

Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research

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As is true in a wide range of contexts, interest in advancing diversity in the dispute resolution field has been growing rapidly. There has been a proliferation of initiatives focusing on how to be more inclusive of unrepresented groups including the CPR diversity pledge;¹ the ArbitralWomen Diversity Toolkit;² the JAMS diversity and inclusion rider;³ the mindbug sheet;⁴ the Diversity Scorecard;⁵ special issues of publications,⁶

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¹ *National Task Force on Diversity: Diversity Commitment*, CPR ADR, <https://www.cpradr.org/programs/committees/diversity-task-force-adr/Diversity-Pledge>, (last visited Feb. 11, 2019).

² ARBITRALWOMEN, www.arbitralwomen.com (last visited Feb. 11, 2019).

³ The inclusion rider option adopted in May 2018 that can be included in dispute resolution clauses states, “[t]he 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.” *JAMS Introduces Inclusion Rider, Promotes Diversity Initiatives in ADR*, JAMS ADR (May 29, 2018), <https://www.jamsadr.com/news/2018/jams-introduces-inclusion-rider-promotes-diversity-initiatives-in-adr>.

⁴ The mindbug sheet “is given to the entities and individuals actually engaged in making selections before any list of potential arbitrators is provided to them, it prompts them to think about diversity as a criterion.” Theodore K. Cheng, *The ADR Mosaic: Moving the Conversation Beyond Raising Awareness of Diversity*, DIVERSITY & THE BAR MAGAZINE, Fall 2018, at 10.

⁵ According to Ben Davis, “[t]he process involved would be to reach out to dispute resolution providers as well as court-annexed structures to get an indication of the appointments made over a calendar year. That data would be in turn aggregated to give a snapshot of the profession for each year.” Benjamin G. Davis, *Diversity Scorecard*, AMERICAN BAR, https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-resolutions/davis_diversity_%20scorecard.authcheckdam.pdf (last visited Feb. 11, 2019).

⁶ For example, the ABA Dispute Resolution Magazine devoted an entire issue to diversity. See Marvin E. Johnson & Maria R. Volpe, *Uncovering Race in Dispute Resolution*, DISP. RESOL. MAG. (Spring 2009).

programs,⁷ conferences and symposia;⁸ the ABA's Diversity in ADR Resolution 105;⁹ targeted bar association efforts;¹⁰ and varied research projects,¹¹ among countless other efforts. While there has been no shortage of diversity awareness activities blossoming since the early 2000s, it is important to note that there has been a long history of early diversity efforts which has gone largely unacknowledged.¹²

Despite the increasing attention given to the topic,¹³ there has been an astonishing dearth of research measuring the extent of diversity. There is very little empirically based research from which to measure progress. Much of what is known has come from anecdotal information, what is observable at events, and oft-repeated comments that the practitioner field has been dominated by rosters of mostly white males.¹⁴ Needless to say, accessing data

⁷ For example, in 2003, Marvin E. Johnson and Homer LaRue started Access ADR, a project designed "to increase the number of Alternative Dispute Resolution (ADR) professionals of color and to enhance their access to ADR clients." Homer C. La Rue & Marvin E. Johnson, *Access ADR: A New Diversity Initiative Launched with the Support of the JAMS Foundation and the ABA*, METROPOLITAN CORP. COUNSEL (May 2004), <http://ccbjournal.com/articles/3932/access-adr-new-diversity-initiative-launched-support-jams-foundation-and-aba>. In 2017, a group of ADR leaders in New York started the ADR Inclusion Network aiming to enhance diversity and inclusion in ADR. See ADR INCLUSION NETWORK, <https://www.adrdiversity.org>.

⁸ Many conferences have included panel discussions, keynote talks, and workshops on diversity in the ADR field over the years. And some conferences have been devoted entirely to diversity like the WomenArbital conference in Nov 2018. *Celebrating AW's 25th Anniversary*, ARBITRALWOMEN, <https://www.arbitralwomen.org/events/aw-diversity-toolkit-launch-gala-dinner-8-nov-2018-new-york/> (last visited Feb. 11, 2019).

⁹ *ABA Resolution 105 – Diversity in ADR*, AMERICAN BAR, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf (last visited Feb. 11, 2019). The resolution states: "RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services 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 RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals."

