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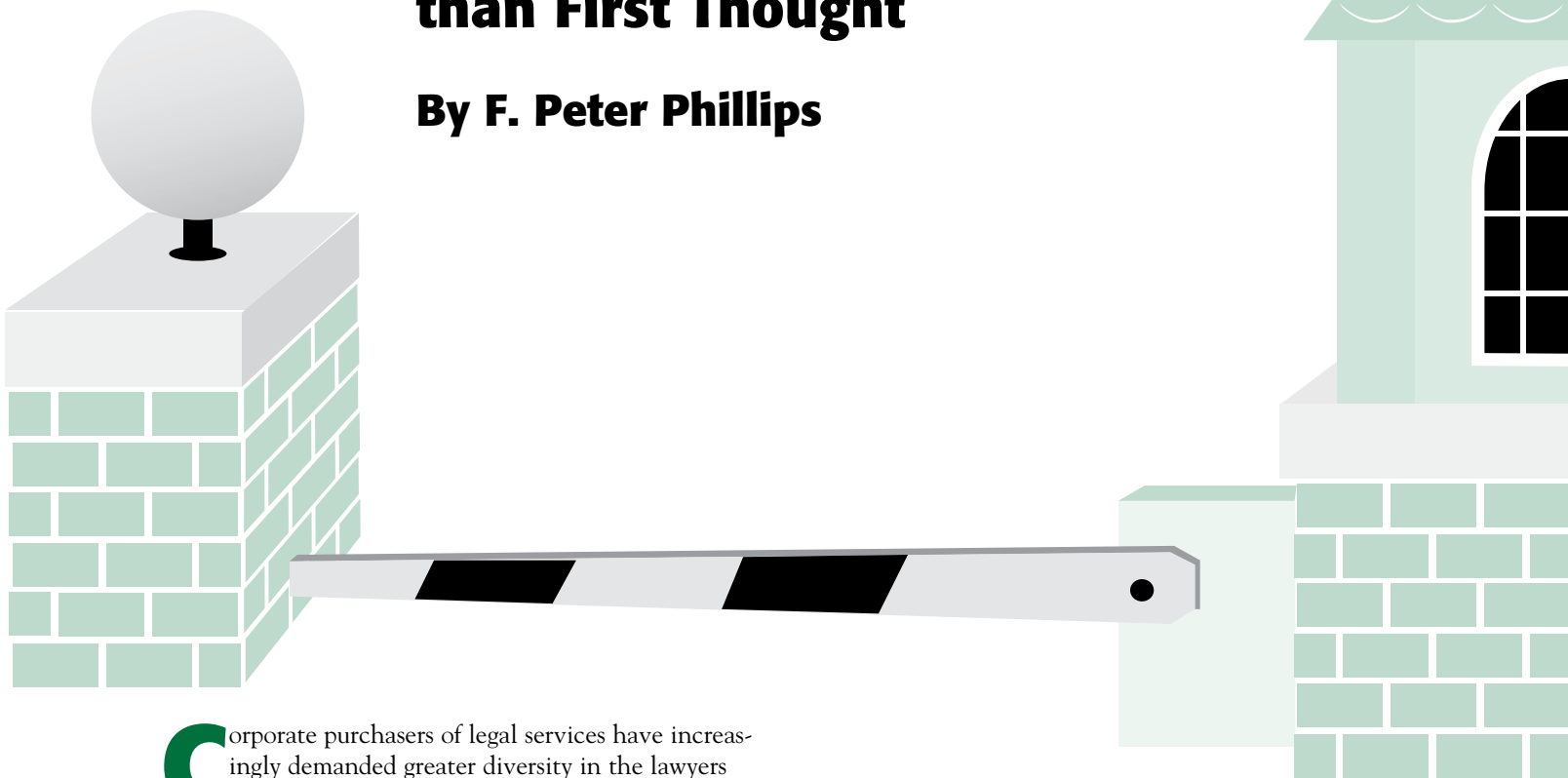
Diversity in ADR: More Difficult to Accomplish Than First Thought

F. Peter Philips

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More Difficult to Accomplish than First Thought

By F. Peter Phillips



Corporate purchasers of legal services have increasingly demanded greater diversity in the lawyers who are assigned to their work. As incidents spread of law firms being “fired” for failure to take these expectations seriously, law firms are responding, and legal ranks are becoming more diverse.

