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# THE RESOLUTION ISSUE

## The Changing Face of Arbitration



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**A**rbitration in California entered new territory Jan. 1, when SB 707 took effect to nudge ADR providers toward greater diversity on the rosters of arbitrators they offer clients.

From now on, providers must report arbitrator candidate aggregate data that take account of ethnicity, race, disability, veteran status, gender identity and sexual orientation as reported by the arbitrators.

The issue gained national attention after the rap mogul Jay-Z complained in 2018 that there were nearly hardly any neutrals on a roster of arbitrators in New York available to hear his trademark and contract dispute over a clothing line. In early 2019 a selection of African-American candidates was offered and the beef was smoothed over, demonstrating a point the rapper had made earlier: “Everybody needs a chance to evolve.”

But even before the Jay-Z controversy, the ADR industry in California tried to diversify its arbitration panels, a reflection of the state’s diverse population and business community.

JAMS was the first major ADR provider to add an inclusion rider option in 2018, seeking to increase the number of women appointed as arbitrators. The clause is modeled on the Equal Representation in Arbitration pledge, which JAMS signed onto in 2016. Said Kimberly Taylor, JAMS’ senior vice president and chief legal officer, “We’ve identified this as a challenge. We can provide a diversity of neutrals, but the parties have great latitude in whom they select. Will reporting the demographics move the needle? We’re certainly in favor of anything that helps.”

In 2019, Taylor added, JAMS amped up its effort by bringing on a diversity program manager to work with law firms, house counsel and affinity bar organizations to broaden the selection of mediators and arbitrators.

Hiro N. Aragaki joined JAMS last year. He has worked as a neutral since 2001 and teaches international and domestic commercial arbitration and mediation at Loyola Law School. “Very experienced older judges have been the norm in the past,” he said. “Now, more sophisticated users of ADR are realizing that just because you were a judge, that doesn’t necessarily make you a great neutral.”

As for finding Asian-Americans in the field, “It makes sense to have a diverse panel, not just along race and gender but also things like practice background and expertise, but the reality is that there are very few racial minorities working now,” Aragaki said. “And although there are lots of successful Asian-American litigators, increasing diversity on neutral provider rosters isn’t easy. Even if providers do have diverse rosters, that doesn’t mean you’ll be selected. For example, Asian parties are not necessarily going to select Asian neutrals, and not all at JAMS are equally busy. SB 707 is a positive development and even though change comes slowly, it’s happening.”

The new law addresses an old problem. “We’ve been too traditional. The industry has not been progressive,” said Lars C. Johnson of Signature Resolution LLC in Los Angeles. “Go into my office, the neutrals are older guys.” Johnson is 46. “I’m darn near the youngest guy doing what I do in Southern California,” said the mediator and arbitrator, a former plaintiff-side personal injury trial lawyer. “I connect with the younger lawyers who appear before me. I can bridge ethnic and cultural and age differences.”

Johnson said he represents the future. “Glad to say, my firm took me on enthusiastically. We’d love to see more young people of different backgrounds come knocking. We’re pushing change here.”

Maria-Elena James joined ADR Services Inc. 18 months ago, following 30 years on the state and federal bench. As a judge and woman of color she sometimes saw racial and gender prejudice directed her way in court, but that hasn’t been a problem for her in her new role. “Nobody can deny that bias exists, but I can’t complain because I’ve been doing so well here,” she said. “The intent of the new law is a good one — because we serve the public, it really helps to bring diversity into our workplace.”

She said she has spoken to younger colleagues of color about joining her in the ADR industry, but finds resistance. “There’s an anxiety about whether they’d be chosen [from rosters of neutrals to serve on panels], and it can be hard to address that concern. We’re going to need to be able to incentivize minorities to come in.”

Amy F. Solomon, a former Girardi Keese partner, signed on at Judicate West in January 2019. “In my 30 years in the legal business I’ve always been in the minority as a woman,” she said. “The profession has been a bit slow in recognizing the importance of diversity. That was a motivating factor when I moved to Judicate West. I had a niche practice representing women in medical malpractice and other cases that were sensitive and specific to women. Clients would sigh with relief when they found a woman to represent them but when we ended up in mediation or arbitration it was very difficult to find a woman neutral. That caused discomfort. Now it’s really nice to be that woman neutral who is available in such cases.”