¹⁰ On January 29, 2019, Todd Drucker sent an email to the ADR-INCLUSION Listserv stating "The [New York] City Bar is pleased to offer a limited number of scholarships to the upcoming Basic Mediation and Advanced Commercial Mediation training programs in an effort to encourage diverse attorneys to consider adding Alternative Dispute Resolution (ADR) to their practices."

¹¹ See, e.g., Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr., Christopher M. Kwok, Janice Tudy-Jackson, & R. Velez, *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119 (2008).

¹² Marvin E. Johnson & Maria R. Volpe, *Roots of Diversity in Dispute Resolution: Preliminary Observations*, 13 ACRESOLUTION (Winter 2013).

¹³ A large number of articles have been published on how to promote diversity in a variety of ADR publications. See, Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal*, 84 NYSBA JOURNAL 33, 33-34 (January 2012). Also available at https://www.adr.org/sites/default/files/document_repository/Increasing%20Diversity%20Among%20Arbitrators_0.pdf.

¹⁴ See Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, LAW.COM, http://www.nysba.org/Sections/Dispute_Resolution/Materials/2017_Fall_Meeting/Panel_3_-_5_ADR_Business_Wakes_Up_to_Glaring_Deficit_of_Diversity_Law_com_pdf.html.

to gain clarity about the extent of diversity has been and remains a daunting undertaking. In a rare, high-profile arbitration, the celebrity Jay-Z shined the spotlight on the lack of diversity on a roster of arbitrators he received for his arbitration. He disclosed that only three of the 200+ arbitrators on the American Arbitration Association's New York Large Complex Case Roster were African American arbitrators.¹⁵

This article, which will address some observations and challenges of measuring diversity in the dispute resolution field, grows out of an invitation from Nancy Welsh to give a presentation at Texas A&M University Law School's conference focusing on transparency, metrics, and empirical research.¹⁶ The theme of the conference provided a reminder not only about the necessity but also the urgency to deepen our thinking regarding diversity and inclusivity among dispute resolution neutrals by giving greater attention to the metrics needed for transparency and a better understanding of the field.¹⁷ What this article will illustrate is that the search for data on diversity-related efforts in the dispute resolution field raises more questions than answers.¹⁸

I. DIVERSITY: WHAT IS IT?

Before proceeding, it is important to understand the concept being examined, namely diversity. The Merriam-Webster dictionary defines diversity as "the condition of having or being composed of differing elements."¹⁹ Some of its synonyms include assortment, heterogeneity, and variety among others.²⁰ In the contemporary discourse about diversity, there is no monolithic understanding of what it refers to. It has come to be used as "a very broad, catchall umbrella term that applies to many qualities and characteristics and is defined differently by different segments of society."²¹

Diversity is also a socially-constructed concept and has come to have many meanings depending on the context. In some instances, it is defined by

¹⁵ Sopan Deb, *Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo*, N.Y. TIMES, Nov 28, 2018, https://www.nytimes.com/2018/11/28/arts/music/jay-z-roc-nation-arbitrators.html?emc=edit_ur_20181129&nl=new-york-today&nid=1271657320181129&te=1; see also, Jay-Z's petition to stay arbitration at https://www.courthousenews.com/wp-content/uploads/2018/11/jay-z-iconix.pdf.

¹⁶ The 2018 Dispute Resolution Symposium at Texas A&M University School of Law on Shining a Light on Dispute Resolution: Transparency, Metrics, and Empirical Research was the inspiration for this article. Thomas Stipanowich, Dean of the Straus Institute for Dispute Resolution, Keynote Address at the Texas A&M University School of Law Dispute Resolution Symposium: Shining a Light on Dispute Resolution: Transparency, Metrics and Empirical Research (Nov. 16, 2018).

¹⁷ *Id.*

¹⁸ There has been a constant theme in the contemporary dispute resolution field for passion versus studies documenting detailed efforts.

¹⁹ *Diversity*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/diversity>.

