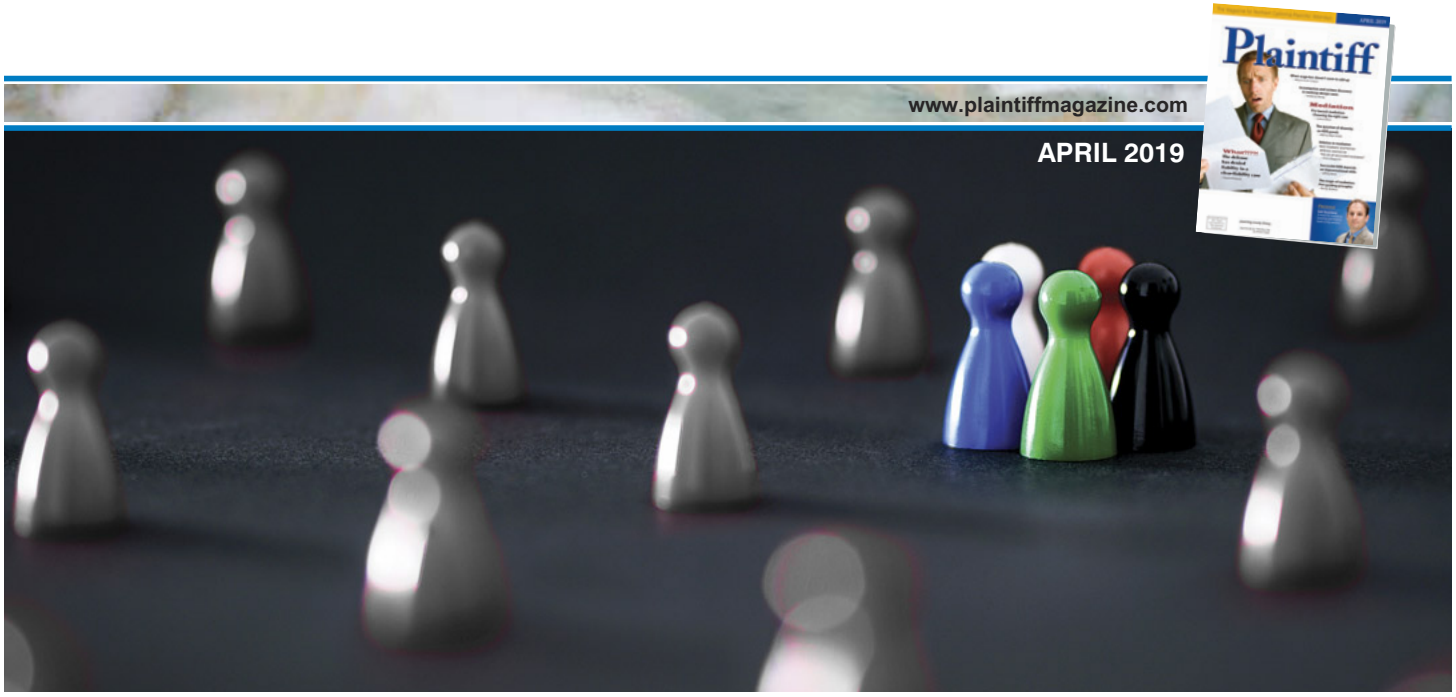

Diversity among ADR professionals and personal responsibility

The "Jay-Z" and Iconix Brands arbitration brought to the front the issue of diversity and ADR panels

By Melissa Blair Aliotti

Statistics vary, but somewhere between 81 and 97 percent of civil cases settle before trial. The 2013 Judicial Council report reflects an 81 percent settlement rate for unlimited cases, and a 93 percent rate for limited. The figure for settlement often thrown about – 95-97 percent – includes disposition by means other than settlement such as voluntary dismissal or dispositive motion.

Since I am not a statistician, I find an easier way to express this is simply to say that the vast majority of civil cases settle before trial. This truth makes settlement negotiations, and those who facilitate them, absolutely critical to the meaningful and reliable operation of our judicial system. This article addresses the problem of a lack of diversity among neutrals, and what you might do to make an impact on this problem.

Before we progress, it is appropriate to point out that there is little agreement on the appropriate terminology to use when seeking to speak politely and respectfully to, and about, the beautifully vast diversity of humanity with whom we share our state. The terms "minority" and "people of color" and "LGBT" are just examples among a collection of descriptors used variously throughout the reports the writer has accessed. These words are not always defined, and they may not share a precise definition. Loosely speaking, the terms refer to anyone other than those identifying as non-Hispanic Caucasian. No offense is intended by use of any of these terms, nor is anyone intended to be left out of the discussion.

