

Are We There Yet? The Path Forward on Bias Elimination and Diversity in ADR

DRC Annual Conference 2022

Kelly Overstreet Johnson

Overstreet Johnson Mediation & Arbitration

Ana Cristina Maldonado

Upchurch Watson White & Max

About the speakers

▶ Kelly Overstreet Johnson

- ▶ Florida Supreme Court certified circuit civil mediator
- ▶ Florida Supreme Court qualified arbitrator
- ▶ AAA Arbitrator (large complex, commercial, employment & consumer panels)
- ▶ Panelist, Alterity ADR
- ▶ Member, The Florida Bar for 40 years
- ▶ Full time ADR practice across Florida since February 1, 2022
- ▶ Prior litigator and mediator/arbitrator in private practice
- ▶ Past President: The Florida Bar
 - Tallahassee Bar Association
 - Tallahassee Women Lawyers
- ▶ Co-Chair, ABA Litigation Section ADR Committee
- ▶ Member, National Academy of Distinguished Neutrals

▶ Ana Cristina Maldonado

- ▶ Florida Supreme Court certified mediator (County, Family, Circuit Civil, Dependency)
- ▶ Florida Supreme Court qualified arbitrator
- ▶ Panel member for Upchurch, Watson, White & Max
- ▶ Member, National Academy of Distinguished Neutrals
- ▶ Member, Florida Academy of Professional Mediators
- ▶ Member, The Florida Bar for 11 years
- ▶ Primary Trainer of Circuit Civil and Family mediators
- ▶ Assistant Trainer of Dependency and County mediators
- ▶ Appointed to Mediation Qualifications Discipline and Review Board
- ▶ Treasurer, ADR Section of The Florida Bar
- ▶ Chair of Diversity Committee, ADR Section of The Florida Bar
- ▶ Regional Co-Chair, Women in Dispute Resolution, American Bar Association

Our discussion today: Are the legal and ADR professions meeting diversity demands?

- ▶ Diversity within The Florida Bar and with ADR professionals
- ▶ What do the current statistics show us?
- ▶ Why is it challenging?
- ▶ How can we improve upon diversity?
- ▶ Ideas about moving forward
- ▶ Examples of continuing efforts to diversify mediators and arbitrators
- ▶ What can be done to help
- ▶ Welcome questions as we go along and will also have time at end of presentation for questions

From The Florida Bar Mission Statement:

- ▶ “To increase diversity and inclusion in The Florida Bar so that the Bar will reflect the demographics of the state, to develop opportunities for community involvement, and to make leadership roles within the profession and The Florida Bar accessible to all attorneys, including those who are racially, ethnically and culturally diverse, women, members of the LGBTQ community and persons with disabilities.”
- ▶ <https://www.floridabar.org/about/diversity/>
- ▶ From the Diversity Symposiums - begun in 2004.
- ▶ The Florida Bar Committee on Diversity and Inclusion - created in 2010
- ▶ <https://www.floridabar.org/about/cmtes/cmtes-cm/cmte-cm315/>

The Florida Bar - Definition of “Diversity”

- ▶ The Florida Bar wanted diversity to be interpreted as broadly as possible.
- ▶ Recognizing the term “diversity” has a dynamic meaning that changes as the demographics of Floridians change, TFB chose not to try to define diversity in ways which could limit its application to future changes.
- ▶ “Apart from differences in race, color, gender, national origin, religion, age, sexual orientation, citizenship, and geography, to mention a few, the public and our profession will experience changes in thought, culture, and beliefs. These demographics are constantly in flux. Defining “diversity” based on current differences would limit its application to future changes, and likewise restrict or limit The Florida Bar’s consideration of and response to such changes.”
- ▶ Recommendation 1 for TFB’s Diversity Initiative