²⁰ *Id.*

²¹ Johnson & Volpe, *supra* note 12.

law, in other instances, it is loosely referred to depending on the individuals' frames of reference. In 2011, the United States federal government defined workforce diversity as

[A] collection of individual attributes that together help agencies pursue organizational objectives efficiently and effectively. These include, but are not limited to, characteristics such as national origin, language, race, color, disability, ethnicity, gender, age, religion, sexual orientation, gender identity, socioeconomic status, veteran status, and family structures. The concept also encompasses differences among people concerning where they are from and where they have lived and their differences of thought and life experiences.²²

While the aforementioned is a comprehensive definition, if one randomly examines a variety of agencies and organizations, the result is that specific characteristics are referred to or emphasized in their diversity statements.²³ For example, the NYC Office of Information Technology and Telecommunications adds "thinking style and background" to the more common categories of age, race, gender, nationality, sexual orientation, and physical ability.²⁴ This is equally true for dispute resolution organizations. The AAA Diversity Committee refers to the following: gender, race, ethnicity, age, religion, sexual orientation, or other characterization.²⁵ It states that its mission "is to promote the inclusion of those individuals who historically have been excluded from meaningful and active participation in the alternative dispute resolution (ADR) field."²⁶ Note that "historical" exclusion is part of the statement.²⁷ The mission of CPR's Diversity in ADR Task Force states that "[t]he mission of this group is to devise practical strategies to increase the participation and inclusion of women, minorities and other diverse individuals in mediation, arbitration, and other dispute prevention and resolution processes."²⁸

Finally, the use of diversity-related phrases such as a 'diverse individual' or 'diverse person' is vague. Who is considered a diverse individual or a diverse person? Is the phrase 'a diverse individual' or 'a diverse person' used as a synonym for anyone who is visibly different? What is meant by 'diverse individual' or 'diverse person' often implies implicit understanding, but is left up to others to deconstruct.

²² *Id.*

²³ See generally, *Government-Wide Diversity and Inclusion Strategic Plan 2011*, U.S. OFFICE OF PERSONNEL MANAGEMENT OFFICE OF DIVERSITY & INCLUSION 5 (2011), <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/governmentwidedistrategicplan.pdf>.

²⁴ *Diversity and EEO*, NYC OFFICE OF INFORMATION TECHNOLOGY & TELECOMMUNICATIONS (2019), <https://www1.nyc.gov/site/doitt/about/diversity-eeo.page>.

²⁵ *Diversity Initiatives*, AMERICAN ARBITRATION ASSOCIATION (2019), <https://www.adr.org/DiversityInitiatives>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, *Diversity in ADR Task Force*, <https://www.cpradr.org/programs/committees/diversity-task-force-adr> (last visited Feb. 2019).

II. WHY DIVERSITY MATTERS FOR DISPUTE RESOLUTION

For the dispute resolution field diversity matters, perhaps even more so than in other contexts for several reasons. First, ADR processes are informal and, for the most part, occur in spaces that are not publicly visible.²⁹ As a result, an important feature of ADR processes is the reliance on the trust in the dispute resolvers who are providing these services.³⁰ While trust is an important component of all dispute resolution work, it is particularly true for mediation since mediators are expected to create a comfortable context for parties to communicate amongst themselves and try to reach to an understanding about their concerns in a private environment, often behind closed doors. The very nature of informal dispute resolution settings gives rise to concerns about who individuals trust in informal, private spaces.

Second, since individuals come to processes like mediation with their own perspectives and perceptions, they rely on the mediator to be impartial in helping them to determine their own outcomes.³¹ Since we have evidence that everyone has implicit biases,³² mediators have to pay special attention to how their own understandings, behaviors, and process related actions are affected by their implicit biases.³³ As a member of any group, one embraces different perceptions of situations, makes different assumptions, uses words differently, has different likes and dislikes, and subscribes to different values, beliefs and traditions by virtue of one's lived experiences. As a result, it is crucial to have diverse backgrounds represented in a field where perceptions and experiences are an important part of the work itself.

Third, in addition to the need to pay attention to the role of setting and personal preferences and differences, Standard IX of the Model Standards of Conduct for Mediators prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution (now the Association for Conflict Resolution) reminds mediators that advancing the practice of mediation includes "fostering diversity within the field of mediation."³⁴ Along with all of the other standards, paying attention to the diversity of the field helps "serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."³⁵

²⁹ See, AMERICAN BAR ASSOCIATION, Model Standards of Conduct for Mediators, 2005, https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf.

