The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection†

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TABLE OF CONTENTS

† This article grew out of a workshop presented by the authors at the 13th Annual Labor and Employment Law Conference of the American Bar Association Section of Labor and Employment Law. The conference took place on November 9, 2019 in New Orleans, LA.

The workshop description was:

> Parties select arbitrators based upon a reputation for acceptability and fairness. However, parties have criticized the makeup of arbitration panels as being too white, too male and too old. Yet those same parties select "who they know to hear and resolve disputes presented. The recruitment and advancement of women and persons of color to serve as arbitrators and mediators presents a vexing problem in the labor and employment ADR community. This panel will discuss the challenges and opportunities in developing more diverse rosters of arbitrators.

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PART I
A RESTATEMENT OF THE PROBLEM

Introduction

To understand diversity and inclusion in the selection of arbitrators, the discussion must begin with a brief exposition of the ABA's work to eliminate bias and enhance diversity.[1] The authors believe it necessary to begin with a brief exposition of the efforts of the ABA ". . . to become more diverse and inclusive as an Association and a profession."[2] The *Goal III Report* states:

> Diversity, inclusion, and equity—both the legal profession and the pursuit of justice are core values the American Bar Association

1. *Goal III* of the ABA's mission is to "Eliminate Bias and Enhance Diversity." Robert M. Carlson, *Letter from the ABA President*, *Goal III Report 2019* 4 (2019).
2. *Id.*

> (ABA, or the Association). Among the ABA's most visible initiatives is Goal II (*formerly Goal IX*—Eliminate Bias and Enhance Diversity. Its objectives are to promote the full and equal participation in the Association, the profession, and the justice system by all persons and to eliminate bias in the profession and the justice system.[3]
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> In 1986, the Commission on Racial and Ethnic Diversity, the Commission on Disability Rights, the Commission on Women in the Profession, and the Commission on Sexual Orientation and Gender Identity—individually published an annual "Goal III Report," collecting data from the ABA Sections, Divisions and Forums (SDFs) on the participation within the ABA leadership of their respective diverse groups—racial minorities, persons with disabilities, women and persons who are lesbian, gay, bisexual or transgender (LGBT). Collecting this data is critical to measuring how the Association is doing in its efforts to advance *Goal III*.[4]

It is significant to note that Goal IX[5] was amended,

> ". . . to include "persons with disabilities," and in 2008 to include "persons of differing sexual orientation and gender identities.". . . [T]he House of Delegates voted to revise the Association's Goals to ensure that the rights of other underrepresented groups could be addressed, and Goal III was adopted.[6]

These provisions of the *Goal III Report* are significant for the discussion that follows. As Goal III indicates, the ABA's goal is to expand the mission of the Association, in the elimination of bias and the enhancement of diversity. The issue dealt with in this paper is that of arbitrator selection, and discussion that follows, as well as, the recommended plan of action is intended to be inclusive as expressed in Goal III. The unconscious bias that is at play in the selection of arbitrators of color and woman are equally at play in the selection of persons with disabilities and persons for those persons in the LGBTQ+ community. The authors fully intend that the discussion and the plan of action be read expansively rather than narrowly.

Second, the primary focus of this paper is on the selection of arbitrators of color and women and the problems posed by unconscious

3. *Id.* at 5.
4. *Id.* at 6.
5. Carlson, *supra* note 1 at 2 (explaining that that the American Bar Association adopts a ninth goal: "Goal IX: To Promoted Full and Equal Participation in the Profession by Minorities and Women").
6. *Id.*

bias in that selection process. By focusing on the selection of arbitrators, the authors do not intend to minimize the challenges facing persons, particularly persons of color and women, who seek to become arbitrators.[7] For this reason, Part I of this paper goes into some detail about the process for becoming an arbitrator of labor-management and employment disputes.

The authors further believe, however, that as daunting as the challenges of entry are, the challenges of selection for cases so that one can continue, thrive, and succeed are seemingly insurmountable. As the authors discuss in Part II of the paper, the challenges of bias, while difficult, are possible to overcome. Indeed, there is a strategy for the diminution or hopeful elimination of the problems of bias. We begin the discussion of the problem of arbitrator selection with a discussion of the challenges raised with the entry into the profession—a restatement of the long-existing problem.

A. Jay-Z's Cried Alarm—Current Statement of an Old Problem

On November 28, 2018, in the Music Section of the New York Times an article appeared which covered a commercial dispute between an entrepreneur named Shawn Carter and the Iconix Brand Group.[8] The dispute concerned an infringement matter involving the use of the "Roc Family" of trademarks principally promoted and associated with the well-known hip hop performer Shawn Carter ("Jay-Z"). Jay-Z was sued by Iconix because his entertainment company called Roc Nation had entered into an agreement with Major League Baseball to sell New Era baseball caps with the Roc Nation paper-airplane logo. Iconix claimed that the agreement violated the original sale agreement with Jay-Z involving the sale of his Rocawear Brand. Jay-Z counterclaimed saying that the agreement he had with Iconix applied only to Rocawear, not Roc Nation. The agreement of sale provided that the parties were to have the matter presented to a panel of arbitrators under the rules of the American Arbitration Association as it applied to Large and Complex Cases.

The AAA provided a list of twelve arbitrators to the parties from its database of neutrals qualified to handle such cases. According to

7. *See* ABA Resolution 105, August 2018 (adopted), *Report* at 3–9.

8. Deb Sopan, *Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo*, N.Y.TIMES, (Nov. 28, 2018), https://www.Nytimes.Com/2018/11/28/Arts/Music/Jay-Z-Roc-Nation-Arbitrators.Html?Searchresultposition=1) (hereinafter *Jay-Z Criticizes Lack of Black Arbitrators*. . .).

Jay-Z, he "could not identify a single African-American arbitrator on the Large and Complex Cases roster."[9] Jay-Z expressed his concern to the AAA and discovered that out of the 200 eligible arbitrators on the roster only three identified as African American, two men and one woman. One of the men had a conflict of interest leaving just two arbitrators to choose from. On November 27, 2018, counsel for Jay-Z filed a petition asking the NY Supreme Court in Manhattan to enjoin the processing of the arbitration if the dispute was not resolved. According to the New York Times article, "The dearth of qualified black arbitrators deprives litigants of color of a meaningful opportunity to have their claims heard by a panel of arbitrators reflecting their backgrounds and life experience: because of "unconscious bias" that most people have against people of different races, Jay-Z's lawyer, Alex Spiro, wrote in the filing." This according to the lawyers was a form of racial discrimination. The Times noted that the petition did not cite any legal precedent. However, it noted that courts have ruled that jurors in criminal trials cannot be eliminated from jury pools on the basis of race.[10]

For many involved in the arbitration of labor or employee/management disputes, this news is not new. The underrepresentation of people of color as neutrals in labor and employment arbitration has been a constant concern within the labor management community. This issue has resonance considering an increasingly diverse workforce. The lack of diversity among neutrals has the potential impact of discrediting the benefits of the ADR process.

For example, in 1991 the Supreme Court ruled that the Federal Arbitration Act requires the enforcement of an arbitration clause to compel arbitration of statutory Age Discrimination in Employment Act claims.[11] In delivering the opinion of the Court, Justice White, citing Mitsubishi v. Soler Chrysler-Plymouth, Inc.[12] stated "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum." 550 U.S. 20, 27.

9. *Id.*

10. The petition itself was not published. However, for an understanding of the underlying dispute *see* Iconix Brand Group., Inc. v. Roc Nation Apparel Group., LLC, 2019 U.S. Dist. Lexis 169140 (US District Court SD NY, 2019).

11. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

12. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985)

B. What We Know About the Numbers and Why They Are Not Changing

There is limited information describing the extent of the lack of diverse neutrals involved in labor management dispute resolution. None of the major appointing agencies, the American Arbitration Association or Federal Mediation and Conciliation Service or JAMS keep demographic statistics of its arbitrators. The authors of this paper are members of the National Academy of Arbitrators. The National Academy is a "professional and honorary organization of arbitrators."[13] of labor-management and employment disputes. Its members are made up of persons in the United States and Canada. The Academy was founded in 1947. According to its NAA website,

> members are chosen by involved parties to hear and decide thousands of labor and employment arbitration cases each year in private industry, the public sector and non-profits in both countries. Admission standards are rigorous in keeping with the goal of establishing and fostering the highest standards of integrity and competence.[14]

According to its website, the Academy was formed

> [t]o establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management disputes on a professional basis, including those who as a part of their professional practice hold hearings and issue written decision in other types of workplace disputes; to secure the acceptance of and adherence to the Code of Responsibility for Arbitrators of Labor-Management Disputes prepared ty the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service. . . .[15]

In other words the members of the Academy represent many of the most acceptable and respected labor and employment arbitrators in North America.

In order to attain membership in the Academy one must apply and generally demonstrate that he or she: (1) is of good moral character, as demonstrated by adherence to sound ethical standards in professional activities; and (2) have substantial and current experience as an impartial neutral arbitrator of labor-management disputes, so as to

13. Nat'l Acad. of Arbs., *Const. and By-Laws, Article III, Sec. 1* (Updated June 2019), https://naarb.org/constitutions-and-by-laws/ (hereinafter NAA Con.).

14. Nat'l Acad. of Arbs., *Who We Are*, (last accessed Feb. 13, 2020, 10:11PM), https://naarb.org/who-we-are/.

15. NAA Con. at article II, sec. 1.

reflect general acceptability by the parties or alternatively (3) if the applicant has limited but current experience in arbitration but has attained general recognition thorough scholarly publication or other activities as an important authority on labor–management relations.[16]

As members of the National Academy of Arbitrators, the authors of this paper have been able to research the membership rolls and through our personal knowledge of members and the body's oral history and institutional history have been able to identify nearly all of the persons of color who have served or are serving members of the organization. We have determined that as of January 25, 2019, the Academy had accepted 1484 members over its 72 years; approximately 35 persons or 2.35% of that group were persons of color. Half of those persons of color have been admitted within the last 25 years. While membership in the Academy does not represent all the individuals who have held themselves as arbitrators of labor/employee – management disputes we submit that these statistics adequately represent the gross underrepresentation of people of color in the profession.

C. The Factors that Lead to Under-Selection of Persons of Color and Women in Labor-Management and Employment Arbitrations

The objective of this paper is to discuss the various factors that contribute to the overall demographic makeup of professional arbitrators.[17] We submit that most of these factors have a very neutral impact on the challenges one must face to become a professional arbitrator. However, one's success in the profession depends almost exclusively on the ability of the individual to be recognized and selected by the parties as being competent, fair and ethical and do the best job possible in resolving the underlying dispute. In making these selections, the parties almost consistently select arbitrators with whom they are comfortable based on reputation or prior experience. In short, the parties tend to select "who they know." This function can at times lend itself to unintended biases or a general failure to recognize

16. NAA Con., article VI, sec. 1.

17. This paper focuses on arbitration and the issues related to the underutilization of persons of color and women, but those issues are not limited to the selection of neutrals in arbitration; rather, they apply equally to the selection of neutrals in mediation—particularly high-stakes mediations. *See* Marvin E. Johnson & Homer C. La Rue*, The Gated Community: Risk Aversion, Race, and the Lack of Diversity in the Top Ranks* 15 DISPUTE RESOLUTION MAGAZINE 17, 17 (Spring 2009).

equally competent and capable but somewhat less experienced neutrals. Other factors contribute to the failure to select even highly experienced neutrals of color or women.[18]

A successful arbitrator in labor-management and employment disputes is one who is acceptable to the parties, and one who is recognized for their ability to run a hearing, and one who is discerning and judicious in their writing and decision making. There is no pattern for one to become eligible to serve as a labor/employment arbitrator.[19] Arbitrators have extensive experience in the field as advocates, teachers, judges or hearing officers. In order to work as an employment arbitrator[20] one gains the necessary experience advocating on behalf of employers or employees as litigators, or in-house counsel. Over time, even before the person presents as an arbitrator, the person should have become recognized as someone who not only knows the processes of dispute resolution but is civil and fair to all parties. What is important here is that anyone seeking to arbitrate employment disputes may continue their practice on behalf of employers or employees while deciding those cases.

On the other hand, one who wishes to arbitrate labor-management disputes must be experienced in the area and recognized by the

18. Johnson and La Rue participated in a forum sponsored by the ABA Section of Dispute Resolution in 2003. That forum resulted in their identifying three primary themes that gave rise to a diversity initiative called *ACCESS ADR*. The themes were:

> [T]he first theme was that the ADR user-community acknowledged that there was a lack of diversity in the pool of persons whom they regularly call upon for arbitration or mediation services, and participants further acknowledged the need to correct this imbalance.
>
> The second theme was the acknowledgment by the ADR user-community that many of those who are responsible for the selection of arbitrators and mediators are lawyers who are responsible for the representation of their clients' interests. As such, they typically avoid selecting an unknown mediator without an assurance that the mediator has the perceived requisite knowledge, skill, and experience. To decide otherwise would, in the minds of many lawyers, compromise the interests of their clients, something that their ethical obligations do not permit. That risk aversion translates into the decision not to call upon the services of a neutral whom the lawyer does not know, or one whom the lawyer cannot easily learn about from a close colleague.
>
> The third theme was that mediators from racial and ethnic groups that are underrepresented in the ADR field, no matter how experienced, are usually unknown to the relatively small group of lawyers who are responsible for selecting arbitrators and mediators. Although arbitration was included in the dialogue, much of the discussion centered around mediation. The initiative that resulted from the forum dialogue thus also focused on mediation.

Id. at 17–18.

19. When we discuss the practice of arbitration, we are exclusively referring to arbitration in labor and employment matters. We believe, however, that much of what we write about labor and employment arbitration is equally applicable to other modes of arbitration as well as other ADR processes.

20. These are individuals who arbitrate disputes not arising out of the collective bargaining process.

parties as neutral—not engaged in the representation of either labor or management. Many arbitrators have been former agents with the government agencies notably the National Labor Relations Board or other labor focused federal and state agencies. Many are academicians engaged in the study of labor relations law and/or policy. Unlike with employment arbitrators, one does not have to have a law degree to serve. Therefore, many successful arbitrators have experience as former management executives or union representatives.

It is extremely important to understand that there are stark differences in the paths taken to become qualified as an employment versus a labor arbitrator. In labor-management arbitration, in addition to having experience advocating on behalf of management and/or labor, one usually approaches one or several established arbitrators and enters a relationship as a mentee as one develops the practice. The type of relationship may vary. In most examples, the novice arbitrator will consult with one or more to receive pointers in drafting awards or handling the business considerations in setting up a practice. From time to time the novice arbitrator will sit in with an experienced neutral and observe the hearing. This is not solely for the purpose of observing the process from a neutral's point of view. In sitting with a well-respected arbitrator, the novice receives an implicit "seal of approval" indicating to the parties that that person will eventually be acceptable for selection.

Many experienced arbitrators sometimes have the new person "shadow write", write a second award on the same matter in order to have the experienced arbitrator review and critique the novice's analysis and drafting skills. In other cases, the novice may serve as a "ghost writer" for the experienced arbitrator. This exercise is like that of a law clerk for a judge. The novice will meet with the arbitrator, understand his or her thinking and create a draft that is edited and finalized. Meanwhile, while engaging in this mentorship process, the novice will also attempt to spend time networking at conferences and seminars in order to gain recognition by the parties.

At some point, the aspiring arbitrator will notify practitioners that he or she is available for selection by approaching one of the rostering agencies and asked to be placed on their panels. If one wants to practice in the employment area, he or she may approach agencies such as the American Arbitration Association or, depending on the persons reputation, he or she may receive and invitation to join JAMS.

For labor-management matters, one approaches either the American Arbitration Association and, as their experience increases, Federal Mediation or Conciliation Service to apply to be placed on the labor or employment panel.[21] The AAA maintains several panels in addition to labor and employment. It also administers panels of arbitrators with expertise in resolving disputes in construction, commercial and international relations. The necessary qualifications for admission to the labor and employment panels are similar in many respects but there are stark differences.