Florida Supreme Court Standing Committee on Fairness and Diversity

- ▶ “The Florida Supreme Court Standing Committee on Fairness and Diversity was established to help advance the State Court System’s efforts to eliminate from court operations bias that is based on race, gender, ethnicity, age, disability, financial status, or any characteristic that is without legal relevance.”
- ▶ <https://www.flcourts.org/Administration-Funding/Court-Administration-About-Us/Standing-Committee-on-Fairness-and-Diversity>

Florida ADR Institutions on “Diversity”

- ▶ Diversity has been taken into consideration in Florida ADR. For example:
 - ▶ mediator certification courses require 1 hour of training on diversity
 - ▶ bias elimination CME requirement
 - ▶ the collection of demographic information from mediators
 - ▶ DRC’s annual conference in 2016 focused on the topic
 - ▶ Diversity in appointments to the ADR R&P, MEAC, & MQDRB
- ▶ There are no “big picture” policy commitments or institutional entities that focus on promoting diversity in ADR or monitoring the same. For example:
 - ▶ The Florida Rules for Certified and Court-Appointed Mediators are silent on diversity issues outside the discussion of neutrality and impartiality
 - ▶ Florida-based ADR organizations are not structured to promote and monitor diversity

2020 Census - Florida

- ▶ Florida has 331 million people.
 - ▶ Racial and Ethnic Groups
 - ▶ White alone 61.6%
 - ▶ Black alone 12.4%
 - ▶ Hispanic 18.7%
 - ▶ Asian alone 6%
 - ▶ Native Hawaiian and Other Pacific Islander alone 0.2%
 - ▶ American Indian and Alaska Native alone 1.1%
 - ▶ Gender
 - ▶ Male 48.9%
 - ▶ Female 51.1%

2021 Members of Florida Bar by Race and Ethnicity (MIGS, in Florida)

Source	Total	No Data Available	White (Non-Hispanic)	African American	Hispanic	Asian American / Pacific Islander	American Indian / Alaska Native	Other
Florida Bar (#)	94,634	39,783	43,751	2,400	6,787	831	88	986
Florida Bar (%)	100%	42.0%	46.2%	2.5%	7.2%	0.9%	Less than 0.0%	1.0%
Census 2020	331M	-	61.6%	12.4%	18.7%	6.2%	1.1%	-

Florida Bar Public Records Request Report, December 2021. Data includes judges.

2021 Florida Judges (County, Circuit, Appellate and Supreme Courts) by Race and Ethnicity

Total	No data	White (Non Hispanic)	African American	Hispanic	Asian American	American Indian	Other
1533	402	922	76	107	11	0	15
1533	26%	60%	5%	7%	1%	0%	1%
Census 2020	-	62%	12%	19%	6%	1%	

Does diversity impact the public's perception of judicial system?

- ▶ Yes - Studies show diversity affects the public's perception of the judiciary as a fair and impartial arbiter of justice.
- ▶ While we lack ADR-related data equivalent to what we have from the courts, it is fair to infer that diversity in the ADR community also impacts the public's perception of the impartiality of the ADR.
- ▶ With the exception of court-annexed programs, ADR service providers operate as a “private” judicial system.

Perception of the court system

Florida courts treat Caucasians and minorities alike.								
	Attorneys	Judges	Staff	Jurors	Litigants		Non-Hispanic White ²⁴	Minorities ²⁵
# Responses	1,319	240	1,082	1,211	1,136		3,689	874
Agree	55%	79%	72%	82%	50%		70%	43%
Disagree	26%	13%	12%	3%	26%		12%	36%

2008 Final Report on Perceptions of Fairness in the Florida Courts, by the Florida Supreme Court Standing Committee on Fairness and Diversity, p. 30

<https://www.flcourts.org/content/download/218224/file/FairnessDiversityReport.pdf>

Perception of the court system

Have you seen or experienced unfair treatment of individuals in Florida courts based on their race or ethnicity?					
	Attorneys	Judges	Staff	Non-Hispanic White	Minorities
#Responses	1,321	236	1,038	2,204	293
Yes	32%	24%	12%	19%	47%