Alas, the same cannot be said for diversity in the provision of dispute resolution services, at least in the niche of complex commercial matters with significant amounts at issue. Again and again, corporate counsel lament that they are being given the same short lists of the same arbitrators and the same mediators (presumably older white men) from whom to choose.

In 2006, the CPR National Task Force for Diversity in ADR was formed. One of its first products was a series of questions that corporate law departments could pose to their outside firms, to measure the diversity in their law firms’ recommendations of mediators and arbitrators and make the clients’ expectations clear. This corporate-led task force concluded that the corporate client was the proper engine of change, and that the clients’ influence on their firms was the right place to start.

However, there is no early indication that major change is just around the corner.

Why is that so? If the corporate client—the ultimate purchaser of these services—wants a more diverse palette from which to select, why is there no response from the market of legal and ADR service providers? The demand

is there, say these corporate leaders: Where is the supply?

The challenges to diversifying ADR practice are several and subtle. Indeed, the question begets other questions, and the answers are not self-evident.

Is There Really a Lack of Supply?

Some corporate counsel say that the answer is to increase the number of ADR professionals of color by offering training. But many women and minority ADR professionals will vociferously argue that there are already a great many very well-experienced and very highly qualified professional dispute resolution experts. It’s just that they don’t get hired. Indeed, this community of professionals is quite vocal that what is needed is *not* more training, or mentoring, or “shadowing” opportunities. In particular, what is *not* needed is the assumption that women and people of color need some sort of remediative assistance. What is needed, they say, is work.

Is There Really a Corporate Demand?

Many corporate law departments say they need no convincing that diversity in ADR is a business necessity. They say it is self-evident to any business that has a diverse customer base, has a diverse vendor list, or is

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Endnotes

1. See Hari Viswanathan & John Ptak, *Power in Mediation: An Analysis of St. Stephen's Community House*, 1999, available at <http://cfjc-fcjc.org/clearinghouse/drpapers/v&p.htm>; Linda Fisher & Jeremy Long, *Cultural Differences and Conflict in the Australian Community* (Working Papers on Multiculturalism, Paper No. 11, 1991) available at ERIC Document Reproduction Service, ED419059; MICHELE HERMANN, GARY LAFREE, CHRISTINE RACK, & MARY BETH WEST, *THE METRO COURT*

PROJECT FINAL REPORT, 1993.

2. Lorig Charkoudian, *We Are How We Do*, ACR RESOLUTION, Winter 2006, at 12.

3. Although the demographic options available on the questionnaires included other racial and ethnic groups, the vast majority of participants and mediators were either African American or white. We have therefore used the label "race" with regard to this measurement.

Diversity in ADR

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growing in a diverse market, that they need counsel with diverse viewpoints, advisors from diverse backgrounds, and problem-solvers with diverse perspectives.

But does every corporate law department think this way? Do most? In high-end cases, experience and familiarity is the key to neutral selection. Corporate end users—and their counsel—review lists of proposed arbitrators not with the question, "How many of these people are minorities?" Instead, they ask, "What has this person done before?" or, "Has anyone appeared before this arbitrator?" or, "What is this person's track record in big cases?" To insist upon an experienced and familiar arbitrator on the one hand, but then to decry the absence of diversity on the other, seems like pleading, "Stop me before I hire again!" Experience and reputation are, very reasonably, the touchstones of neutral selection in high-end cases, but work against a desire to introduce new and unfamiliar faces.

For every established and influential lawyer who advocates for diversity there is another established and influential lawyer who voices concern about maintaining "quality" if ethnicity or gender is a criterion for hiring ADR neutrals. That concern may arise from ignorance, or prejudice, or experience, or all three—but the question is still embedded in the ethos of the business legal community. Ethnicity or gender alone is clearly inappropriate criterion for selection of any arbitrator or a mediator. But ignoring those attributes will not yield the result that corporate law departments say they want to achieve.

