



Achieving Diversity and Inclusion in Arbitration

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Some Propositions

1. Our backgrounds and identities matter for how we interpret the world.
2. No perspective has a monopoly on the truth, so it is important to get multiple perspectives.
3. Every individual is too complex to be reduced to demographic identity alone.
4. Our society has systematically discriminated against certain groups, with lasting effects.

Diversifying Arbitration as a Systemic Challenge

Distinguish the level of *resolving individual disputes* from the level of the robustness and legitimacy of arbitration as a *system of resolving disputes*

Diversifying the arbitration field is principally about addressing *systemic* problems

Any solution to diversifying arbitration will also have impacts at the level of *individual disputes*

Systemic Problems



How Wide is the Range of Perspectives?

- ◆ Individual arbitrators want to treat parties fairly, want to get the law right, want to get the facts right, and want to produce an award that is reasonable and defensible
- ◆ And every individual arbitrator has a certain perspective that falls somewhere within the range of professional opinion
- ◆ Do we have a system in which the full range of professional opinions get expressed? Or is there a systematic skew caused by arbitrators being selected from a narrow segment of the population?

How Robust is the Internal Professional Conversation?

- ◆ Ongoing professional development is important for arbitrators and parties to keep up-to-date on major issues
- ◆ These conversations are where professionals can share differing perspectives, identify the profession's blind spots, learn from each other, and move the field forward
- ◆ But this can only happen when the profession is diverse along multiple axes, and when the profession genuinely welcomes heterodox perspectives

How Legitimate is the Profession?

- ◆ The phenomenon of a profession's social legitimacy goes beyond having a solid legal foundation or even generating efficient/socially beneficial outcomes
- ◆ Does the profession abide by social norms? Is it consistent with the unwritten and unspoken rules that determine what is worthy of respect?
- ◆ Diversification is a necessary component of legitimacy; for arbitration to be seen as a legitimate form of dispute resolution, it needs to be diverse
 - ◆ 2017 NAA Presidential Address: “if we don’t increase our diversity, and do it soon, there will be a lack of trust in our organization. ... [Parties] will see us as out of touch. This is not a problem way over the horizon but facing us now.”

What are the Mechanisms of Producing Arbitrators?

- ◊ Relative informality and party selection of arbitrators are two of the key attributes of arbitration
- ◊ This also creates a dynamic in which the profession perpetuates itself in ways that undermine diversification
 - ◊ Those who have reputations for being diligent and thoughtful get more work
 - ◊ Those who are unknown but resemble those with strong reputations may break in
 - ◊ Those who are unknown and don't resemble those with strong reputations may struggle
 - ◊ This tends to map onto existing patterns of advantage and disadvantage

Systems Level Solutions



Pipeline Programs

- ◆ Address the supply side of the system by recruiting a diverse pool of arbitrators
- ◆ This requires making arbitration available as a viable career path
 - ◆ Performing outreach to communities that are underrepresented in arbitration
 - ◆ Helping diverse arbitrators gain experience that would make them desirable as arbitrators
 - ◆ Mentorship programs so that experienced arbitrators can help guide diverse arbitrators through their careers and can vouch for them

Arbitrator Selection

- ◆ Address the demand side of the equation by making diversity a factor in selection
- ◆ Parties may consider naming diversification as a factor in arbitrator selection
 - ◆ From JAMS: “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.”
- ◆ Parties may work from a shortlist of arbitrators with a critical mass of diversity
- ◆ Parties can explicitly track and monitor their overall arbitrator selection

A tall, dark ladder stands vertically in a vast, arid desert landscape. The ground is sandy and uneven, with low, rolling hills in the distance. The sky is a deep blue with scattered white clouds. The ladder is positioned slightly to the left of the center, and its rungs are clearly visible. The overall mood is one of isolation and challenge.

Challenges on the Individual Level

Building Supply Isn't Enough

- ◆ Efforts to diversify arbitration by increasing diversity on the supply side is not enough
 - ◆ Does arbitrator selection reflect the diversity of the rosters?
 - ◆ Parties facing a concrete dispute often default to selecting an arbitrator on the basis of factors internal to that specific dispute
 - ◆ Arbitrators serving in specific disputes think of diversity as a macro-level issue
- ◆ Diversifying arbitration requires making diversity a factor on the demand side too

Compromising Party Choice?

- ◆ Party selection of arbitrators is a sacrosanct principle of most forms of arbitration
 - ◆ What role should a concern with diversity play in arbitrator selection?
- ◆ Parties often say they value diversifying the field of arbitration. But when it comes time to select an arbitrator for a dispute, this value does little in evaluating arbitrators
 - ◆ This phenomenon reflects an assumption that diversification comes at the cost of expertise – but is that really so?
 - ◆ This phenomenon also reflects an assumption that the only thing that matters is the resolution of the instant dispute – but is that really so?

The Zero-Sum Nature of Arbitrator Selection

- ◆ Established arbitrators may need to cede some space to a diverse cohort of junior colleagues, through direct mentorship and by raising their profiles
- ◆ Established arbitrators often say they value diversifying the field of arbitration. But does that remain true when it comes to sacrificing concrete opportunities to arbitrate?
 - ◆ Unless the volume of arbitrations increases, giving more appointments to arbitrators from underrepresented backgrounds means fewer appointments to established arbitrators
 - ◆ What do established arbitrators gain from diversifying the field?

Educating Parties and Arbitrators

- ◆ The buy-in of parties, established arbitrators, and arbitration providers is necessary
- ◆ Arbitration providers seem on board – the business case for diversifying is clear at the systems level
- ◆ For parties and established arbitrators, the challenge is to demonstrate that a robust arbitration *system* will benefit *individual* arbitrations
 - ◆ Arbitration will become a relic if it doesn't incorporate diverse perspectives
 - ◆ More diverse criteria for arbitrator selection can enrich arbitration
 - ◆ Arbitrators can become *better practitioners* within a diversified field
 - ◆ Parties benefit from a healthier arbitration system attentive to diverse perspectives

Conclusion

Name _____

Signature _____

Date _____



Diversifying Arbitration to Improve the Quality of Arbitration

- ◆ Work on the supply side is essential
 - ◆ Outreach programs, mentorship and fellowship programs, raising the profiles of arbitrators from underrepresented backgrounds
- ◆ And so is work on the demand side
 - ◆ Educate parties and arbitrators on what diversification of arbitration gives them
 - ◆ A healthier field that evolves to maintain legal & social legitimacy, and that represents the full range of perspectives in our society and in labor relations
 - ◆ Parties can commit to make diversity a factor in arbitrator selection, such as by requiring shortlists to have critical levels of diversity, and can monitor for compliance in selection
 - ◆ Established arbitrators can seek out colleagues from underrepresented backgrounds for collaboration, and put forward those colleagues for selection as arbitrators

Questions?

- ◆ Thank you!
- ◆ Please feel free to reach out via email: amamo@niu.edu