

Gender Diversity in Arbitrator Selection

By Deborah Rothman

The purpose of this article is briefly, and anecdotally, since no reliable data is accessible, to explore the status of women in commercial arbitration as well as the remaining obstacles women face in becoming successful commercial arbitrators, a field in which women continue to face great challenges. Some possible ways to address the remaining obstacles are addressed in the final portion of the article.

It has been almost 50 years since the Civil Rights Act of 1964 was signed into law. And while lawyers have stepped up and actively forced corporate America to diversify its employees and engage in non-discriminatory hiring and promotion practices, not all lawyers have “taken their own medicine.” It is not news that women lawyers have not found the same success as men in American law firms, so it should come as no surprise that women have a harder time getting traction as commercial arbitrators than do men.

The ever-astute Warren Buffett put a humorous spin on this sort of state of affairs when he famously said he was “privileged to work during a period when it was only necessary to compete against half of the population.” Of course, he was not talking about the 21st century!

The situation facing women arbitrators is not far different from that facing women lawyers in general and professional women in the business world. When Sheryl Sandberg, Facebook’s COO, gave a TED Talk entitled “Why we have too few women leaders” in 2011, the video promptly went viral. At last count, it had been viewed over a million times. She shared a disturbing

conclusion — few women are making it to the top of any profession anywhere in the world — and some discouraging statistics:

- While there are 190 heads of state in the world, only nine are women. (An interesting footnote is that while “less-developed” countries have had and continue to have female heads of state, the U.S. never has.)
- In all the parliaments in the world, only 13 percent of positions are currently held by women.
- Women hold only about 15 percent of executive officer positions and board seats in the private sector¹.
- Even in the non-profit world, women are at the top in only 20 percent of organizations.

Women make up 57 percent of all college students, about half of all law and medical school students, and more than 40 percent of students who earn master’s degrees in business. They make up 46 percent of the total private sector workforce and 38 percent of all managers. However, it’s still lonely for women at the very highest rungs of the corporate and political ladder, according to a 2008 nationwide Pew Research Center Social and Demographic Trends survey. Women are just 2 percent of the CEOs of the nation’s Fortune 500 companies. In the political realm, they make up just 17 percent of all members of the U.S. House of Representatives; 16 percent of all U.S. senators; 16 percent of all governors; and 24 percent of all state legislators.

The situation is much the same for women lawyers. Among the top 10 law schools, the rate of female enrollment ranges from a low of 42.6 percent (NYU) to a high



of 52.9 percent (UC-Berkeley). Women's enrollment at law schools overall hit just over 50 percent in 1993 and has been on a steady decline since 2002.² According to the ABA, women comprised about 47 percent of all first-year law students in 2009 to 2010 and 45.9 percent of all law school graduates.

According to the October 2009 National Association of Women Lawyers (NAWL) Fourth Annual Survey on Retention and Promotion of Women in Law Firms,³ women currently constitute 48 percent of first- and second-year associates in law firms. As women become more senior, however, they constitute 34 percent of "of counsels" and 27 percent of non-equity partners, but only 16 percent of equity partners.

NAWL summarized, "In other words, less than one-third of the women who start in the profession ultimately make it into the equity partnership ranks." Further, the study revealed that this statistic has not changed dramatically over the twenty or so years that women have been graduating from law school at the same rate as men.

A 2011 study by NAWL presents a sobering picture of the prospects for women practicing with major law firms: "Not only do women represent a decreasing percentage of lawyers in big firms, they have a far greater chance of occupying positions — like staff attorneys, counsel, and fixed-income equity partners — with diminished opportunity for advancement or participating in firm leadership."⁴

According to the Minnesota-based Infinity Project, housed at the Center on Women and Public Policy at the University of Minnesota, as of October, 2011, 49 (30 percent) of the 162 active judges in the 13 federal courts of appeal are women, and 30 percent of the active district or trial court judges are women.

"There are hundreds, if not thousands, of mediators who are hearing smaller, local disputes among individuals, community or civic groups. It is the higher-income segment that has proved more difficult to crack. In fairness, there are certainly exceptions. There are a number of high-profile, very successful women neutrals. Some are former federal judges and others have parlayed successful law firm careers into thriving ADR practices. But there are far fewer than their male counterparts, and some female neutrals report that while they can get steady work in areas like employment, it is much more difficult to be selected to mediate a huge class action or chair a high-profile tripartite arbitration."⁵ Kathy Bryan, president and CEO of the International Institute for Conflict

Prevention & Resolution (CPR Institute) makes a similar observation: "While there may be sufficient numbers of diverse neutrals, they seem to hit a 'glass ceiling' of sorts in that they experience difficulty in being selected for more complex matters." This observation is consistent with the pilot *Survey of the ABA/Women in Dispute Resolution (WIDR)* first conducted during CPR's 2012 Annual Meeting.