Judicate West was looking to create more diverse panels, which is



Phyllis W. Cheng, Esq., mediator and arbitrator, ADR Services, Inc.

why Solomon chose to work there, she said. “How do you recruit more of us? That’s a multi-faceted chicken-and-egg conundrum. The trick is to make it known that people with diverse backgrounds are wanted in the field, and SB 707 will help accomplish that.”

Because so many judges retire to go into dispute resolution, a diversified bench will help transform the ADR field, said Solomon, who sat on the state commission that evaluates judicial candidates. “Jerry Brown put a lot of women and minorities on the bench, which means more of them will eventually become neutrals.”

Democratic state Sen. Robert A. Wieckowski of Fremont, an attorney who sponsored SB 707, pointed to a 2015 national survey of practicing employment arbitrators that found 74 percent were male and 92 percent were non-Hispanic white. Wieckowski said Jay-Z’s plight did not inspire the California legislation but “certainly highlights the need for more diversity in the arbitration industry.”

The law could well reinforce another — SB 766 — that newly boosts the state’s profile on the international commercial arbitration circuit

by quashing protectionist rules that discouraged the growing practice. As commerce tilts toward Asia, multicultural arbitrators will likely be increasingly in demand in a thriving California market.

The new diversity law is timely and essential, according to the prominent international commercial arbitrator Cedric C. Chao. "There are very few Asian Americans in the world of domestic and international big dollar disputes," he said. "SB 707 opens the door by shedding light on the offerings of each institution, and that's all to the good. A client from Asia wants a panel member who can appreciate the different cultures' different ways of expression. In Asia it's not contentious in the same way as in American litigation. Diversity is a helpful factor in approaching this reality."

SB 707 is a potentially potent nudge toward better minority recruitment. The law is intended to persuade providers to hire neutrals who don't look like their predecessors. Meanwhile, those already in the vanguard of the new wave of arbitrators show that arbitration rosters can indeed include young folks, females and the racially diverse.

Lexi W. Myer became a JAMS neutral two years ago. At 44, "I'm among the younger arbitrators working," she said. Earlier, she did legal research for the company after a stint as a litigator. "I haven't experienced any pushback. People are increasingly open to folks like myself doing the job. Some of JAMS' clients want contemporaries in the arbitrators' role. Clients come from all kinds of backgrounds, and it is important for us to mold ourselves to fit the diverse community we serve."

Adrienne C. Publicover joined JAMS in 2016 after a quarter-century litigation career. "Every single arbitration I ever had as a litigator was presided over by a man," she said. "That world was pale, male and stale. But JAMS encouraged me because of my subject matter expertise in health care, insurance and ERISA to train as an arbitrator. They're not just paying lip service to this. Often when I go in now to hear a case, at least half the attorneys are women. Things are changing."

She made the move to life as a neutral to reduce career stress after a health crisis. "People ask what's the barrier to entry and I say poverty,"

Publicover said. "I had a good book of business, and then I got breast cancer. Work as a neutral was always something I wanted to do, but I thought it would come later in my career. Now I see it as a fabulous profession — even though you go in like a startup and get paid only a proportion of what you bring in."

Angela J. Reddock-Wright transitioned to Judicate West on Jan. 1 after eight years as the founder and managing partner of Los Angeles' Reddock Law Group, specializing in employment and labor law, mediations, arbitrations and workplace investigations. "I'm excited to be among the few women of color in this field," she said. "I consider it my duty to make sure I'm not the last one. Lack of diversity has clearly been an issue in our profession. Here in L.A., lots of employment issues involve litigants of color, but there haven't been a lot of choices among neutrals. Panels should reflect the diversity of the society we live in, not be reserved for a chosen few. SB 707 brings the issue out of backroom conversation into the light."

Melissa Blair Aliotti of Sacramento joined Judicate West in 2018 after more than 30 years as a litigator. "The pipeline lacks females, and women in the field aren't being used as frequently as men," she said. "It has been best practice for providers to track diversity for years, and it is unfortunate that the Legislature has to mandate that they do it in public. How long are we going to be saying that diversity is the right thing to do — while we haven't done it yet? We used to say things are moving at glacial speed, but glaciers move faster than this."