2008 Final Report on Perceptions of Fairness in the Florida Courts, by the Florida Supreme Court Standing Committee on Fairness and Diversity, p. 31

<https://www.flcourts.org/content/download/218224/file/FairnessDiversityReport.pdf>

Efforts to diversify Florida's Courts

- ▶ Public's perception has reinforced the need to diversity in judicial system.
- ▶ There have been constant and intensive efforts to diversify the bench. In 2017, the recommendations in the Report of the Florida Bar President's Special Task Force to Study the Enhancement of Diversity in the Judiciary and on the JNC'S included:
 - ▶ Appointment of diverse judicial candidates by the Governor
 - ▶ History of JNC make up and effects on participants
 - ▶ Recruitment and support qualified judicial candidates from historically excluded groups to run in elections
- ▶ Are we there yet?

<https://www-media.floridabar.org/uploads/2017/04/report-of-the-florida-bar-presidents-special-task-force-to-study-enhancement-of-diversity-in-the-judiciary-and-on-the-jncs.pdf>

2021 Florida Certified Mediators by Race and Ethnicity (Attorneys only)

Certificate	Total	Caucasian	African American	Hispanic	Asian American	American Indian	Other/Unk.
County	738	81%	4%	9%	2%	0%	4%
Family	1170	79%	4%	12%	1%	0%	4%
Circuit	2385	83%	3%	9%	1%	0%	4%
Dependency	79	86%	3%	8%	0%	0%	4%
Appellate	268	85%	2%	8%	1%	0%	4%
Census 2020	331M	62%	12%	19%	6%	1%	0%

DRC Mediator Search Reports, on 7DEC2021

2021 Florida Certified Mediators by Race and Ethnicity (Attorneys & Other Professionals)

Certificate	Total	Caucasian	African American	Hispanic	Asian American	American Indian	Other/Unk.
County	2033	61%	14%	10%	2%	0%	13%
Family	2246	66%	9%	11%	1%	0%	13%
Circuit	3293	72%	5%	8%	1%	0%	14%
Dependency	204	75%	6%	12%	1%	0%	5%
Appellate	414	73%	6%	9%	1%	0%	11%
Census 2020	331M	62%	12%	19%	6%	1%	0%

DRC Mediator Search Reports, on 7DEC2021

2021 Members of Florida Bar by Gender (MIGS, in Florida. Judges excluded)

Certificate	Total	Male	Female	Without Information
Florida Bar (#)	93,095	56,124	36,958	13
Florida Bar (%)	100%	60.3%	39.7%	Under 0.01%
Census 2020	331M	48.9%	51.1%	Only male and female options were asked; no “other” category

Florida Bar Public Records, review by salutations Mr., Mrs., Ms., Col. Lt. Col, Maj., Dr., Rev., Gov., and without information). 1,533 judges - “Hon.” removed from total and percentages. December 2021

2021 Florida Certified Mediators by Gender (Attorneys only)

Certificate	Total	Male	Female	Other/ Unk.
County	738	55%	44%	0%
Family	1170	42%	58%	0%
Circuit	2385	68%	31%	1%
Dependency	79	29%	71%	0%
Appellate	268	61%	39%	0%
Census 2020	331M	49%	51%	NA

DRC Mediator Search Reports, on 7DEC20201

2021 Florida Certified Mediators by Gender (Attorneys & Other Professionals)

Certificate	Total	Male	Female	Other/ Unk.
County	2033	42%	51%	7%
Family	2246	34%	60%	6%
Circuit	3293	62%	31%	6%
Dependency	204	30%	68%	1%
Appellate	414	60%	37%	4%
Census 2020	331M	48.9%	51.1%	NA

DRC Mediator Search Reports, on 7DEC20201

Florida Qualified Arbitrator data

- ▶ The DRC maintains the list of Qualified Arbitrators in Florida.
- ▶ There is no database publicly available on the DRC web page.
- ▶ The list of Qualified Arbitrators does not include any demographic information categories.