³⁰ *Id.*

³¹ Core principles for mediation practice are impartiality and self-determination. See *Id.*

³² See, e.g., PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (a self-administered implicit attitude measurement test).

³³ Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71 (2010).

³⁴ AMERICAN BAR ASSOCIATION, *supra* note 29.

³⁵ *Id.*

A. *Why research on diversity is needed*

Research is needed to amass more extensive and systematic data about all aspects of dispute resolution processes and practices, a state of affairs that has been a longstanding concern of the dispute resolution field. Early in my career, many mediators and scholars testified before the New York State (“NYS”) Assembly Judiciary Committee in support of efforts to mandate the mediation of child custody disputes. At the hearings, the legislators asked, “What evidence do you have about the effectiveness of mediation?” Those testifying expressed abundant enthusiasm for the process and had lots of anecdotal information about how wonderful it was. However, the research and metrics were missing. The year was 1985. While much has changed about the mediation field, practitioners continue to generally rely on anecdotal information due to the lack of extensive statistical data.³⁶ Given the contemporary commitment to achieve a diverse field, knowing who practices in what context is particularly urgent.

The need for data in furthering our understanding of diversity has been widely recognized. Recently, Benjamin Davis noted that,

[I]t is important to measure quantitatively the extent of the diversity in our field so that we can know how we are doing. Knowing how we are doing may help us develop paths for enhancing the ADR practices of these underrepresented groups in the profession. From what we have seen, this kind of data is essentially absent in the dispute resolution space.³⁷

Additionally, Deborah Masucci and Benjamin Davis have pointed out that “[o]ur underlying theory is that if it is not measured, it is not counted. So our task is to begin that measurement process. After that, the reasons for successes or needs for improvement can be addressed as another iteration of solving America’s ADR Diversity Issues.”³⁸ The importance of measuring the extent of diversity has also been noted by the recently established ADR Inclusion Network in New York. Its ADR Inclusion Pledge encourages members to promote “[d]eveloping metrics and a system to measure the progress of encouraging ADR users to select, recruit and retain diverse neutrals.”³⁹

Unlike other contexts where those involved in the work are identifiable through organizational structures such as judges in the courts, teachers in schools, professors in colleges, and others who can be counted, those

³⁶ See, e.g., Benjamin G. Davis & Deborah Masucci, *May – Diversity*, AMERICAN BAR ASSOCIATION (2015), https://www.americanbar.org/content/dam/aba/publishing/just_resolutions/E-News%20-%20May.pdf.

³⁷ Benjamin G. Davis, *Diversity Scorecard*, AMERICAN BAR ASSOCIATION (2015), https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-resolutions/davis_diversity_%20scorecard.authcheckdam.pdf.

³⁸ Davis & Masucci, *supra* note 36.

³⁹ *Take Our Diversity & Inclusion in ADR Pledge*, ADR INCLUSION NETWORK (Oct. 2017), <https://static1.squarespace.com/static/596f7177f5e23161e2ee5cf8/t/59f38d8be31d19fc40909560/1509133714257/Pledge%2B%28FINAL%29ADR%2BInclusion%2BNetwork.pdf>.

structures do not exist widely for the ADR field.⁴⁰ Much of the ADR work is provided by those working in silos such as private practitioners practicing in solo or small group practices, program staff members operating in local communities, scholars attached to varied faculties in their universities, among others.⁴¹ Additionally, there are those in varied applied professions who describe what they do as dispute resolution-related work like human resources professionals, police officers, teachers, among others. In short, there is no centralized reporting system or easy way to identify who is doing ADR work.

B. *Data Collection: What Exists?*

Collecting and analyzing existing data about diversity in the ADR field can be daunting since databases and systematic surveys are virtually nonexistent. For other sources of information about who is practicing, one must search websites, newsletters, little known journals, and other places such as program office files that are not readily available, identifiable or known to scholars, practitioners, program administrators, policymakers, users or the public.