Candidates for the employment panel must meet the following qualification criteria:

- Attorneys with a minimum of 10 years' experience in employment law with fifty (50) percent of your practice devoted to this field, retired judges, or academics teaching employment law.
- Educational degrees and or professional licenses(s) appropriate to your field of expertise.
- Honors, awards and citations indicating leadership in your field.
- Training or experience in arbitration and/or other forms of dispute resolution.
- Membership in a professional association(s)
- Other relevant experience or accomplishments (e.g. published articles.[22]

In addition to this specific criteria, the candidate must demonstrate neutrality defined as "freedom from bias and prejudice" and commitment to impartiality; an "ability to evaluate and apply legal, business or trade principles" and judicial capacity defined as the "ability to manage the hearing process" and to evaluate evidence.[23]

The qualification criteria for admittance to the labor panel is quite different and the process is lengthy. Candidates must meet the following qualifications:

- Must have a minimum of 10 years senior level business or professional experience or legal practice directly related to the labor industry.

21. The individual seeking to practice as a labor arbitrator may also seek to be placed on panels maintained by state public employee relations boards or other national boards such as the National Mediation Board which administers panels of arbitrators with experience in handling disputes in the railroad and airline industry.

22. *Qualification Criteria and Responsibilities for Members of the AAA® Panel of Employment Arbitrators*, AMERICAN ARBITRATION ASSOCIATION, 1 (last visited Feb. 14, 2020), https://www.adr.org/sites/default/files/document_repository/Employment%20Arbitrators%20Qualification%20Criteria.pdf.

23. *Id.*

- **Cannot be an active advocate for labor or management.**
- Must possess significant hands-on knowledge about Labor Relations.
- Must have a judicial temperament.
- Must have strong writing skills. The AAA may ask for a writing sample.
- Educational degree(s) and /or professional license(s) appropriate to your field of expertise.
- Honors, awards and citation indicating leadership in your field.
- Training and experience in arbitration and/or other forms of dispute resolution.
- Membership in a professional association(s)
- Other relevant experience or accomplishment (e.g. published articles, part of a mentoring program. [Bold emphasis in original document.][24]

The individual candidate must also have the reputational attributes discussed above, including neutrality, judicial capacity and reputation.[25]

The candidate for admission to the labor panel must also undergo a rigorous application process.

- Applicants must have someone **prominent in the Labor/Management field or user of AAA's services, preferably another arbitrator who is familiar with the applicant's work, write a letter of nomination** and include a copy of the applicant's resume and send it to the Labor/Employment/Elections Senior Vice President at 200 State Street, 7th Floor, Boston, MA 02109
- The AAA will review the nominating letter and the resume and then, if applicable, will schedule an interview to discuss the application process and AAA's expectations.
- If it is determined to proceed with the application, the AAA will send the nominee an application package, which will need to be completed and returned to the AAA for processing. **Included in the package is a request to identify nine (9) references; 3 management references; 3 union references, and 3 arbitrator references.**
- The AAA will write to your references and request their comments with regard to the nature and duration of their relationship with the applicant, why they think the applicant would be

24. *Qualification Criteria for Admittance to the AAA® Labor Panel*, American Arbitration Association, 1 (last visited Feb. 14, 2020), https://www.adr.org/sites/default/files/document_repository/Labor_QualificationsCriteria_AAAPanel.pdf.

25. *Id.*

> qualified to serve, and the number of arbitration cases the references was involved during the past 24 months. The application package will not be finalized until all the references are received.
> - All follow-up to the references will be done by the nominee. [Bold emphasis is in the original.[26]

The new labor arbitrator usually then applies to the FMCS for admission to their panel. The eligibility criteria and application process are set forth at 29 C.F.R. Part 1404 and is highly rigorous as well. The candidate must provide references as well as five recent labor arbitration awards that are final and binding or successfully complete the FMCS labor arbitrator training course and either submit one award or complete and apprenticeship that meets the specifications of the Agency may provide.[27] In addition, the regulation specifically states the following:

> Any person who at the time of application is an advocate as defined in paragraph (c)(1) of this section, must agree to cease such activity before being recommended for listing on the Roster by the [Review] Board. Except in the case of persons listed on the Roster as advocates before November 17, 1976, any person who did not divulge his or her advocacy at the time of listing or who becomes an advocate while listed on the Roster and who did not request to be placed on inactive status pursuant to § 1404.6 prior to becoming an advocate, shall be recommended for removal by the Board after the fact of advocacy is revealed.[28]

Advocacy is broadly defined in the regulation.

It is acknowledged that the requirements of neutrality do place a unique burden on a person seeking to become a labor arbitrator regardless of demographic representation. The candidate must effectively stop his or her practice and find another source of income while seeking to build a labor arbitration practice. However, while the integrity of arbitration has come under intense scrutiny by a media which has blanketly referred to the arbitration process and arbitrators as incompetent or corrupt,[29] the requirements described above have

26. *Id.* at 2.
27. 29 C.F.R. §1404.5 (a) and (b).
28. 29 C.F.R. §1404.5 (c).
29. *See* Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1; Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015, at A1; *The Virtues of Arbitration*, N.Y. TIMES, Nov. 14, 2015, Opinion; Jessica Silver-Greenberg and Michael Corkery, *Efforts to Reign In Arbitration Come Under Well-Financed Attack*, N.Y. TIMES, Nov. 15, 2015, at B1; and Jessica Silver-Greenberg and Michael Corkery, *Bipartisan Bill Would Protect Service Members' Right to Avoid Arbitration*, N.Y. TIMES, Nov. 20, 2015, at B16.

supported its integrity as arbitration applies to collective bargaining. Indeed, some have suggested that the advocacy standard be relaxed to enable more candidates of color to enter the field without presenting a significant risk to their livelihood while they are struggling to make a "go of it". Many would disagree. Any advantage that may be given to candidates as a result of this change will have a far greater negative impact on the integrity of the process and unfairly label such arbitrators as being somehow underqualified to adequately handle such cases.

Regardless of the rigorous challenges one has to undergo to become an arbitrator, it is apparent that in order to qualify for consideration one must, besides getting the requisite experience, one must seek to generate requisite recognition, and establish a reputation that would make one suitable to decide labor and employment disputes. This requires extensive guidance and mentoring. There are several examples of organizations and panel agencies that have worked with younger, less experienced arbitrators especially arbitrators of color and have trained and nurtured them through the qualification process. The National Academy of Arbitrators has for several years have reached out to individuals pursuing careers as arbitrators and have established mentoring relationships to help qualify them for acceptance to the agency panels and eventually to membership in the Academy itself. The American Arbitration Association has, since 2009, created the A. Leon Higginbotham, Jr. Fellows Program in order to provide training and "networking opportunities to up and coming diverse alternative dispute resolution professionals who have historically not been included in meaningful participation in the field of alternative dispute resolution."[30]

Despite the training efforts and mentoring of underrepresented professionals in dispute resolution, these individuals cannot be successful unless they are regularly selected by the parties themselves. Arbitration, after all, is a voluntary process when it comes to the selection of neutrals. Parties have the freedom to select who they choose to resolve their disputes. Indeed, this privilege is codified in the Code of Federal Regulations. It states, "Nothing contained in this part should be construed to limit the rights of parties who use FMCS

30. *AAA Higginbotham Fellows Program*, AMERICAN ARBITRATION ASSOCIATION, (last visited Feb. 14, 2020), https://www.adr.org/higginbothamfellowsprogram.

arbitration services to jointly select any arbitrator or arbitration procedure acceptable to them."[31]

Parties as the gatekeepers to the selection of neutrals use a variety of processes and have differing reasons for selecting an arbitrator. The selection may depend on the parties' comfort level with the arbitrator based on one's perceived fairness and the comfort of the client.[32] Parties have expressed preferences for arbitrators based upon the nature of the case, the arbitrator's fee schedule, his or her willingness to travel and his or her handling of expenses.

The selection process may include certain biased perceptions based upon an arbitrator's race or gender as it relates to the arbitrator's ability to make fair and reasoned decisions.[33] Some parties have also expressed preferences based upon the perception that an arbitrator's race or gender may show a bias toward individuals of the same race or gender. While the NAA and the appointing agencies have been engaged in the mentoring and nurturing new arbitrators of color, there is little they can do to combat exclusion from consideration for cases based on unfounded bias of the parties.