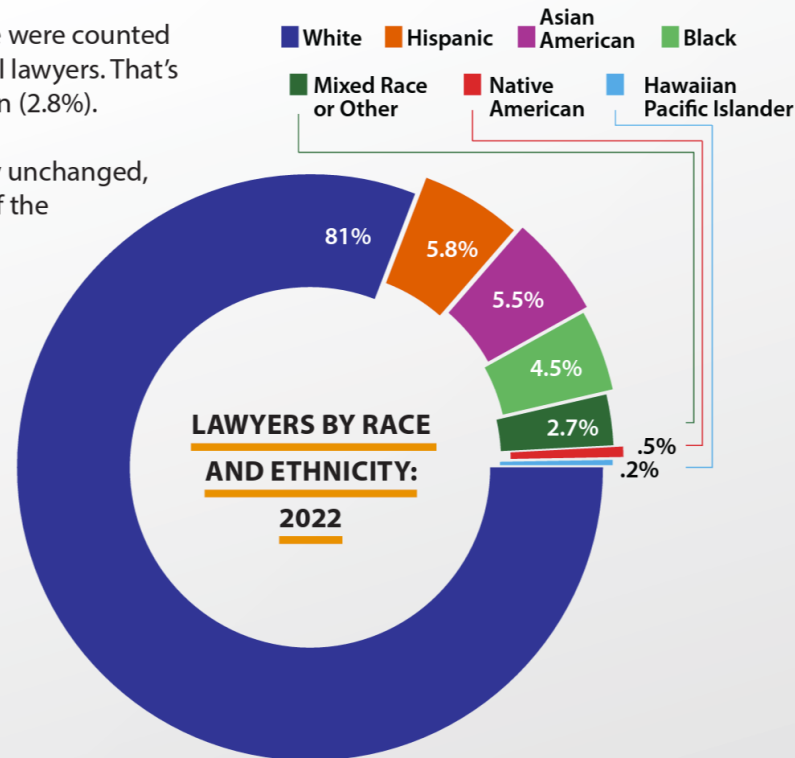
American Bar Association 2022 Profile of the Profession Report (Race and Ethnicity of lawyers in the U.S.)

The number of mixed-race lawyers also grew. None were counted in 2014 and 2015, but by 2022 they were 2.7% of all lawyers. That's almost identical to their share of the U.S. population (2.8%).

Meanwhile, the number of Black lawyers is virtually unchanged, according to the survey. Black lawyers were 4.7% of the profession in 2012 and 4.5% in 2022. That's far less than the percentage of Black people in the U.S. population (13.4%).

Native Americans are the smallest racial or ethnic group among U.S. lawyers. One-half of 1% of all lawyers (0.5%) were Native American in 2022 – nearly unchanged from 0.6% a decade earlier. The U.S. population is 1.3% Native American.