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Indeed, it is still rare to see women serving as arbitrators in the largest commercial arbitrations, and rarer still to see two women sitting on the same panel. In fact, for 2010, the American Arbitration Association (AAA) reports that it administered only three arbitrations in which the parties had selected a

panel that was entirely made up of women.

One arguably bright spot is that women find it easier to become successful employment arbitrators than commercial arbitrators. This may be a result of employers' belief that awards rendered in arbitration should be rendered by a group of arbitrators whose demographic makeup reflects, to the extent possible, the demographic makeup of their employees.

In 2010, women were appointed in roughly 15 percent of AAA arbitrations involving claims for money (which excludes a large number of non-monetary labor cases, in which women had a 23 percent appointment rate). One hopeful statistic is that the distribution of cases to women did not drop off as the case values increased—a pattern, known as the pyramid effect, which characterizes the glass ceiling effect. On the contrary, the percentage of female appointments remained constant through the highest-value cases.

While JAMS' statistics were not available, one has only to look at the photos of the neutrals in their newspaper ads to recognize that they, too, have not achieved gender equality on their arbitration roster. Similarly, the CPR Institute reports that in 2011, women comprised 10 percent of its roster of neutrals and 25 percent of the



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prestigious National Roster and were selected 13 percent of the time.

The situation facing women trying to become international arbitrators is the grimmest of all, according to a Columbia Law School study.⁶ Of 249 known investment treaty arbitrations, just 6.5 percent of all appointments were of women. Worse, two well-known, well-respected women captured three-quarters of the women's percentage. In contrast, the two most frequently appointed men accounted for a mere 5 percent of the men's 93.5 percent of the cases.

Possible Explanations and Contributing Factors

Supply-Side Obstacles: Mark Smalls, vice president and chief marketing officer of JAMS, offers a supply-side explanation for the dearth of successful women arbitrators, saying part of it is a “pipeline” issue: “To become a successful mediator or arbitrator, attorneys need to 1) know that ADR is a viable career option, and 2) build a resume that makes them an attractive candidate to a major ADR provider or have enough experience to successfully maintain their own ADR practice. The most attractive recruits to major ADR providers are former judges with substantial civil court experience or attorneys that have ascended to the senior (i.e., partner) level at major law firms. Women and minorities are underrepresented in both of these talent pools. The same forces that keep many women from reaching the partner level at law firms or attaining the general counsel title at corporations naturally reduce the pool of candidates that transition to a career as a mediator or arbitrator.”⁷ By the same token, when there are not enough seasoned, visible women arbitrators, younger women lack the role models and mentors to inspire, encourage and help them to succeed as commercial arbitrators.

McKinsey's 2010 *Women Matter* survey of barriers to gender diversity in top management provides support for the supply-side explanation of why women are not represented in equal numbers as men on the major providers' rosters. The McKinsey study identified the “double burden” syndrome — the fact that child-bearing and child-rearing responsibilities ordinarily fall more heavily on women than on men, even when both are working professionals.⁸ Although most women arbitrators are no longer dealing with small children, this stage of mothering negatively impacts a woman lawyer's ability ultimately to achieve success as a commercial arbitrator.

The McKinsey study identifies a related barrier to women achieving success as top managers: the “anytime, anywhere” performance model, whereby success is equated with 24/7 availability and total geographical mobility. Combined with the double burden barrier, the anytime, anywhere model—equally applicable to litigators as to top managers—saddles lawyers who bear children with almost insurmountable obstacles to success as full equity partners in their firms and later as commercial arbitrators. In other words, many women lawyers can't qualify for recruitment by the major providers for their commercial arbitration panels because the double burden syndrome and the anytime, anywhere model are virtually impossible for women litigators with younger children.

A good number of high-stakes arbitrations involve construction and banking law, two areas in which women are notoriously under-represented at both the law firm and the commercial arbitration level. Thus, until women are integrated into their firms' business and commercial practice and encouraged to and supported in succeeding as counsel on construction and banking matters, women will continue to be excluded from this productive source of arbitration opportunities.

Demand-Side Obstacles: The lawyers who select the arbitrators for particular cases are, not surprisingly, quite senior. Because environmental factors prevent women from being well-represented in the ranks of litigation partners and senior corporate counsel, the very people who might be most likely to consciously select women arbitrators, all things being equal, are not in a position to do so. Unfortunately, women's law school enrollment percentages are falling off, and women's employment with large law firms is also falling off. As a result, the pipeline of both female commercial arbitrators, and women litigators who might be more open to selecting qualified women arbitrators for complex commercial matters, is being negatively affected.