Although limited, there are emerging diversity databases where individuals can post their identity and be transparent about how they would like to be viewed. For example, the American Bar Association Directory of Minorities in Dispute Resolution Directory⁴² allows for “persons who self-identify as minorities, lawyers with disabilities, and/or LGBTQ lawyers” to be included. Since individuals were able to disclose their specific identities, the 74 individuals used the following descriptions: African, American Indian or Alaskan Native, Asian, Bicultural, Biracial, Bisexual, Black or African American, Disability Status [Attention Deficit Disorder, managed effectively with medication], Disability Status [Walks with a cane and has very limited feeling in legs and feet, and also substantial weakness; also has periodic episodes of nerve pain], Disability Status [ADHD Predominantly Inattentive Type, as well as a chronic neuromuscular disorder], Gay, Hispanic or Latino, and Lesbian.⁴³ The Women in Dispute Resolution Committee of the American Bar Association Section of Dispute Resolution has also posted a Directory aimed at “increasing the selection and retention of women arbitrators, mediators, and other neutrals.”⁴⁴ This directory included only gender without other descriptors that the Minority in Dispute Resolution Directory included.

⁴⁰ See, e.g., Davis & Masucci, *supra* note 36 (beginning to identify dispute resolution providers to seek aggregate data on diversity is a priority for the ABA Section on Dispute Resolution).

⁴¹ See, e.g., *Take Our Diversity & Inclusion in ADR Pledge*, *supra* note 39.

⁴² *Member Directory: Minorities in Dispute Resolution*, AMERICAN BAR ASSOCIATION (2015) https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/MIDR-Directory.pdf.

⁴³ *Id.*

⁴⁴ *Women in Dispute Resolution Committee*, AMERICAN BAR ASSOCIATION (Sept. 2018), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/2018-widr-directory.pdf.

In instances where extensive dispute resolution databases do exist, the data are usually aggregated or there is a vague reference to diversity.⁴⁵ For example, the ABA Section on Dispute Resolution “boasts over 11,000 members”⁴⁶ without providing any specifics as to the composition of its membership.⁴⁷ It could serve as an invaluable database to shed additional light on who is involved in ADR work. According to the State of Community Mediation: 2011 Report’s survey of community mediation programs, including volunteer mediators, Justin Corbett and Wendy Corbett stated that “there are an estimated 20,000 active volunteers who mediate at local community dispute resolution programs.”⁴⁸ According to the study, the mediators “come from all walks of life and represent the broad diversity present within their local communities.”⁴⁹ Overall, the authors conclude that “community mediation administrators should be pleased with the diversity, quality and quantity of their volunteer mediators.”⁵⁰

The aforementioned research, undertaken by the National Association for Community Mediators (NAFCM), “generated over 36,000 data points supplemented by over 250 qualitative accounts of program operations and impact.”⁵¹ Despite the emphasis placed on diversity and the amount of data that was collected, the report was silent on the specifics of what diversity referred to.⁵²

Since the data have been so difficult to collect, the bulk of the attention has been focused on the large provider organizations to disclose who are the practitioners on their rosters. As a result, there is an increasing amount of information being made available regarding the composition of the rosters, particularly the newer appointments to the rosters.⁵³ What is still lacking is information on who in fact gets selected to serve and is compensated.⁵⁴

A Law.com article posted insights on demographics at leading providers of neutral rosters.⁵⁵ It stated, an analysis of JAMS’s website consisting of

⁴⁵ *Id.*

⁴⁶ *Section of Dispute Resolution - Section Membership*, AMERICAN BAR ASSOCIATION https://www.americanbar.org/groups/dispute_resolution/membership/ (last visited Feb. 18, 2019).

⁴⁷ *Id.*

⁴⁸ Justin R. Corbett & Wendy E.H. Corbett, *The State of Community Mediation 2011*, THE NATIONAL ASSOCIATION FOR COMMUNITY MEDIATION (2012) https://c.ymcdn.com/sites/www.nafcm.org/resource/resmgr/State_of_Community_Mediation.pdf.

⁴⁹ *Id.* at 26.

⁵⁰ *Id.* at 27.

⁵¹ *Id.* at 6.

⁵² *Id.*

⁵³ Maria R. Volpe & Marvin E. Johnson, *The Color of Money: Compensation Opportunities and Barriers*, DISP. RESOL. MAG. (Summer 2017).