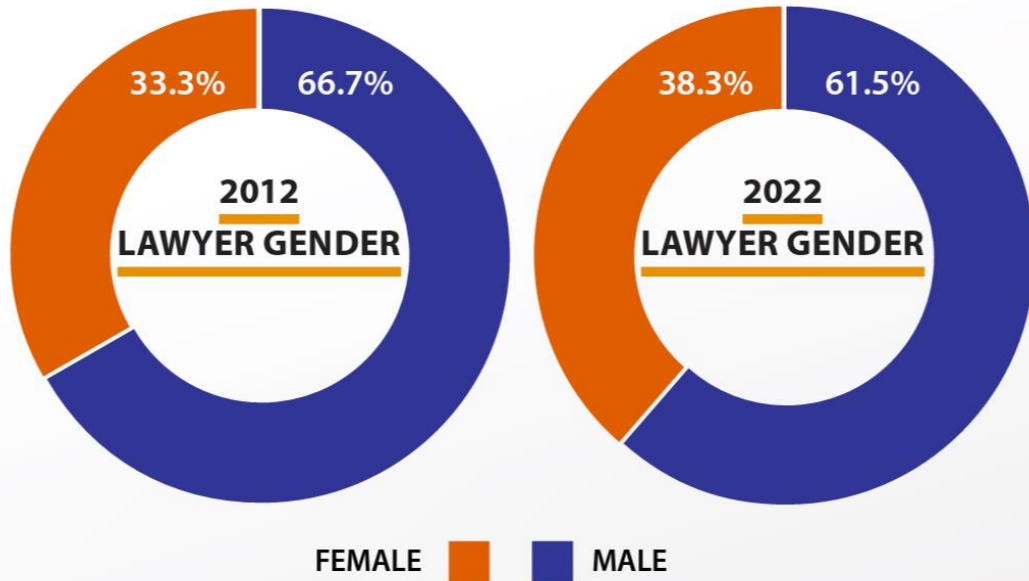
Finally, the percentage of white lawyers has declined. White lawyers were 88.4% of the profession in 2012, but 81.0% in 2022. They are still overrepresented compared to the U.S. population. Non-Hispanic white people are 60.1% of the national population. ■



Source: ABA National Lawyer Population Survey / U.S. Census Bureau

American Bar Association - 2022 Profile of the Legal Profession

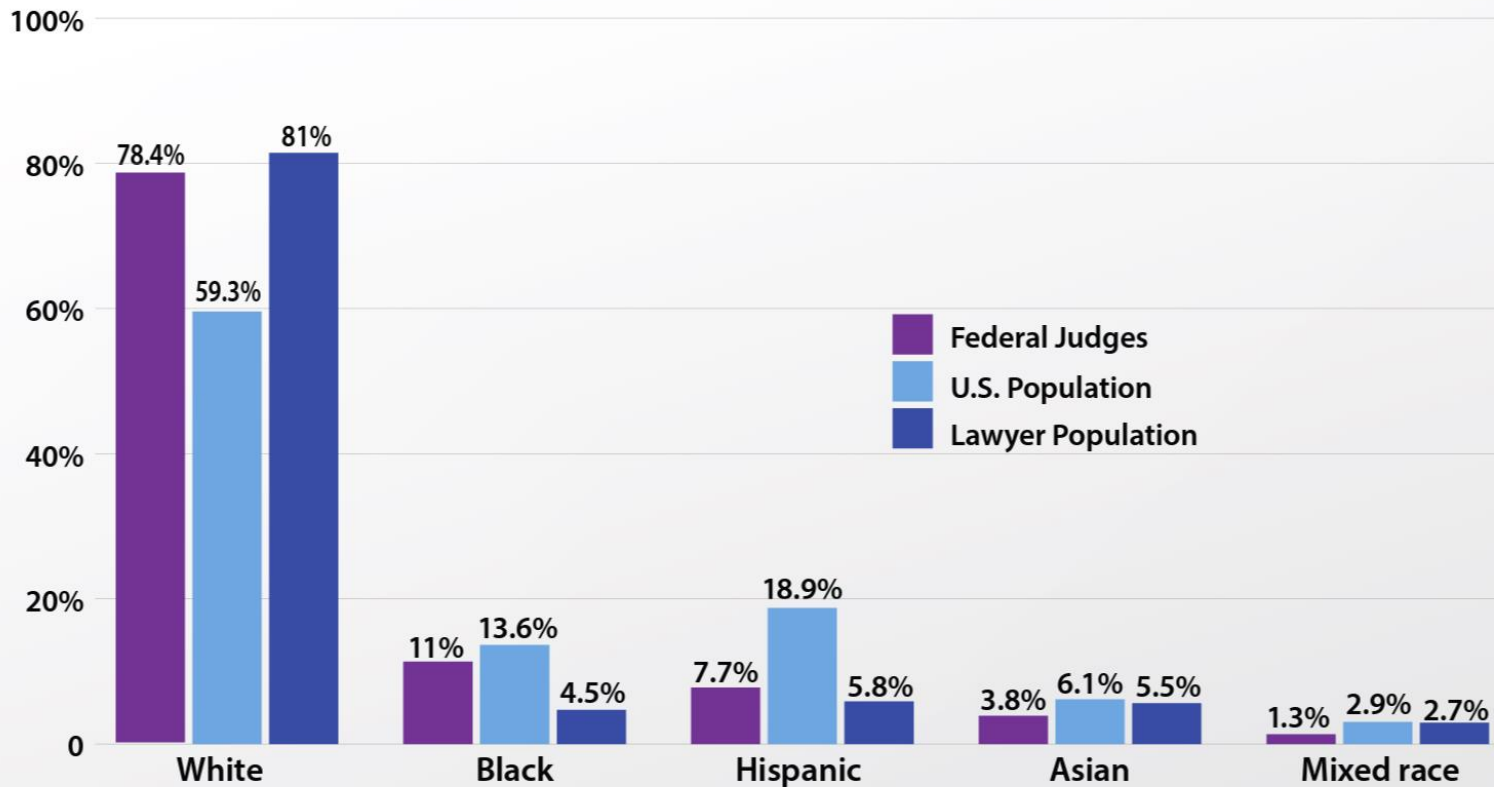
American Bar Association 2022 Profile of the Profession Report (Gender of lawyers in the U.S.)



