsoring organizations periodically share information with neutrals to let them know whether they are being listed and the number of cases for which they have been listed, and how parties are ranking the neutral if a list/strike process is being utilized.

Permanent Panels for New Arbitrators

A new arbitrator should seek, where possible, permanent panel assignments. Many ADR providers and large users have established permanent panels for their less complicated caseloads, geared towards new arbitrators who have substantive experience. For example, there could be specific discipline disputes in the labor-management context that are assigned permanent panels. Typically, the per diem is determined by the parties and there are set requirements for both the arbitrator's study time and cancellation fees. Many permanent panels are established because the volume of disputes. Such permanent panels work on a rotation basis and have annual reviews of the panel and fee structure. The parties must mutually agree on all arbitrators on the permanent panel.

ADR Providers and Users Need to Sponsor More New Arbitrator Programs and Meet-and-Greet Events

By sponsoring professional and social networking events, ADR providers and users can provide greater exposure, which benefits new arbitrators. In May 2010 and June 2011, the New York City Bar Association and AAA co-

sponsored successful panel programs with 12 new arbitrators. More than 150 ADR users attended each program.

Ruth Moscovitch, a new arbitrator panelist on the May 2010 program, stated, “There is no question that I have benefited from the experience and exposure. Many people came up to me afterward to give me positive feedback, and I continue to hear that people are asking about me. I also got two new cases from the AAA, so that has been a tangible result.”

Bring Together ADR Users, Providers, and Experienced and New Arbitrators to Discuss Collectively How This Goal Can Be Achieved

There is a need for more communication and dialogue about developing new arbitrators. This should no longer be an academic exercise, but an industry-wide effort. There should be actual initiatives and a clear understanding that investing in new arbitrators is mutually beneficial. The main players – ADR users, providers, experienced arbitrators, and new arbitrators – have to be on board and ready to make changes. Representatives from each group should meet annually or semi-annually to discuss goals, specific caseloads for new arbitrators, resources, and steps towards implementing programs.

Use New Arbitrators, Reaching Out to Women and Minorities, on Specific Caseloads to Provide Exposure and Experience

The best way to assist a new arbitrator is by putting him or her on a case. Plenty of arbitration caseloads involve straightforward factual and legal issues. These types of cases should not be decided by experienced arbitrators with high per diems but by new, less expensive arbitrators. The perceived risk factor for the ADR users is reduced and these cases provide an opportunity for the ADR user to create a larger pool of arbitrators. Seeing an arbitrator in action is the only true way for the ADR user to achieve an absolute comfort level. ADR providers offer less-complicated case services and try to utilize new arbitrators. For example, the AAA offers Labor Rapid Resolve where an arbitrator will hear up to three cases in a single day for a reduced flat fee. These types of cases, heard mostly by new arbitrators, usually involve suspension or discipline issues.

Conclusion

It can take several years for the novice arbitrator to achieve success in the field. This is true even for the arbitrator with stellar credentials and an active practice. While all professions demand that practitioners market and promote themselves to achieve broader success, arbitration's commitment to the highest ideals of fairness and access to justice is reflected in the path to success. They enhance and advance an arbitrator's career and are the foundation for the future of the entire profession. ■