The American Bar Association has challenged practitioners to step up their efforts to select more persons of color and women as arbitrators. As the authors discuss below, initiatives begun by the Diversity Lab offer some promising opportunities for the ADR community. In 2017, the Diversity Lab partnered with thirty (30) of the country's leading law firms to pilot the *Mansfield Rule*™[34]. The *Mansfield Rule* measures whether law firms affirmatively consider women and attorneys of color for leadership and governance roles. It is our view that a similar initiative could be applied in the selection of neutrals in the labor-management and employment field. The ABA, in general and this section, could urge users and providers of dispute res-

31. 29 C.F.R. §1404.8. It should be noted that while the parties have right to select arbitrators, the parties may not request that an arbitrator be included or excluded from a panel for selection "because of age, race, color, gender, national origin, disability, genetic information, or religion." 29 C.F.R. §1404.11 (b).

32. The role of unconscious bias has been shown to play a role as we discuss later in the paper.

33. For example interviews of James Harkless and the Honorable Harry T. Edwards, "The Art and Science of Labor Arbitration" College of Labor and Employment Lawyers, Video History Project. *See generally* DVD: The Art and Science of Labor Arbitration (Carol M. Rosenbaum 2013).

34. The use of *Mansfield Rule* and *Mansfield Rule Certified* in this paper is intended to be consistent with the rights of *Diversity Lab* as the owner of the service mark rights for these terms.

olution services to expand ways to develop and encourage the selection of diverse neutrals.

PART II
HOW TO ACHIEVE DIVERSITY AND INCLUSION IN ARBITRATION SELECTION: TIME TO EXPAND THE MANSFIELD-RULE™ LAW-FIRM INITIATIVE TO THE SELECTION OF ADR NEUTRALS

A. Thinking Outside-of-the-Box Based on Empirical Data

In this portion of the paper we address the proposal to meet the challenges posed in correcting the problem of the under-selection of women and persons of color as arbitrators[35]. Both parts of the paper speak to the vexing problem of the *selection* of women and persons of color to serve as arbitrators and mediators in labor-management and employment disputes. The paper does not address the front-end issue of increasing diversity in the rosters—not that there is not course correction to be done there as well. It is the *black box*, in the selection of arbitrators and other neutrals, that must be opened, and the information therein decoded to create a solution to why there are so many *crashes* in the selection process when persons of color and women are involved.

The suggestions put forward in this portion of the paper address the suggestion of expanding the *Mansfield Rule*™[36] *Law-Firm Initiative* (the *Mansfield Initiative*). We believe that the *Mansfield Initiative* demonstrates an opportunity for the ADR community to think "outside of the box." There is empirical data to support the notion that ADR providers and selectors must find ways to overcome unconscious biases that appears to operate against true diversity and inclu-

35. The reader is reminded that the authors intend this portion of the paper to be read broadly as applicable to those persons embraced by Goal III of the ABA's mission. The elimination of bias and the enhancement of diversity is viewed as applicable to racial minorities, persons with disabilities, women and persons who are lesbian, gay, bisexual, or transgender (LGBTQ+).

36. Diversity Lab is the owner of the service mark rights for *MANSFIELD RULE* and *MANSFIELD RULE CERTIFIED*, and Diversity Lab is the sole entity that can use and authorize other parties to use these service marks in connection with diversity programs. These terms should not be used unless a law firm or other entity is registered and participating in the Mansfield Rule certification process administered by Diversity Lab. *Mansfield Rule 3.0,* DIVERSITY LAB, (last accessed Feb. 14, 2020), https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/.

The use of the terms *Mansfield Rule* and *Mansfield Rule Certified* in this paper are intended to be used as descriptive of the programs administered by Diversity Lab. Hereinafter, the service mark will not be included when using the terms *Mansfield Rule* and *Mansfield Rule Certified.*

sion in the selection of neutrals. If there is going be significant movement toward diversity and inclusion, there must be an intent coupled with a plan of action. Mere urging, we now know is insufficient.

This portion of the paper restricts itself to a discussion of the application of the *Mansfield Initiative* in the selection of arbitrators who are persons of color and women in the labor-management and employment arbitration arena. We see no reason, however, why the *Mansfield Initiative* could not have application in commercial and international arbitration as well as labor-management arbitration.

B. New Status Quo Around Race and Sex—Does Getting Two in the Final-Selection Pool Matter?

Earlier, we asserted that "[t]he ABA, in general and this section, in particular could urge users and providers of dispute resolution services to expand ways to develop and encourage the selection of diverse neutrals."[37] Of course, this is not the first exhortation to action as we explained in the first part of this paper. Indeed, it is worth noting a humorous moment in the development of *ACCESS ADR*.[38] This was an initiative to expand the selection of experienced mediators of color in commercial mediation matters. The initiative was co-sponsored by the ABA Section of Dispute Resolution and JAMS. All the sponsors of the initiative were genuinely impressed with the quality of neutrals identified and invited to participate in *ACCESS ADR*. During the stage of the execution of the program in which the initiative was recruiting plaintiff and defendant advocates to agree to select *ACCESS ADR Fellows* (as participants were called), buy-in was slow. One of the sponsors was astonished and remarked, "I never thought that this would be so hard."

That sponsor's remark is indicative of the seeming intractability of the problem of persuading users of ADR services, whether in labor-management and employment matters or in commercial matters, to use persons of color and women as arbitrators or as mediators. The surprise expressed in the *ACCESS ADR* sponsor's statement is also reflected in the data related to efforts to increase diversity.

> Despite the ever-growing business case for diversity, roughly 85% of board members and executives are white men. This doesn't

37. *See* text on page 16.
38. *See* Johnson & La Rue, *infra* note 85.

> mean that companies haven't tried to change. Many have started investing hundreds of millions of dollars on diversity initiatives each year. But the biggest challenge seems to be figuring out how to overcome unconscious biases that gets in the way of these well-intentioned programs. . . . [R]ecently conducted research . . . suggests a potential solution.[39]

As the authors further note:

> [i]t's well known that people have a bias in favor of preserving the status quo; change is uncomfortable. So because 95% of CEOs are white men, the status quo bias can lead board members to unconsciously prefer to hire more white men for leadership roles.[40]

The authors, whose statistics are cited in the above paragraphs, conducted two (2) empirical studies to determine ". . . what happens when you change the status quo among finalists for a job position."[41] The results of the studies were what the empiricists had predicted. In the first study, participants (144 undergraduate students) were asked to ". . . review the qualifications of three job candidates who made up a finalist pool of applicants. The applicants had the same credentials—the only difference among them was their race."[42]

> Participants indicated the extent to which they agreed that each candidate was the best for the job. Half of them evaluated a finalist pool that had two white candidates and one black candidate, and the other half evaluated a finalist pool that had two black candidates and one white candidate. . . . [The researchers] found that when a majority of the finalists were white (demonstrating the status quo), participants tended to recommend hiring a white candidate. But when a majority of finalists were black, participants tended to recommend hiring a black candidate . . . [formula omitted].[43]

The second study was equally as revealing. It involved 200 undergraduate students, focused on gender rather than race, with a similar result.

> In this case, . . . [the researchers] expected that the status quo would be to hire women, so . . . [they] looked at the effect of having two

39. Stefanie K. Johnson, David R. Hekman, & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, HARVARD BUS. REV. Reprint H02U2U, 1, 2 (April 26, 2016) [hereinafter *If There's Only One* . . .], https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired.

40. *Id.* at 3.