FAST FACT:

Most state bars and state licensing agencies track gender in the profession, but not all do. In 2022, 44 states reported the number of male and female lawyers – up from 42 states in 2011.

**FEDERAL JUDGES BY RACE AND ETHNICITY
COMPARED TO U.S. POPULATION AND LAWYER POPULATION: 2022**



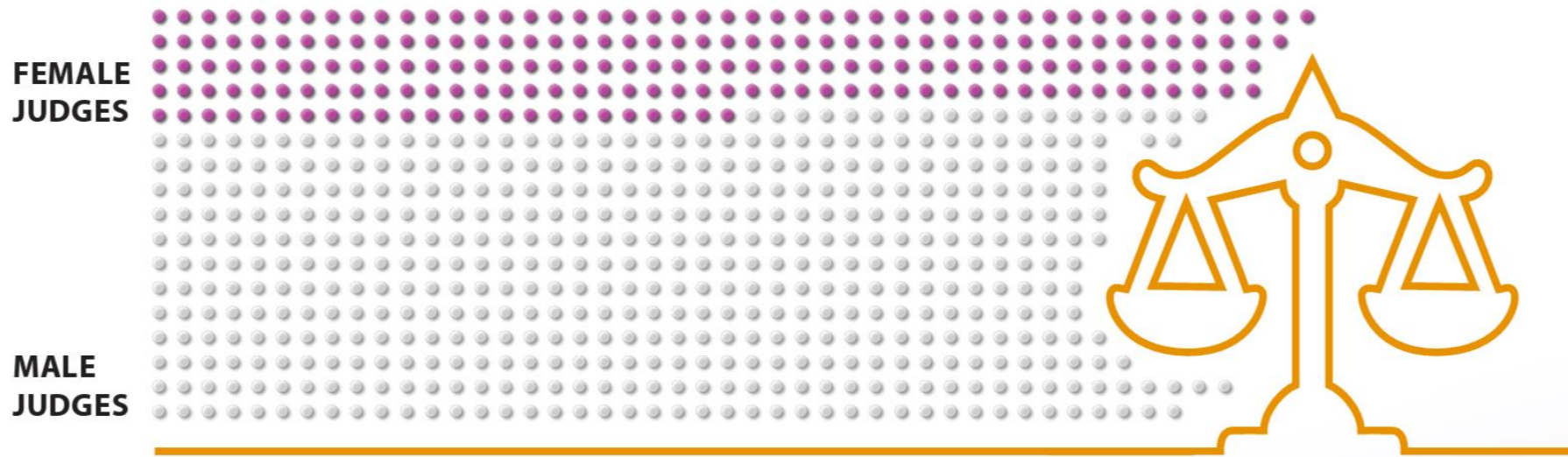
Source: Federal Judicial Center / ABA National Lawyer Population Survey / U.S. Census Bureau