Can Institutional Service Providers Meet a Demand for Minority Mediators and Arbitrators?

The American Arbitration Association told the CPR Task Force that it tries to determine the gender and ethnicity of all of its several thousand listed arbitrators and mediators, and has set a goal internally to ensure that

each list that goes out to its customers for their selection includes at least 20 percent women or minorities.

The Financial Industry Regulatory Authority, by contrast, reported to the task force that it has gone to great expense to expunge any such information from the database from which it draws lists of candidates, in order to ensure that customers receive information solely on the basis of such professionally relevant considerations as geography, availability, skill, experience, and suitability.

Which is the right business model to serve the need for diversity that the corporate customers say they seek?

Some advocate the creation of a "pool" of high-quality female and minority mediators and arbitrators from which corporate counsel can make selections in appropriate cases. AAA, JAMS, CPR, the National Arbitration Forum, and other providers could offer access to this pool to corporate end-users seeking to engage such professionals. But

considering these organizations' past efforts to identify women and minorities who meet their standards, such a "pool" may end up including the same names that have already been identified.

There is also an ethical hurdle. Practically all statements of professional ethics for ADR provider organizations require those organizations to treat all neutrals equally, not to favor one over the other, and to be transparent in

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their dealings with their customers. It is an open question whether an ADR provider can ethically recommend a particular candidate on the basis of race or gender.

Do Women and Minorities Market Less Well than White Males?

It may sound silly on its face, but it's a fact of life: White men are better known in this business than their female or minority counterparts. Some might conclude that the nonwhite nonmales need some mentoring and boosting in their market strategies. The American Bar Association, the Center for Alternative Dispute Resolution in Maryland, and other organizations periodically hold training sessions for mediators on how to market their services to high-end case disputants and their counsel. Successful minority and female mediators are often included as instructors and exemplars in these trainings. But marketing alone does not create demand—it works only if you have something people want. And the most difficult obstacle of all may be that not enough people want it.

Is There Enough Mediation Work to Go Around?

It has been estimated that the annual median income of professional mediators is zero—that is, that at least half of the trained mediators in the United States earn nothing per year from mediation. Theorists in ADR teach that, before mediators concern themselves with cutting the pie, they should “grow” the pie, to make sure that each party's piece is bigger. All mediators regardless of gender or hue are grossly underutilized. Perhaps the solution lies in doing even more to increase the amount of commercial mediation available, on the chance that increasing the gross number of mediations will increase the amount of work available for all (including women and minorities).

In light of these uncertainties, maybe it's time to do what ADR professionals do so well: “Think out of the box.” Consider the following examples.

Just Say Yes

What if arbitrators and mediators were chosen as always, but an arbitrator or mediator of color were “inserted” into the selection process? It could happen upon the initiative of any provider, party, counsel, or neutral. It's one way of giving underutilized neutrals the “track record” they need to command the attention of high-end disputants, and it might be a way to leverage the current system towards change.

Are the Courts a Silver Bullet?

Mediation that is either ordered by a court, or encouraged by a judge, continues to be one of the biggest sources of work for mediators. These courts could be supplied with information about minority and female mediators in their regions, and encouraged to bring them to the attention of litigants.

Should the Approach Be Sector by Sector?

Perhaps the access efforts to date have been too broad. Focus might better be placed on a particular corporate consumer of ADR—such as the insurance industry, which

is the largest purchaser of legal services in the United States. A campaign might be designed in collaboration with a trade association to provide information, education, and direction to encourage the use of women and minority mediators and arbitrators within that industry. Trade associations could even recognize achievement in the area by an annual award or other gesture.

These challenges are legitimate and can sometimes confuse and even paralyze people who seek to create change in the diversity of ADR services. But it is clear that the dominance of white men in the field of mediation and arbitration of high-end commercial disputes cannot last—change will come. And, as is true with every other great achievement in ADR over the past 30 years, it will arise from the goodwill of the community, the pressure for more efficient business practices, the persistence of legal and corporate leadership, and the sure belief that we are working for an outcome that is historically inevitable. ♦

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