41. *Id.*

42. *Id.*

43. *Id.*

> men in the pool. . . . [They] found that when two of the three finalists were men, participants tended to recommend hiring a man, and when two of the three finalists were women, participants tended to recommend hiring a woman . . . [formula omitted].[44]

As the researchers predicted, "[w]hen there were two minorities or women in the pool of finalists, the status quo changed, resulting in a woman or minority becoming the favored candidate."[45] Perhaps equally enlightening about the two studies is that the researchers ". . . were also able to measure each participant's unconscious racism or sexism using implicit association tests (IATs)—reaction-time tests that measure unconscious bias."[46]

The researchers found

> that the status quo effect was particularly strong among participants who had scored high in unconscious racism or sexism on the IAT. So when hiring a black candidate was perceived to be the status quo (i.e., the pool was two black candidates and one white candidate), individuals scoring average in unconscious racism tended to rate the black candidate 10% better than the white candidate; individuals scoring one standard deviation above average in unconscious racism tended to rate the black candidate 23% better than the white candidate [formula omitted]. . . . [They] found a similar effect for gender.[47]

In a third study to test the *status-quo hypothesis*, the researchers examined ". . . a university's hiring decisions of white and nonwhite women and men for academic positions."[48] Their sample included ". . . 598 job finalists, 174 of whom received job offers over a three-year period. Finalist pools ranged from three to 11 candidates (the average was four)."[49]

The researchers wanted ". . . to see . . . whether more than one woman or minority in the finalist pool . . . would increase the likelihood of hiring a woman or minority—beyond the increased . . . [expected] simply due to probability."[50]

The findings were somewhat startling. They found that

> . . . when there were two female finalists, women had a significantly higher chance of being hired . . . [formula omitted]. The odds of

44. *Id.*
45. *If There's Only One . . .* , *supra* note 39, at 4.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

> hiring a woman were ***79.14*** times greater than if there were at least two women in the finalist pool (controlling for the number of other men and women finalists) [emphasis added]. There was also a significant effect for race . . . [formula omitted]. The odds of hiring a minority were ***193.72*** greater if there were at least two minority candidates in the finalist pool (controlling for the number of other minority and white finalists) [emphasis added]. This effect held no matter the size of the pool (six finalists, eight finalists, etc.), and these analyses excluded all cases in which there were no women or minority applicants."[51]

The researchers concluded the following:

> [b]asically, . . . [the] results suggest that we can use bias in favor of the status quo to actually change the status quo. When there was only one woman or minority candidate in a pool of four finalists, their odds of being hired were statistically zero. But when we created a new status quo among the finalist candidates by adding just one more woman or minority candidate, the decision makers actually considered hiring a woman or minority candidate.[52]

What might this study begin to tell us about lawyers who select arbitrators and neutrals? In arbitration, the lawyers want to win their cases. Every advocate and arbitrator, however, knows that winning is not completely dependent on the arbitrator; although, it cannot be gainsaid that in some cases who the neutral is weighs heavier than in others. This brings the discussion back to the point that lawyers tend to be *risk adverse*; and therefore, they do not want to explain to their client that they lost the case and that this was the first time that the lawyer had appeared before this arbitrator. The client may very well ask, "why didn't you stay with the status quo—who you knew?"

Juxtaposing the lawyer's dilemma with the findings from the study just discussed, a lawyer might very well decide that a "strike/rank" list that contains only one woman or person of color ". . . highlights how different . . . [the woman or person of color] is from the norm."[53] It follows that ". . . deviating from the norm can be risky for the decision . . . [maker], as people tend to ostracize people who are different from the group. For women and minorities, having . . . [those] differences made salient can also lead to inferences of incompetence."[54] Thus, the lawyer is less likely to select the person of color

51. *If There's Only One . . .* , *supra* note 39, at 5.
52. *Id.*
53. *If There's Only One . . .* , *supra* note 39, at 6.
54. *Id.*

or the woman as the arbitrator. The researchers suggest that their study provides a start to providing a solution to the problem of diversity in the selection of who to hire. They ". . . believe that the *get two in the pool effect* represents an important first step for overcoming unconscious biases and ushering in the racial and gender balance that we want in organizations . . . [and in the arbitrator-selection process]." [emphasis added].[55]

The authors also reject the notion that their proposal to add ". . . a second minority or woman candidate to the finalist pool is a type of affirmative action or reverse discrimination against white men."[56] According to the authors such a criticism ". . . implies that there are fewer qualified women or nonwhite candidates than white male candidates."[57] They suggest a change in the perception of what is the status quo, achieved in part, by *get two in the pool effect*, moves the selection process closer to a *blind audition*. In such *blind auditions*, more women than men are hired as programmers and engineers—similarly true in blind auditions for professional orchestras.[58]

By citing the results of this study, the authors of this paper do not suggest that it contains a panacea to speed up the incredibly slow pace of moving toward true diversity and inclusion in the selection of arbitrators. We do suggest, however, that the community of providers and advocates must acknowledge what is ". . . apparent[,] that an individual [who] is female or nonwhite . . . [is] rated worse than when . . . [that individual's] sex or race is obscured.]"[59] The purpose for obscuring is not an attempt to achieve the platitude, "I don't see race or sex." The purpose is to ensure that unconscious bias about race and sex does not eliminate from selection qualified persons because of race and sex.

55. *Id.*
56. *Id.*
57. *Id.*
58. Curt Rice, *How Blind Auditions Help Orchestras to Eliminate Gender Bias*, THE GUARDIAN (Oct. 14, 2013, 7:00 AM), https://www.theguardian.com/women-in-leadership/14, 2013/oct/14/blind-auditions-orchestras-gender-bias.).
59. *If There's Only One. . . , supra* note 39, at 6.

C. The Mansfield Rule—Origins and How it Works

On September 3, 2019, Diversity Lab[60] ". . . announced . . . that . . . 102 trailblazing law firms . . . are piloting Mansfield Rule 3.0."[61]

> Now in its third iteration, the Mansfield Rule Certification measures whether law firms have affirmatively considered at least 30 percent women, attorneys of color, LGBTQ+ and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions. New for 3.0 is the addition of lawyers with disabilities. There are also five participating firms, Eversheds Sutherland, Hogan Lovells, Holland & Hart, Miller Canfield, and Stoel Rives, that have volunteered to pilot a more intensive tracking process that measures the consideration of individual demographic groups for each category. The goal of the Mansfield Rule is to boost the representation of diverse lawyers in law firm leadership by broadening the pool of candidates considered for these opportunities.[62]

D. The Mansfield Rule Builds on the Success Shown by the Rooney Rule in the NFL

The *Mansfield Rule Initiative* began on June 7, 2017 in San Francisco. Diversity Lab announced a partnership with ". . . 30 of the country's leading firms to pilot the *Mansfield Rule*."[63] The *Mansfield Rule* got its genesis from the National Football League's "Rooney Rule". The brief historical origin of the "Rooney Rule" is that:

> [f]or decades, many criticized NFL teams' minority hiring practices. These criticisms peaked in 2002, as data revealed that while more than 60% of players were black, only 6% of head coaches were.[footnote omitted] The "Rooney" Rule, adopted in 2003 and

60. "Diversity Lab is an incubator for innovative ideas and solutions that boost diversity and inclusion in law. Experimental ideas are created through our Hackathons and piloted in collaboration with more than 50 top law firms and legal departments across the country. We leverage data, behavioral science, design thinking, and technology to further develop and test the ideas, measure the results, and share the lessons learned." DIVERSITY LAB, https://www.diversitylab.com/ (last visited Feb. 13, 2020).

61. *Mansfield Rule: Boosting Diversity in Leadership,* DIVERSITY LAB, https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/.

62. *Id.*

63. Caren Ulrich Stacy, *30 Law Firms Pilot Version of Rooney Rule to Boost Diversity in Leadership Ranks,* DIVERSITY LAB, (June 7, 2017), https://amlawdaily.typepad.com/files/mansfield-rule-release.pdf; https://amlawdaily.typepad.com/files/mansfield-rule-release.pdf; *Id.* ("Named after Arabella Mansfield, the first woman admitted to the practice of law in the United States . . . "); *see* Donald E. Young, *America's First Woman Lawyer*, ARABELLA MANSFIELD, https://arabellamansfield.com/ (stating that Belle Babb was admitted to the practice of law in 1869).

> named for then-Pittsburgh Steelers Chairman Dan Rooney, [footnote omitted] requires teams to interview at least one minority candidate for a head coaching vacancy.[64]

Data from ". . . the 1992 through 2014 seasons . . . suggests that a minority candidate is . . . statistically significant . . . more likely . . . to fill an NFL head coaching vacancy in the post-Rooney era than the pre-Rooney era."[65] While one may argue that progress in the number of minority coaches in the NFL is still woefully slow compared with the percent of NFL players who are persons of color, it cannot be gainsaid that there has been a significant increase in minority head coaches during the Rooney Rule era.