JUDGES

FEDERAL JUDGES BY GENDER, RACE AND ETHNICITY

FEDERAL JUDGES BY GENDER: 2022

1 dot = 2 judges



FEMALE
JUDGES

MALE
JUDGES

TOTAL FEDERAL JUDGES: 1,409
as of July 1, 2022

GENDER
of the Federal Bench: **70%** MALE

American Bar Association (ABA)

Goal III:

To eliminate bias and enhance diversity

- ▶ Objectives:
- ▶ 1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
- ▶ 2. Eliminate bias in the legal profession and the justice system.

(ABA Mission and Goals. http://www.americanbar.org/about_the_aba/aba-mission-goals.htm (April 14, 2016))

- ▶ *Derived from former Goal IX:*
- ▶ *“To promote the full and equal participation of in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.”*

American Bar Association(ABA) Resolution 105 on Diversity in ADR

- ▶ RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution 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.
- ▶ https://www.americanbar.org/groups/dispute_resolution/resources/aba-resolution-105/

Per ABA 105, lack of diversity in ADR can be traced to two issues:

- ▶ SUPPLY, AKA “THE ROSTER ISSUE”. There is a lack of diverse representation of neutrals on the national rosters, as well as on individual lawyers’ personal “short lists.” Even when they are on rosters, diverse neutrals receive less work.
- ▶ DEMAND, AKA, “THE SELECTION ISSUE”. Neutrals are chosen through networks which lack transparency, and in processes that are affected by the implicit biases of attorneys and clients.

American Arbitration Association (AAA) as an example of efforts to diversify ADR

- ▶ The AAA's Mission and Vision statement asserts a “shared commitment to a diverse Roster of Arbitrators and Mediators.”
- ▶ The AAA has the ability in its algorithms to provide arbitrator lists to parties that comprise at least 20% diverse panelists where party qualifications are met.
- ▶ The AAA Higginbotham Fellows Program is a program created to provide training, networking, and mentorship for up-and-coming diverse ADR practitioners. Fellows not only have advanced to appointment to the AAA Roster but also have been selected to serve on cases--one even has joined the AAA's Board of Directors.
- ▶ As of the end of 2021, the AAA reported that:
 - ▶ 29% of active panel members are women and racially and ethnically diverse.
 - ▶ 50% of new additions to the AAA-ICDR Roster are women and racially and ethnically diverse.

<https://www.adr.org/diversity-and-inclusion>

JAMS sample clause: Diversity and Inclusion Clause for Arbitration Agreements and Contracts

- ▶ “The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.”

<https://www.jamsadr.com/inclusion-clause> ntial arbitrator appointees.

International Institute for Conflict Prevention and Resolution

► Diversity Commitment Sample Clause

- “Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution (“CPR”) [Rules for Administered Arbitration](#) (the “Administered Rules” or “Rules”) by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). The parties agree that however the arbitrators are designated or selected, at least one member of any tribunal of three arbitrators shall be a member of a diverse group, such as women, persons of color, members of the LGBTQ community, disabled persons, or as otherwise agreed to by the parties to this Agreement at any time prior to appointment of the tribunal. Where CPR is to nominate or select the arbitrators, CPR will convene the parties to discuss the selection. In the event the parties desire multiple qualifications, if CPR is unable to accommodate a qualification specified by the parties and diversity, CPR may use its discretion to nominate or appoint a diverse candidate or candidates to serve on the tribunal. [The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s).] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state).”