⁵⁴ *Id.*

⁵⁵ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, LAW.com (Oct. 5, 2016), http://www.nysba.org/Sections/Dispute_Resolution/Materials/2017_Fall_Meeting/Panel_3_-_5_ADR_Business_Wakes_Up_to_Glaring_Deficit_of_Diversity_Law_com_pdf.html.

more than 350 neutrals, 25% are women and 7% are minorities. It also reported that over 95% are over the age of 50.⁵⁶

To diversify its roster, FINRA noted that it “embarked on an aggressive campaign to recruit new arbitrators with a particular focus on adding arbitrators from diverse backgrounds, professions, and geographical locations.”⁵⁷ It hired third-party consultants who reached out to FINRA dispute resolvers who were assured that the survey was voluntary, confidential, and anonymous.⁵⁸ For the arbitrators, the findings showed that in 2018, females comprised 27%, Caucasians 83%, African Americans 7%, Hispanic or Latino 4%, Asian 2%, Multi-Racial 2%, American Indian or Alaska Native were less than 1%, LGBT 3%, 70 or older 38%, 69 to 61 years of age 26%, and 60 or younger were 20%.⁵⁹ For the mediators, females made up 27% of the roster, age-70 or older 37%, 69 to 61 years of age 26%, and 60 or younger 20%, Caucasians 72%, African Americans 7%, Hispanic or Latino 4%, Asian 2%, Multi-Racial 2%, American Indian or Alaska Native less than 1%, LGBT 3%.⁶⁰

The mission and vision statement of the American Arbitration Association asserts a “‘shared commitment to a diverse Roster of Arbitrators and Mediators.’ The AAA Roster is composed of 24% women and minorities, and this figure is increasing. AAA division executives around the U.S. actively recruit women and minority candidates who meet the criteria established for panels.”⁶¹ In 2014, AAA reported, “[o]f the 306 panelists added to the AAA Roster in 2014, 25% are women and 31% are women or minorities.”⁶² In 2015 AAA stated, “[f]or arbitrator and mediator lists finalized in 2015, overall 78% were at least 20% diverse.”⁶³ Furthermore, “in 2017, the AAA added 78 new women [and] minority to its roster.”⁶⁴

Finally, the AAA has worked on “a nationwide organizational goal of making sure that at least 20% of the names included on lists of arbitrators

⁵⁶ *Id.*

⁵⁷ *Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA: Why Diversity Is Important*, FINRA (2019), <http://www.finra.org/arbitration-and-mediation/diversity-and-finra-arbitrator-recruitment>

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Roster Diversity & Inclusion*, AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/RosterDiversity>.

⁶² *2014 Annual Report and Financial Statements*, AMERICAN ARBITRATION ASSOCIATION (2015), https://www.adr.org/sites/default/files/document_repository/2014_Annual_Report_Financial_Statements_0.pdf.

⁶³ *2015 Annual Report and Financial Statements*, AMERICAN ARBITRATION ASSOCIATION (2016), https://www.adr.org/sites/default/files/document_repository/2015_AAA_AnnualReport_Financials_0.pdf.

⁶⁴ *2017 Annual Report and Financial Statements*, AMERICAN ARBITRATION ASSOCIATION (2018), https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_Financials_2018.pdf.

proposed on a case are women and minority panelists where party qualifications are met. For arbitrator and mediator lists finalized in 2017, overall 87% of lists sent to parties during this period met that goal.⁶⁵

C. *The Research Questions: Challenges Ahead*

There are countless research questions that emerge when diversity in the dispute resolution field is addressed. A first step for researchers is to define what they are measuring, particularly diversity. As noted earlier, it is a catchall term. Moreover, what is meant by diversity in different ADR contexts? Some of the references to diversity are expansive and some are very narrow.⁶⁶ To complicate matters, ADR itself is also a wide-ranging, umbrella term. Although it is often used to refer to mediation and arbitration, it is also used to refer to early neutral evaluation, negotiation, conciliation, and collaborative law.⁶⁷ Like diversity, it too needs to be deconstructed in order to understand what constitutes its landscape.