Indeed, the United States Senate, based on the success of the Rooney Rule in the NFL,

> . . . encourages each corporate, academic, and social entity, regardless of size or field, to—
>
> (1) Develop an internal rule modeled after a successful business practice, such as the Rooney Rule or RLJ Rule, and in accordance with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), adapt that rule to specifications that will best fit the procedures of the individual entity; and
>
> (2) Institute the individualized rule described in paragraph (1) to ensure that the entity will always consider candidates from underrepresented populations before making a final decision with respect to selecting a business vendor or filling a leadership position.[66]

A recent study in 2016 attempted to measure the impact of the "Rooney Rule" in the hiring of head coaches in the NFL. "The Rooney Rule" is an example of a "soft" affirmative action policy in that no quota or preference is given to minorities in the hiring decision . . . ."[67]

> [T]eams are simply required to interview at least one minority candidate. If a team fails to interview a minority candidate for a vacant

64. *The Mansfield Rule and "Big Law's" Embrace of Diversity Hiring*, MEDIA, https://lawshelf.com/blog/post/the-mansfield-rule-and-big-laws-embrace-of-diversity-hiring.

65. Cynthia DuBois, *The Impact of "Soft" Affirmative Action Policies on Minority Hiring in Executive Leadership: The Case of the NFL's Rooney Rule,* 18 AMER. L. & ECON. REV. 208 (2015), https://pdfs.semanticscholar.org/1db6/1062a0988cb16e203bf309e7673a1960d7b9.pdf?_ga=2.86868571.2106868983.1581908856-124013924.1581908856.208, 210 (2016).)

66. S. Res. 11, 115th Cong. (2017) (Senate Resolution 11 was introduced by Tim Scott (R-South Carolina)). Senator Scott was joined by cosponsors Senators Rand Paul (R-KY), Rob Portman (R-OH), Marco Rubio (R-FL), Cory Booker (D-NJ), Sherrod Brown (D-OH), and Kamala Harris (D-CA).

67. *DuBois, supra* note 65.

> head-coaching position they are subject to league-imposed sanctions. For example, in 2003 the Detroit Lions were fined $200,000 for failure to interview a minority *candidate. However, other than the 2003 fine and reprimand levied on the* Detroit Lions, no other NFL team has been found in violation of the Rooney Rule when hiring a head coach.[68]

There are two things that are significant about the author's account of her research on the Rooney Rule and its implementation. First, the interview of minority candidates for head-coaching positions is mandatory by the NFL. This means that there is accountability—an important element to the successful implementation of any policy—even a *soft affirmative action* policy.

Second, the study seems to be consistent with the research cited earlier in this paper about the composition of the candidate pool. Both studies seem to suggest that how the candidate pool is composed is crucial to overcoming unconscious bias. "[T]he Rooney Rule does not impact hiring criteria but simply the racial composition of candidates interviewed."[69] Similarly, in the consideration and selection of arbitrators, the criteria for selection (e.g., high ability to run an efficient and fair hearing and the ability to write a clear and well-reasoned award) do not change. Both studies suggest that the racial and sexual composition (number, race and sex) of the candidates in the pool considered for selection as the arbitrator does matter.

It is beyond the scope of this article to assess the success or impact of the Rooney Rule; however, the authors do note that the Rooney Rule has not proven to be the *answer* that some may have hoped for the dearth of head coaches of color in the NFL. We are reminded that three-quarters of the players in the NFL are African American. "In November [2019, however], Richard Lapchick, the director of the Institute for Diversity and Ethics in Sport, issued his annual report on the hiring of women and minorities in the N.F.L. and gave the league its lowest grade since the Institute began tracking this data in 2004."[70]

> "We're celebrating the 100th anniversary of the N.F.L., yet we have only three head coaches of color, said Rod Graves, a former N.F.L. general manager and league executive who now runs the Fritz Pol-

68. *Id.*
69. *Id.*
70. Ken Belson, *Only Three N.F.L. Coaches Are Black. 'It's Embarrassing.",* N.Y. Times 1 (January 1, 2020), https://www.nytimes.com/2019/12/31/sports/football/nfl-coach-diversity.html?smid=nytcore-ios-share.

> lard Alliance, which promotes diversity in football. "For all the hoopla that football has become in this country, that kind of progress, or lack of it, is shameful."
>
> As Graves noted, the December firing of Carolina Panthers Coach Ron Rivera, who is Hispanic, brought the number of minority head coaches to three—Mike Tomlin of the Steelers, Anthony Lynn with the Chargers and Brian Flores with the Dolphins—down from a record eight, in 2018 and other years. (Perry Fewell, who is African-American, replaced Rivera, but only on an interim basis.) There are just two general managers of color.[71]

Jeff Pash[72], perhaps summed up the impact of the Rooney Rule best when he said:

> . . . [T]he Rooney Rule, while imperfect, has been impactful. "It's made a difference in our league that's been valuable and important[,] and I think over time it will continue to be a valuable part of what we do." [citation omitted] Mehri, meanwhile, sees the Rooney Rule as a process, not a numerical solution. "We're not asking for a leg up. Just give us a level playing field. At least we have a plan for progress." [citation omitted].[73]

E. The Ray Corollary—the ADR Expansion[74] of the Mansfield Rule Concept

The goal of this paper is to call on the ADR community to act to increase diversity in the selection of arbitrators and other neutrals in labor-management and employment disputes. The Diversity Lab's work with 102 law firms ensures that *Mansfield Certified* entities have considered at least 30% diverse lawyers for all governance and leadership roles. This means that these firms have ". . . affirmatively considered at least 30 percent women, attorneys of color, LGBTQ+ and lawyers with disabilities for . . . equity partner promotions, formal client pitch opportunities and senior lateral positions."[75]

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71. *Id. See also* Pamela Newkirk, DIVERSITY, INC. 170 (2019) in which the author cites Cyrus Mehri, co-founder of the Fritz Pollard Alliance Foundation along with former civil rights lawyer Johnny Cochran.

> Mehri acknowledged that the Rooney Rule only works if there's oversight. "They're going through the motions," Mehri said of some of the companies that have adopted . . . [the Rooney Rule]. "Who's actually enforcing it? If someone doesn't own carrying it out, it doesn't happen. You need accountability. [citation omitted].

72. Jeff Pash is the N.F.L. Executive Vice President and General Counsel. *Id.* at 165.

73. DIVERSITY, INC. at 175.

74. HOMER C. LA RUE, COROLLARY—THE ADR EXPANSION AND RAY COROLLARY CERTIFICATION (forthcoming) (on file with author).

75. Diversity Lab, *Mansfield Rule 3.0, Mansfield Rule: Boosting Diversity in Leadership*, DIVERSITY LAB, (Sept. 3, 2019), .https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/.

The *Ray Corollary*[76] to the *Mansfield Rule* is quite simple. Expand the work that has been done and the lessons that have been learned in "biglaw" to the arbitration-selection process in the ADR community. The *Ray Corollary—the ADR Expansion* of the *Mansfield Rule* is an initiative that calls for the commitment and collaboration of the sections of the American Bar Association, those entities that maintain arbitrator rosters, those lawyers who select arbitrators, those public and private entities that hire the lawyers who select arbitrators, and other neutrals. The *Ray Corollary* would be the title for a national task force that would reach out to the Diversity Lab to partner with the ADR community to help bring about diversity in the selection of ADR neutrals.

It is beyond the scope of this paper to specify the details of how the national task force will ultimately compose itself or what the outcomes will be. The charge of the task force, however, would be as stated in Senate Resolution 11:

> . . . [To] [d]evelop an internal rule modeled after a successful business practice, such as the Rooney Rule . . . and in accordance with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), adapt that rule to specifications that will best fit the procedures of the . . . [ADR community] and
>
> . . . [To] [i]nstitute the individualized rule described . . . [above] to ensure that the entity will always consider candidates from underrepresented populations before making a final decision with respect to selecting . . . [an arbitrator or other neutral].[77]

An important element of the charge of the task force would be to build into any rule or procedure *accountability* on the part of the participants. A way to hold those seeking *Ray Corollary Certification* accountable to the initiative would be an integral part of what the task force would need to work through. These, however, are not new challenges, and they have been faced and overcome in the work done by Diversity Lab with its partners in the *Mansfield Rule* program.