Even when women manage to get recruited to the arbitration panels of major ADR providers, they are not as likely to get selected as their male counterparts. When they receive a strike list of ten potential arbitrators, the law firm drill is to circulate an internal memo to get feedback on the names on the list. At times, the lawyers may solicit input from lawyers at other firms. It is unacceptably risky for litigators, given the paucity of bases for appeal, to recommend that their clients select an arbitrator who appears on paper to be qualified but is not known by that firm's subset of attorneys. This vicious

circle—the better-known the arbitrator is, the more likely to be known by counsel on both sides, and thus to get selected—prevents women from moving along the pipeline to selection.

Implicit Bias: Even the rare woman who achieves the same level of experience, expertise and success as her male counterparts may be selected less frequently as a commercial arbitrator because implicit bias prevents equally qualified women from being perceived as equally qualified. This type of bias is called “implicit” because the individuals explicitly articulate opposite, non-biased values. Because implicit bias resides in the unconscious part of the mind, operates automatically and is in conflict with the espoused values of the individual, it is in some ways more difficult to address than explicit bias.

A Harvard Business School study of MBA students at New York University is illustrative.⁹ At the outset of the study, the students assessed themselves as unbiased. Half were given study packets describing a venture capitalist known as “Heidi,” while half were given packets describing the identical venture capitalist, but named “Howard.” While the students rated Heidi and Howard equally highly as professionals, the students—both men and women—responded negatively to Heidi’s aggressiveness. They weren’t sure they’d want to work with Heidi; they felt she was out for herself. Their attribution of negative qualities to the woman but not the man is an example of implicit bias.

Indeed, when it comes to perceived ability to conduct complex commercial arbitrations, the interviews I conducted revealed absolutely no conscious bias against women arbitrators. The fact remains that women are selected at lower rates than their representation in the legal profession would suggest, and at lower rates than comparably-qualified males on the same strike lists.

As CPR Institute’s Kathy Bryan said, “Implicit bias perpetuates the inability of women to achieve the necessary benchmarks to be perceived as equal to males.” In other words, implicit bias begets fewer opportunities to demonstrate that a woman has the same abilities as her male arbitrator counterparts. Former U.S. Secretary of State Madeleine Albright’s quote is *apropos*: until women have the same opportunities to succeed as commercial arbitrators, “women may have to work just a little bit harder. There’s plenty of room for mediocre men, but no room for mediocre women.”

Women’s psycho-social barriers: Women themselves not infrequently hold self-limiting beliefs that hinder their efforts to be successful litigators and arbitrators. The literature is replete with studies showing that women learn to hide their intelligence, lower their expectations, please others at their own expense, work to be perceived as agreeable, etc. Women tend to under-estimate their

abilities and shy away from self-promotion, while men easily express their confidence in their strengths.

In *How to Become an International Arbitrator without Even Trying*,¹⁰ William Tetley, Q.C., illustrates how the combined power of the old boy network and supreme self-confidence enabled him to get his start in international arbitration. In 1982, two prominent international arbitrators phoned and asked him to chair a major arbitration, stating as an afterthought, “Of course, you know the ICC Rules.” The case concerned the construction of airports, air control and air defense systems in seven districts in Saudi Arabia. He accepted the position even though he had never participated in arbitration as either an attorney or an arbitrator, had no idea what the ICC was, and had virtually no experience with construction law. His co-arbitrators later praised his fine work on the matter.

Having striven to succeed in a male-dominated profession, and believing they had to blend in with the males, successful women litigators are sometimes reluctant to support a well-qualified female arbitrator for fear of bringing unwanted attention to their own gender. Professor Susan Estrich described this phenomenon:

When you talk to women at the very top, it becomes clear that part of their success is due to convincing men that they aren’t like other women. . . . [D]enying their status as women becomes a reflex. So when they get high up enough—far from making a difference for the women who come after them—they’re still in the business of proving to the guys that they’re really *not* one of the girls.”¹¹

Approaches to Addressing the Problem

To improve the gender diversity of commercial arbitrators, a concerted effort will need to be made to remove barriers and increase the number of promising women at every point along the pipeline to success. Similar efforts should be made to improve ethnic diversity in the field as well. Providers and professional and bar associations will have to remain mindful of the importance of gender balance in their advertising and in their public and in-house trainings and presentations. Providers cannot stop at merely recruiting women for their arbitration rosters; they will have to find effective ways to address users’ implicit biases when promoting their women arbitrators to users of arbitration and to the ADR community as a whole.