Here in California, those seeking access to justice to remedy the wrongs befalling them in our too-often careless and callous society collectively make up the most ethnically diverse population in the nation. According to 2018 World Atlas, the percentage of our state's population claiming Mexican heritage hovers at just under 40 percent, placing California third just behind New Mexico and Texas. Among the remaining population, 14.7 percent are Asian, 6.5 percent are Black, 1.7 percent are Native American, 0.5 percent are Pacific Islander, 3.8 percent claim more than one ethnicity, leaving approximately 33 percent of the population identifying as non-Hispanic Caucasian. (Retrieved from https://www.worldatlas.com/articles/which-is-the-most-ethnically-diverse-us-state.html.) Gender ratios (measuring binary only) have women at slightly more than one-half of the state's population. And according to the Williams Institute at UCLA School of Law, 5.3 percent of our population identified as LGBT in 2018.

Diversity is a subject which is the topic of many studies, presentations, and articles. Just the problem and progress of diversity in the legal profession alone is too large a topic for this article. Rather, we will focus on diversity among professional neutrals – the mediators and arbitrators you select to resolve your clients' cases. Why should we care about these statistics? What role does ethnicity, culture, gender, or sexuality play in your practice or mine? From my vantage point it is very simple: These are the people we attorneys serve through our justice system – as advocates, mediators, arbitrators, and judges. Yet despite great progress,

we as a group have very little in common with those we serve.

Diversity in law

In fact, the contrast between the attorney group and the client group is quite startling: Across the nation, according to an American Bar Association (ABA) Commission on Women in the Profession report, women made up 35 percent of private practice lawyers as of January 2017. (January 2018, ABA Commission on Women in the Profession, *A Current Glance at Women in the Law*.) Reporting for roughly the same period of time, the National Association of Law Placement (NALP) concluded that women comprised 45.5 percent of private practice associates and only 23 percent of partners. At the same time, 'minorities' made up 23 percent of the associate base and only 8 percent of the partnership ranks, and the latest NALP report on national diversity suggests only about 2.5 percent of lawyers are "openly LGBT."

Here at home on the California bench, consisting of roughly 1900 judges, two-thirds consider themselves "white" and about one-third are women. Here at home, this reflects substantial improvement occurring over the last dozen years or so. Notably, of the 600 judicial appointments under the recent Brown administration, more than half are women, and 41 percent of the Brown appointees identify as nonwhite (which, for sake of consistency, includes everyone except non-Hispanic Caucasians).

With the foregoing digested, consider the following: Roughly 27 percent of mediators on nationwide ADR service provider panels are women, and only two percent identify (or can be identified) as "people of color." These numbers do not come close to mirroring the client base we all serve as attorneys. This problem resulted in the passage of the American Bar Association's Resolution 105, which reads simply:

> RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") and to encourage the selection of diverse neutrals; and
>
> RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.

Diversity in ADR

Certainly, plenty of cases resolve without the use of professional neutrals. While not all settlements require neutral service providers, all neutral service providers exist to provide alternatives to trial that are impartial and confidential, and governed by self-determination.

The mediator selection process usually involves lawyers exchanging names, followed by lawyers independently researching the proposed professionals, and culminating in lawyers and their respective clients together reviewing the culled results. (The arbitrator selection process varies depending upon the service provider, but similarly, the ultimate choice remains in the joint hands of the lawyer and client.) Obviously, diversity alone must not serve as the basis for selection of a single neutral for a particular case. But until the entire pool of available neutrals reflects the population being served, diversity must be a consideration in the selection process.

This lack of diversity gained some public attention recently when Shawn Carter ("Jay-Z") and Iconix Brands sought to have an arbitrator appointed in accordance with a contractual requirement. Jay-Z complained that the panel offered by the national service provider was not sufficiently diverse. Specifically, only 2 of 200 proposed neutrals were Black. Jay-Z sought to enjoin enforcement of the arbitration clause on that basis. The petition did not go to decision, because Jay-Z was ultimately satisfied that the neutral service provider was doing the best it could with the pool it had available to it. Given that neutral panels typically have about two percent people of color, the one percent the provider was able to muster was understandable. But this begs the question: Are we really seeing all the diversity available to us in the profession? If so, why are the numbers so low? If there are more diverse neutrals out there, and we aren't seeing them, why not?

There are two driving principles which make diversity a critical consideration: First, many studies show that diverse teams improve decision-making by bringing new perspectives to the table; and second, neutrals should reflect the diversity of the communities they serve, particularly those who feel their views and circumstances are not fairly represented otherwise. Your clients are in highly charged, stressful, often expensive and protracted problems when they come to you for solutions. They need you to be their trusted guide through the civil justice system. And they need to believe that the neutrals you recommend to them understand them and are trustworthy. This can be an uphill battle given human nature and the stakes involved, but one thing we can all do is ensure there is diversity in the selection process.

I leave you with this challenge: The next time – and each time – you propose a panel of neutrals, make that panel as diverse as you possibly can. It will most likely still not reflect the diversity of our state, but if we keep pushing together, eventually we will get there.


Aliotti

Melissa Blair Aliotti is an AV-rated, full-time California neutral with Judicate West, *based in the Sacramento office, where she serves as mediator, arbitrator, discovery referee, and special master. Her areas of focus are personal injury, construction and construction defect, real property including landlord/tenant, and probate disputes. She may be reached at 916-929-7645 or Melissa@AliottiADR.com.*