Finally, the authors of this paper suggest that such a task-force undertaking would excite a good deal of interest in the ADR community—that finally the issue of diversity in the selection of arbitrators and other neutrals is being tackled and not just talked about. While

76. J. CLAY SMITH JR., EMANCIPATION: The MAKING OF THE BLACK LAWYER 1844-1944 55 (U. of Pa. Press ed., 1993) (explaining that the "Corollary" is named after Charlotte E. Ray, who " . . . graduated from Howard University School of Law in 1872 . . . [and is] the first black woman to receive a law degree and the first to be admitted to the bar in the . . . [United States])."

77. S. Res. 11, 115th Cong. (2017).

the authors do not speak on behalf of the National Academy of Arbitrators (NAA) or the NAA Research and Education Foundation (REF), the authors are, nonetheless, confident that a proposal for the funding of such national task force would be of great interest to both the NAA and the REF.

F. The Ray Corollary is a Natural Outgrowth of ABA Resolution 113 and Resolution 105

In 2016, the American Bar Association's House of Delegates, the governing body of the American Bar Association (ABA), approved Resolution 113. It reads:

> RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and
>
> FURTHER RESOLVED, That the American Bar Associate urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and
>
> FURTHER RESOLVED, That for purposes of this resolution, "diverse attorneys" means attorneys who are included within the ambit of Goal III of the American Bar Association.[78]

In 2018, the Section of Dispute Resolution of the ABA introduced, in the ABA House of Delegates, Resolution 105 pertaining to diversity in ADR. It reads:

> RESOLVED, That the American Bar Association urges providers of domestic and international disputes 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
>
> FURTHER RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.[79]

78. American Bar Association, *Adopted by the House of Delegates 113*, A.B.A. (2016), https://law.duke.edu/sites/default/files/centers/judicialstudies/panel_4-american_bar_association_resolution.pdf.

79. American Bar Association, *Section of Dispute Resolution Report to the House of Delegates 105,* A.B.A. (2018), https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf.

The Report to the House of Delegates that accompanied Resolution 105 concisely summarized the problem pertaining to the selection of *diverse neutrals*:

> To enhance diversity and inclusion in Dispute Resolution, it is essential to shine a spotlight on the low level of diverse representation on neutral rosters and the special challenges created by the combination of the network-based culture within the profession, implicit bias, and the confidentiality that tends to obscure the degree to which Dispute Resolution lags behind the legal profession as a whole. By explicitly linking ABA Goal III to Dispute Resolution, this Resolution provides precisely the spotlight needed to encourage active engagement on the part of all stakeholders with the ability to move the needle to increase representation of diverse neutrals on rosters, and to enhance their likelihood of success in the selection process.[80]

Then 2018 Dispute Resolution Section Chair, Harrie Samaras wrote to explain the new policy (i.e., Resolution 105) adopted by the ABA. It was " . . . aimed at increasing diversity in the hiring of neutrals . . . ."[81] In pertinent part, she stated:

> Diverse neutrals may not be chosen or recommended for a number of reasons including: because they are not "like" the individuals choosing them; implicit bias about their capabilities and experience; and the inaccurate belief that experienced and qualified diverse neutrals do not exist. Clients lose out because they are deprived of the opportunity to have the valuable experience, expertise, and perspectives of diverse neutrals.
>
> *So what does this mean to you?* Regardless of whether you are an advocate/law firm, court, client/corporation, or ADR service provider – you can make a difference.[82]

Resolution 113 and Resolution 105 are well-intentioned and fall short of what the authors of this paper believe is necessary at this point in history. First, the data suggests that the needle does not move unless there is accountability and identifiably achievable goals. The authors would suggest that the next iteration of Resolution 105 include additional "Resolved" statements. They would read:

> FURTHER RESOLVED, That the American Bar Association urges providers and users of neutral services, including law firms,

80. *Id.*

81. Email from Harrie Samaras, 2018 Chair, Section of Dispute Resolution (on file with author).

82. *Id.*

> corporations, and other users of neutral service to develop an internal rule modeled after a successful business practice, such as the Rooney Rule, and in accordance with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), adapt that rule to specifications that will best fit the procedures and selection processes of the different parts of the ADR community; and
> FURTHER RESOLVED, That providers and users of neutral services develop the individualized rule described above to ensure that the entity will always consider candidates from underrepresented populations before making a final decision with respect to arbitrators, mediators and other ADR neutrals.
> FURTHER RESOLVED, That providers and users of neutral services affirmatively demonstrate that they have considered persons of color and women—at least 30% of the candidate pool—for appointments as arbitrators, mediators and other ADR neutrals and that the results of such affirmative considerations be objectively measured and reported annually to a certifying entity with responsibility for assistance and oversight of the diversity initiative.

Of course such a resolution would be accompanied by the relevant sections of the ABA participating in the *Ray Corollary Initiative*. It is through such collaborative action that the needle can be moved in the ADR community toward real diversity and inclusion.

CONCLUSION AND RECOMMENDATIONS

A. Summary of What is Needed

The authors of this paper suggest that much progress has been made at the entry level of the ADR field. While barriers do still exist at the entry level, the real issue is how to get selected to serve as an ADR neutral so that one can make it to the mid-level and on into the master-level of the field. To do that the ADR field must become intentional about overcoming unconscious bias in the selection process. This paper has documented some of the data that makes doubt about the operation of bias in the selection process unwarranted and baseless.

The opportunity, created by the current ongoing crisis pertaining to diversity, is reason for optimism. The *Ray Corollary Initiative* discussed in this paper offers the chance for the ADR community—providers, advocates and neutrals—to come together in a collaborative problem-solving process. The *Ray Corollary—the Expansion to ADR National Task Force* (the *Ray Corollary Task Force*) presents a histor-

ical chance to bring the best talents of our profession to the resolution of what appears (but is not) an intractable problem. All that is required is commitment and genuine accountability for the accomplishment of the task.

B. The Road to Success is Not Empty; There Are Guideposts and Waymarks

The remainder of this section of the paper is devoted to identifying what might be starting points for the *Ray Corollary Task Force*. What is set forth here is not intended to be prescriptive. It is, rather, intended to describe some of the things that the *Task Force* might draw on. In addition to what is described here, there are, no doubt, other initiatives underway by various entities that have gone unnoticed; therefore, this section is not intended to be exhaustive of the potential sources of experience and wisdom.

Much of the literature on diversity initiatives is focused on programs inside organizations and concern first-time hiring, lateral hires, and promotion to more responsible positions in the organization. That fact, notwithstanding, the authors believe that the difference, between the selection of arbitrators to resolve a dispute and the selection of persons for hiring and promotion, are differences without meaningful distinction. In both instances, the goal is to remove the operation of unconscious bias from the selection process. Similar strategies will be required in the plans for increasing diversity and inclusion in the selection of arbitrators and the selection of persons for hiring and promotion.

First, the authors believe that the lack of diversity in the selection of arbitrators (and other ADR neutrals) in labor and employment disputes is a national problem.[83] That problem requires the commitment and efforts of all entities in the ADR community. Hence, a national coordinated effort is called for—one that invites all stakeholders to participate. The *Task Force*, therefore, would be the steering-body for the *Ray-Corollary Initiative* and would serve a clearinghouse and certification function. With the assistance of diversity experts (e.g., Diversity Lab), the *Task Force* would develop the plan of action to be implemented by those participating in the *Ray Corollary Initiative*.

83. Indeed, the problem of arbitrator selection because of bias is not limited to labor-management and employment arbitration. The problem can be found in commercial and international arbitration as well; however, it is beyond the scope of this paper to embark on the nuances of the issues facing those other arbitration arenas.