When Aliotti speaks to youth groups holding mock trials, she encourages them to push themselves to stay engaged with the judicial system. "I tell young people to stay with it. We all have a responsibility to encourage diversity at all levels."

Jay C. Gandhi served for eight years as a magistrate judge overseeing the Central District of California's ADR program before joining JAMS as a mediator and arbitrator in 2018. He was the first federal judicial officer in California from a South Asian family background. "The root of arbitration is in contract law, so SB 707 data should help people select more diverse panels, because better

data keeps the topic top of mind," he said. "Inclusivity is an issue that plagues the entire profession, from law firm partnerships to the bench. This is a move on a long road that has a long way to go."

"My background is one factor that keeps me in demand," he added. "I'd certainly like to see more diverse neutrals in the profession. What will help will be public attention married to outreach and the ability of providers to groom minorities for success."

Sidney K. Kanazawa, who worked for 40 years as a litigator, moved in September 2019 to Los Angeles' Alternative Resolution Centers at the suggestion, he said, of ARC President Amy Newman, a friend of long standing. "There aren't many of us Japanese-Americans in the business," Kanazawa said, "but I am finding it personally very satisfying. I'm glad I made the move." He said the disclosures required by SB 707 are likely to improve the profession. "The bill provides sunshine, and it gives a green light to many who may not have considered themselves a fit with the world of alternative dispute resolution. Because of the limited nature of appeals in arbitration, the composition of panels is of the utmost importance. SB 707 shows the ADR community welcomes more perspectives."

Phyllis W. Cheng said that she's sought as an ADR Services Inc. neutral due to her gender, her Chinese American background and the fact that she speaks three Chinese dialects. She is a former DLA Piper LLP partner and the former director of the California Department of Fair Employment and Housing.

"I've been told by clients they wanted a woman for, say, sexual harassment cases," she said. "And I've handled several cases recently in which my language skills were needed." She said that SB 707 will draw needed attention to the diversity issue, which is based on the great varieties of human experience. "People are complicated. It's not obvious, but I am actually a convert to Judaism. I disclose that too when it's called for. A lot can be hidden in a person, and it is wonderful to see the legal profession diversifying. There was a time when women could hardly go to law school. So we take the long view."

Also at ADR Services is Stacie Feldman Hausner, who joined three

years ago after a 15-year litigation career. "A big group of lawyers only want to use judges as neutrals," she said, "so I went back to school at Pepperdine to get a LL.M. at the Straus Institute for Dispute Resolution."

Now she said she feels equipped, though it hasn't been easy. "I'm under 50 and female, but this is a hard profession to crack because it's so saturated," she said. "There is already a shift happening toward a more inclusive demographic because some of the older male judges working as neutrals are retiring now."

JAMS neutral Shirish Gupta practiced commercial and employment law and is a former president of the South Asian Bar of Northern California. He joined JAMS in 2015. "I saw that mediation and arbitration were how most of my litigation cases were resolving, so I got training, hung out my shingle and flew around the state offering my service pro bono for a time. It helped me develop my style. By 2015 I had grown enough to jettison my practice and be a full time neutral."

About 10 percent of his practice involves South Asian clients. "There are just a handful of us; I was the first at JAMS. Now, I am actively recruiting folks to consider this as a career. You don't have to be a retired judge to get here. Lack of diversity can be a perceived injustice."

Suzanne G. Bruguera joined ADR Services three years ago after 27 years on the Los Angeles Superior and Municipal Courts. She once was unsuccessfully challenged for retention based on her ethnic forename, Soussan, she said, which she later changed. "I'm Armenian and Russian, raised in Iran," she said. "Now, as a neutral, I find we female retired former judges are very sought after. I'm sure people have said no because I'm a woman, but I have plenty of cases."

SB 707 will encourage transparency, she said. "I encourage people to work as a neutral by telling them, 'Do a good job and you'll be busy.'"

As for Jay-Z, "We're pleased to see how quickly California moved on this," said his lawyer, Alex Spiro, a New York partner at Quinn Emanuel Urquhart & Sullivan LLP. "So much gets resolved in these closed forums. [The new law is] definitely cool; we want to be agents of progress and change."