What does “diverse ADR professionals,” a frequently used phrase, mean? Context and one’s frame of reference are very important. For example, it is common to hear individuals remark that an audience is not diverse, which assumes that they are referring to visible characteristics. Even then, it is possible that, in a room of males and females, one may hear someone remark that it is not a diverse group. It is challenging when defining who is diverse is left up to the individual to determine. In a recent email, the NYC Bar stated that it “is pleased to offer a limited number of scholarships to the upcoming Basic Mediation and Advanced Commercial Mediation training programs in an effort to encourage diverse attorneys to consider adding Alternative Dispute Resolution (ADR) to their practices.”⁶⁸ If individuals with invisible characteristics that are considered diverse respond and are selected, there still may not be visible diversity noted at the training programs.⁶⁹

Diversity assumes that lived experience matters.⁷⁰ When measuring diversity, depending on what is being researched, not all aspects of diversity are observable to researchers.⁷¹ The range is from the more self-evident, such as gender, race, religion (if symbols are visible), age, and visible disabilities to those that are invisible, such as sexual orientation and some disabilities.⁷²

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Drucker, *supra* note 10.

⁶⁹ See Scott Saarheim & Joanne Schmidt, *Invisible Diversity*, CAL. FACULTY ASSOCIATION, <https://www.calfac.org/magazine-article/invisible-diversity> (last visited Feb. 6, 2019) (discussing what invisible diversities are).

⁷⁰ *How Focusing on Diversity of Lived Experience can Improve Organizations*, FAST COMPANY (Jan. 30, 2019), <https://www.fastcompany.com/90298636/how-focusing-on-diversity-of-lived-experience-can-improve-organizations> (discussing the importance of lived experiences and diversity).

⁷¹ See Saarheim & Schmidt, *supra* note 69.

⁷² *Id.*

For the latter, individuals would have to self-disclose their disability, something that not all are comfortable with.⁷³ These intricacies raise issues for the type of methodology used to examine diversity. If one chooses to merely observe a group without uncovering what may be invisible through self-disclosure, one would not obtain an accurate count.⁷⁴ Similarly, individuals who choose to not self-disclose will contribute to inaccurate results.

In addition to accounting for who constitutes the field, the following set of questions regarding diversity has yet to be fully addressed empirically: Does it matter if the mediator is of the same race as the parties, shares the same sexual orientation, religion, ethnicity, disability, and age?⁷⁵ Are all diverse characteristics weighed equally? Which criteria are more important?⁷⁶ What happens when some of the criteria intersect? In short, which lived experience matters, which matters more, and under what conditions? For example, is it more important that the mediator be a female than gay? Must the mediator be both a female and gay? Is it surprising then that when someone says the field is not diverse and inclusive it is not clear what is being referred to? Moreover, some types of diversity are easier to discuss than others.⁷⁷

Studying the impact of diversity in processes like mediation is challenging because mediation usually occurs behind closed doors.⁷⁸ Researchers cannot just pop-in unannounced as when observing open court sessions.⁷⁹ This is understandable since, in some instances, parties pay significant mediator fees to keep their matters private.⁸⁰

Additionally, if we wanted to study whether diversity matters in matching mediators and parties, there are some aspects of diversity that are hard to

⁷³ Katherine W. Phillips, Tracy L. Dumas, & Nancy P. Rothbard, *Diversity and Authenticity*, HARV. BUS. REV. (Mar./Apr. 2019),

<https://hbr.org/2018/03/diversity-and-authenticity> (providing an example of the difficulties of self-disclosure in regards to race in a business context).

⁷⁴ See Rhett S. Jones, *Diversity, Visibility, and Invisibility in Higher Education*, DIVERSE (Mar. 9, 2006) <https://diverseeducation.com/article/5579/> (discussing issues with spotting diversity that is not visible).

⁷⁵ See Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFLICT RESOL. 23, 23 (2010).

⁷⁶ See *An Overview of Diversity Awareness*, PENN STATE (2001), http://www.wiu.edu/advising/docs/Diversity_Awareness.pdf (discussing the impact of different forms of diversity).

⁷⁷ *Id.*

⁷⁸ Kimberly Taylor, *Mediation: Confidentiality and Enforceability*, JAMS (Apr. 6, 2015), <https://www.jamsadr.com/blog/2015/mediation-confidentiality-and-enforceability>.