CPR Diversity Commitment

- ▶ We recognize the imperative of drawing upon the knowledge, experience and talents of all people in preventing and resolving disputes. We also understand that the field of dispute prevention and resolution has not been nearly inclusive enough in its selection of, and reliance upon, diverse neutrals (women, persons of color, members of the LGBTQ community, persons living with disabilities, or other under-represented groups). Therefore, we at CPR and in the corporate and law firm community support greater inclusion of diverse neutrals in our ADR matters, and, as signatories hereto, make the following commitments with respect to disputes venued in the United States:
 - ▶ **FROM THE CORPORATE COMMUNITY:**
We will include diverse neutrals among any list of mediators or arbitrators we propose, and ask our outside law firms and counterparties to do the same. We also ask that our outside law firms discuss with our counterparties the value in diversity and inclusion among those who mediate and arbitrate and emphasize selecting diverse mediators or arbitrators. Finally, to drive accountability and transparency, we will track the selection of diverse neutrals in our matters.
 - ▶ **FROM THE LAW FIRM COMMUNITY:**
We will discuss with our clients the value in diversity and inclusion among those who mediate and arbitrate our matters on behalf of our clients, which discussion may include the importance of:
 - 1) including diverse neutrals among any list of mediators or arbitrators we propose in those matters,
 - 2) selecting diverse mediators or arbitrators in those matters, and
 - 3) tracking the selection of diverse neutrals in those matters.
 - ▶ **FROM CPR:**
 - ▶ To facilitate the selection of diverse neutrals, we will endeavor to include diverse neutrals on any slate of candidates we are asked to provide to the parties, to provide a slate that is made up of at least 30% diverse candidates,^[i] and when given the opportunity to make a default appointment, to appoint at least 30% diverse neutrals.
 - ▶ <https://www.cpradr.org/about/2020-diversity-commitment>

ADR Section of The Florida Bar DEI... (or JEDI) Committee Goals

- Establishing a baseline then **setting, tracking, and reporting on measurable goals for diversity, equity, and inclusion**, with a commitment to accountability and monitoring change over time.
- **Working to raise awareness and support** the implementation of initiatives to address this issue among stakeholders such as:
 - Legal institutions in Florida (e.g. The Florida Bar, its various sections and its Diversity and Inclusion Committee, The Florida Supreme Court Standing Committee on Fairness and Diversity, the courts themselves)
 - Public Sector ADR institutions in Florida (e.g. the Dispute Resolution Center, the ADR Rules and Policy Committee of the Florida Supreme Court, the Mediator Training and Qualifications Board)
 - Private Sector ADR institutions in Florida (e.g. for-profit and non-profit ADR rosters and providers and solo practitioners)

ADR Section of The Florida Bar DEI... (or JEDI) Committee Goals (ctd.)

- **Raising awareness** about ABA Resolution 105 among Section members, neutrals, members of the Florida Bar, and ADR service consumers.
- **Developing model best practices** for increasing diversity in ADR here in Florida, while drawing from national and international models.
- **Targeting voluntary bar organizations** throughout the state with outreach designed to encourage diverse candidates to get trained in mediation and arbitration skills as to enhance their professional skills and lay groundwork for future careers in ADR.

Discussion & Questions

- ▶ Does the information in this presentation line up with your experience as a mediator or arbitrator?
- ▶ Have you seen a lack of diversity affect your mediations or arbitrations in the past, and what effect did it have?
- ▶ What steps or ideas would you recommend for improving diversity in ADR?

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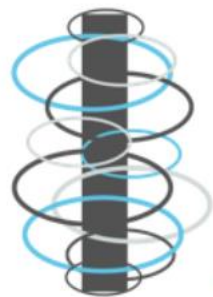
Friday, September 30, 2–6 PM
Saturday, October 1, 8 AM–4:30 PM



FlaBarADR.com/mentoring-academy

Thank You!

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