This entails the ADR community’s identification and mentoring; the major providers’ recruitment, training, mentoring and showcasing; and outside counsel’s selection of qualified women. Until this level of encouragement and support is manifested, many of the most promising women lawyers will be lured to such relatively more female-friendly employers as the public sector, the bench, non-profits, corporate counsel positions and law schools. Not every bright woman relishes the challenge of being a trailblazer.

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Mentoring: The major arbitration providers are actively trying to address this challenging issue. The American Arbitration Association even includes in its mission statement the creation and maintenance of gender and racial diversity on its neutrals roster. Toward that end, the AAA initiated the Leon Higginbotham Fellows Program, which provides a full year of training, mentorship and networking opportunities to up and coming diverse ADR professionals.

CPR suggests that, as a way to assist newer entrants to gain experience and exposure, it would be beneficial to be able to serve as secretary to an arbitral tribunal, much as recent law school grads enhance their experience and CVs by participating in federal and state court clerkships. Serving as a secretary to an arbitral tribunal performs the same function as shadowing while conferring significantly more status upon the mentee.

Professional organizations of highly successful commercial arbitrators such as the College of Commercial Arbitrators and the Chartered Institute of Arbitrators can play an important role in mentoring promising women, even if they do not yet qualify for membership. Adding this to their mission statements would demonstrate and solidify their commitment to this goal.

The Role Arbitration Users Can Play: Corporations have consistently led, not followed, the diversity bandwagon. Law firms' enunciated diversity initiatives did not develop any traction until corporate clients demanded documented progress from their firms, upon pain of losing their legal business. As noted above, it is not the province of law firms to try out women arbitrators with whom no one in their referral circle is familiar. They must be given a green light from their corporate clients to undertake such efforts, arguably reinforced by economic carrots and sticks.

Showcasing Well-qualified Women Arbitrators: JAMS acknowledges that it is tricky for women arbitrators to find opportunities to showcase what they can do. The ABA Dispute Resolution Section's Standing Committee on Diversity identifies as its first objective to "[i]mprove the employment opportunities for ADR professionals of

color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities, by raising awareness of diversity in the ADR field and exploring proactive solutions to eliminating employment barriers these ADR professionals encounter."

With so many stakeholders committed to increasing women's prominence in the field of commercial arbitration, can the day be far away when women will be proportionately represented on the major providers' arbitration rosters, and selected as frequently as their male counterparts? The legitimacy of awards rendered in arbitration demands it. ♦

Endnotes

1 According to a 2011 Harvard Business School Study, women fill less than 15 percent of executive officer positions at Fortune 500 companies and make up just 3.6 percent of CEOs. See Maggie Starvish, *Leadership Program for Women Targets Subtle Promotion Biases*, HBS WORKING KNOWLEDGE, Feb. 21, 2012, <http://hbswk.hbs.edu/item/6885.html?wknews=02222012>.

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3 *Report of the Fourth Annual National Survey of Retention and Promotion of Women in Law Firms*, National Association of Women Lawyers (2009), <http://nawl.timberlakepublishing.com/files/2009%20Survey%20Report%20FINAL.pdf>.

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5 Mark Smalls, *It's Time to Focus on Diversity in ADR*, THE RECORDER, May 30, 2011, <http://www.jamsadr.com/files/Uploads/Documents/Articles/Smalls-Recorder-Time-to-Focus-2011-05-30.pdf>.

6 Gus Van Harten, *Perspectives on Topical Foreign Direct Investment Issues by the Vale Columbia Center on Sustainable International Investment*, 59 COLUMBIA FDI PERSPECTIVES, Feb. 6, 2012. <http://www.vcc.columbia.edu/content/lack-women-arbitrators-investment-treaty-arbitration>.

7 Smalls, *supra* note 5.

8 *Women Matter 2010*, McKinsey & Co. (2010), http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_2010_4.pdf.

9 Francis Flynn, *Too Tough, Too Soon: Familiarity and the Backlash Effect*, working paper (2007), referenced in http://www.gsb.stanford.edu/news/headlines/wim_martin07.shtml.

10 See William Tetley, *How to Become an International Arbitrator without Even Trying*, June 14, 2011, available at <http://www.mcgill.ca/maritimelaw/tetley/arbitrator/>.

11 Ramit Mizrahi, "Hostility to the Presence of Women": *Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579, 1599 n. 115 (2004), citing Kathleen Jacobs, *In Praise of Power*, WORKING WOMAN, Nov. 2000, at 22.