⁷⁹ *Id.*

⁸⁰ *Mediators on Thumbtack Cost*, THUMB TACK, <https://www.thumbtack.com/p/cost-of-mediation> (last visited Feb. 10, 2019)(providing data on the costs of mediation).

ascertain.⁸¹ For example, what if the diversity identity carries a stigma?⁸² Because non-disclosure of one's mental health diagnosis is the norm due to the stereotypes associated with it, how easy is it to match someone with lived mental illness experience with a mediator who also has a mental health diagnosis?⁸³ According to the National Institute of Mental Health, approximately one in five American adults experience a mental health problem each year.⁸⁴ If one wanted to do research on how many mediators have been diagnosed with a mental health illness, one may find very few. Dan Bernstein, for example, is one of the few mediators who has been public about his bipolar disorder.⁸⁵

Due to the limited access to processes, concerns about implicit biases, stigmas, and other reasons for non-disclosure, the measurement of diversity in the dispute resolution field remains daunting. The implications of this may be that if the extent of varied backgrounds cannot be identified, efforts to attract future pools of applicants from them may be stifled because, among other reasons, they may not feel welcome.

III. GROWING DIVERSITY IN THE ADR FIELD: PROSPECTS FOR THE FUTURE

There is no shortage of suggestions about how best to increase the diversity of the field. Some of the barriers are a result of the very nature of some of the processes. Mediation, as noted previously, often relies on relationships and networks, and, for the most part, occurs behind closed doors. While privacy and confidentiality are fixed features that sell mediation and are difficult to address without changing the process, much can be done about broadening who plays a role in helping to shape practices, building relationships, increasing transparency, and accessing networks. Suggestions range from individuals creating websites, mentoring, doing pro bono work, publishing, presenting, networking at professional associations, working on committees, to provider organizations and bar associations sponsoring meet-and-greet events, providing co-mediation or panel related opportunities, or creating pipeline opportunities, among others.⁸⁶

⁸¹ See Reema Patel, *In the Closet: Invisible Diversity*, THE GUARDIAN (Apr. 14, 2011, 4:00 EDT), <https://www.theguardian.com/public-leaders-network/2011/apr/14/in-the-closet-invisible-diversity> (discussing invisible diversity).

⁸² See *Cultural and Ethnic Stigmas Surrounding Mental Health*, SHEPELLFGI, <http://www.shepellfgi.com/managingstigma/article.aspx?aid=50&lang=3> (last visited Feb. 10, 2019) (giving examples of stigmas associated with mental health).

⁸³ See Patel, *supra* note 81.

⁸⁴ *Mental Illness*, NATIONAL INSTITUTE OF MENTAL HEALTH (Nov. 2017), <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> ("In 2016, there were an estimated 44.7 million adults aged 18 or older in the United States with AMI. This number represented 18.3% of all U.S. adults.")

⁸⁵ MH MEDIATE, <http://mhmediate.com/about/> (last visited Feb. 7, 2019). Dan Bernstein states that he "is public with his bipolar disorder to contribute to mental health awareness and counteract stigmas about mental illness." *Id.*

⁸⁶ Deborah Masucci, *Moving Forward for the Benefit of our Members: Minorities in Dispute Resolution (MIDR)*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-

IV. CONCLUSION

While it is relatively easy to make a strong case for diversity in the dispute resolution field, its measurement remains challenging. Much needed are (1) demographic statistics, (2) a more explicit characterization of diversity itself, and (3) how context impacts diversity in the dispute resolution field. Moreover, since the discussion about diversity among neutrals is dominated by the interest being listed on rosters and selection from them, the broader discussion about diversity metrics in other components of the dispute resolution field often gets ignored. For example, who are the law and other dispute resolution professors, who are the community mediators, who are the peer mediators in the schools, and who are the practitioners in solo practice, among others?

The potential for research regarding diversity in the dispute resolution field is tremendous. Without data, particularly readily accessible data, the implications for the future of the field itself could be at stake. Finally, in addition to the usefulness of knowing who is involved in the work of the field, there are other potential parties who may be interested, including funders, policymakers, program administrators, potential users, and future colleagues.

resolutions/masucci_midr.authcheckdam.pdf; Sasha A. Carbone and Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and: ADR Community Should Be Doing to Achieve This Goal*, 84 NYSBA JOURNAL, 33, 33–37 (Jan. 2012), https://www.adr.org/sites/default/files/document_repository/Increasing%20Diversity%20Among%20Arbitrators_0.pdf.