The *Task Force*, or its designee, would be responsible for certifying that participating entities are acting consistently with the *Task Force* plan and are meeting targeted goals. Participating entities should be encouraged to have task forces in their respective organizations that would be responsible in those participating enterprises to monitor and to oversee the implementation of the *Ray-Corollary Certification* strategies.[84] Evidence suggests that enterprise task forces help to create "buy-in" among those responsible for implementing the diversity initiative. Because of the periodical progress reports, peers and superiors will know the degree of success of each *Ray Corollary Certification* participant.

Earlier in this paper, the authors referenced a 2004 experiment to increase diversity in the mediation of high-stakes disputes in commercial mediation—***ACCESS ADR***.[85] That initiative proceeded under the auspices of an advisory board made up of a major ADR-services provider and ADR-services users. The advisory board was essentially

84. *See* Frank Dobbin & Alexandra Kalev, *Spotlight on Building a Diverse Organization, Why Diversity Programs Fail*, *And What Works Better*, HARV. BUS. REV., (July-Aug., 2016), https://hbr.org/2016/07/why-diversity-programs-fail (quoting that "diversity task forces promote social accountability because members bring solutions back to their departments—and notice whether their colleagues adopt them.").

85. MARVIN E. JOHNSON & HOMER C. LA RUE, ACCESS ADR-HEWELETT GRANT APPLICATION: RESPONSE TO PROPOSAL NARRATIVE QUESTIONS 1 OF 17 (2004) (Off. of Homer La Rue) (The description and mission of ACCESS ADR are explained as follows:

> ***ACCESS ADR*** is an independent project with an advisory board charged with the oversight and the overall administration of the project. Oversight and administration include: (a) the selection of fellows for the program; (b) the evaluation of the fellows during their tenure in the program; (c) providing mediation cases for fellows during their tenure in the program; (d) overseeing the subsequent mentoring efforts of the fellows.
>
> ***ACCESS ADR*** is an initiative to increase the exposure of experienced ADR professionals (with at least five years of experience) who are from ethnic and racial groups, who are available and qualified to handle high stakes/complex cases, but who are under-utilized in the ADR field.
>
> * * *
>
> Messrs. Johnson and La Rue are the co-founders and initiators of ***Access ADR***. The program was further described in the grant application:
>
> ***ACCESS ADR*** Fellows will be in the program for a period of twelve (12) to eighteen (18) months. During that period, they will be assigned to mediations that members of the . . . [Advisory Board] will assist in providing. Project Fellows will be paid by the parties at the prevailing rate for mediators of experience in the region in which they are working. ***Access ADR*** Fellows will be assigned approximately two (2) cases per month for a maximum of twenty-four (24) cases during their tenure in the program. Fellows will be evaluated by the parties to their respective mediations. Those evaluations will be shared with the . . . [Advisory Board] who, in turn, will provide feedback to the Fellows.
>
> At the end of the program, the Fellows will be awarded a certificate of completion. Some Fellows will be asked by the Board to become formal mentors for future groups of ***Access ADR*** Fellows. Members of the Advisory Board will be asked to use their best efforts to continue to assist former Fellows by helping them to further their careers as full-time ADR neutrals. "*ACCESS ADR*"—HEWLETT GRANT APPLICATION at **Cover Sheet**.).

a national task force. The model might be useful in formulating the *Ray Corollary Task Force*, and useful as a guide to the organization of the *Task Force.*

Second, the authors believe that a key ingredient for the success of a diversity initiative, of the type described here, is that service providers and users agree to a plan with substantially the following elements:

a. That users of neutral services affirmatively demonstrate that they have considered persons of color and women—at least 30% of the candidate pool—for appointments as arbitrators, mediators and other ADR neutrals;
b. That providers of arbitrator rosters make such consideration by the users possible by providing appropriate selection lists;
c. That the results of such affirmative considerations by service users should be objectively measured and reported periodically to the *Task Force* or its designee, peers and superiors for the purpose of certifying that the 30% consideration requirement is being adhered to.

The elements set forth above come under the headings of *social accountability* and *transparency*, defined simply as " . . . [the] need to look good in the eyes of those around us."[86] In the context of the instant discussion, participants in the *Ray Corollary Initiative* will "look good in the eyes of those around . . . [them]" if they are reported to have met the 30%-consideration goal.[87] The effectiveness of *social accountability* to achieve program success is illustrated in a field study conducted at MIT's Sloan School of Management:

> A firm found it consistently gave African Americans smaller raises than whites, even when they had identical job titles and performance ratings. So . . . [the researcher] suggested transparency to activate social accountability. The firm posted each unit's average performance rating and pay raise by race and gender. Once manag-

86. Dobbin & Kalev, *supra* note 84.

87. The firm of White and Case has participated in the *Mansfield Certification* since the inception of the program. The firm's website clearly states the importance of the "30% consideration factor" as an important element its success in reaching its *Mansfield Certification* goals. In pertinent part, it reads:

> "The 30 percent metric and the built-in accountability have had a positive effect on encouraging our leaders to expand the pool of talented lawyers they develop and select as the next generation of leaders," said White & Case Vice Chair David Koschik (New York). "Our Plus rating demonstrates that we are continuing to succeed at increasing diversity in key leadership roles."

https://www.whitecase.com/firm/awards-rankings/award/white-case-receives-2019-mansfield-rule-certification-plus?s=mansfield.

> ers realized that employees, peers, and superiors would know which parts of the company favored whites, the gap in raises all but disappeared.[88]

Control tactics and injunctive managerial techniques are not effective, according to current thinking, to bring about successful diversity initiatives.[89] There is less diversity, and there is resentment among managers about, from their perspective, being coerced. The lessons learned in the trials and errors in establishing organizational diversity initiatives should be heeded by the *Ray Corollary Task Force*. "It's more effective to engage . . . [the lawyers doing arbitrator-selection] in solving the problem, [to] increase their . . . [professional] contact with . . . [the pool of available arbitrators of color and who are women,] and [to] promote social accountability—the desire to look fair-minded."[90]

A third ingredient for any action plan devised by the *Task Force* ought to focus on creating opportunities for contact between persons of color and women, seeking to be selected as arbitrators, and those doing the selection. If it is true, as the authors state in the title of this paper, "I choose who I know", then the pool of persons, whom the selectors know must be expanded. There is evidence that contact between groups can lessen bias. Increased professional contact between the ***Access ADR*** Fellows and the members of the Advisory Board was a key element of the planned structure of the program.

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88. *Id*. (explaining that the field study was conducted by Emilio Castilla, MIT Sloan Sch. of Mgmt); *see* Emilio J. Castilla, *Accounting for the Gap: A Firm Study Manipulating Organizational Accountability and Transparency in Pay Decisions*, 26 Organ. Sci. J., 311, 311 (2015).

89. *Id.* (quoting that "In analyzing three decades' worth of data from more than 800 U.S. firms and interviewing hundreds of line managers and executives at length, . . . [researchers saw] . . . that companies get better results when they ease up on the control tactics. It's more effective to engage managers in solving the problem, increase their on-the-job contact with female and minority workers, and promote social accountability—the desire to look fair-minded.").

90. *Id.*; *see also* Pamela Babcock, *Diversity Accountability Requires More Than Numbers*, SHRM (Apr. 13, 2009), https://www.shrm.org/ResourcesAndTools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/Pages/MoreThanNumbers.aspx (explaining that the experience expressed by successful diversity officers, the author recounts their statements as noting that "[i]n addition to quantitative measures, diversity and inclusion success should be measured, and rewarded, based on qualitative factors—including key behavioral changes that can create cultural shifts . . . When it comes to creating accountability for diversity and inclusion, experts suggest that organizations: Keep the process clear, simple and understandable. Make sure that the idea of scorecards and accountability is aligned with the culture of your organization, Sodexo's Anand said. "If you don't have metrics and scorecards for other things you can't just have them for diversity." Think carefully about the behaviors that you want. Sodexo first focused heavily on outcome or "quota" metrics such as recruiting, retention and promotion, when in retrospect, Anand said, "we should have focused more on the qualitative measures because those are the behavior changers."").

In closing this section of the paper and the overall discussion, the authors reiterate that this section is not intended to prescribe a way forward. It is intended only to note that there *is* a path forward, and that the path is not untrodden. There are guideposts, markers and, of course, new directions to which this path will lead. It is now time to step onto that path to begin the journey.

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