

ALTERNATIVE DISPUTE RESOLUTION FOR WOMEN OF COLOR

**DIVERSE NEUTRALS AND OPPORTUNITIES
FOR INFLUENCE, CAREER PROGRESSION
AND TRANSFORMATION**

14TH ANNUAL CAREER STRATEGIES CONFERENCE

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WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR) AND WHY SHOULD YOU CARE? THE BASICS

ADR is a means to:

- Resolving disputes in a manner other than through litigation
 - Ombudsperson
 - Negotiation
 - Mediation (Court-appointed or Party selection)
 - Hearing Officers
 - Arbitration (Binding, Advisory, or Non-binding)
 - Med-Arb
 - Private judges (either sitting alone, on panels or over summary jury trials)

WHY ADR?

CONS

- Perception of power imbalance
- Can mimic litigation (costs, discovery) losing its value as alternative
- Limited appeal/review
- Horror stories

PROS

- Avoiding ill will / Preserving relationships
- Private/ Confidential
- Faster / More efficient
- Strategy considerations / Control of outcome
- Parties can design the process
 - Tailored remedies / Creative solutions
- Generally less expensive / Avoids court costs
- Substantive experts as arbitrators

RECENT CASE DEVELOPMENTS

- Overall, courts have been enforcing arbitration agreements, as long as both the parties voluntarily entered into the contract and an unambiguous manifestation of assent to terms.
- The courts have encouraged the binding nature of arbitration clauses, with some exceptions.
 - (Consumer Case) Roberts v. AT&T Mobility LLC, 877 F.3d 833 (9th Cir. 2017): The court found that the Federal Arbitration Act’s deference to arbitration is not a state action for First Amendment purposes when an arbitration agreement is in a contract between private parties.
 - (Consumer Case) McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017): A contract that waives the right to seek a statutory remedy (such as remedies available under the Consumers Legal Remedies Act, unfair competition law, false advertising law, etc.) violates California’s public policy (and this public policy is not preempted by the FAA). Thus an arbitration agreement within such a contract is not necessarily enforceable.
- The way a “Terms of Service” contract appears on internet affects the validity of an arbitration clause within it.
 - (Consumer) Meyer v. Uber Techs., Inc., 868 F.3d 66 (2nd Cir. 2017): The plaintiff had agreed to arbitrate his claims with Uber because Uber had provided reasonably conspicuous notice of the “Terms of Service” when the user registered for the app, and the plaintiff had unambiguously manifested his assent to those terms.
 - (Consumer case) Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454 (S.D.N.Y. 2017): Lyft’s first “Terms of Service” agreement was not a valid contract because the user saw only a link to the a page containing the agreement. However, a second “Terms of Service,” agreement was valid because the user was forced to scroll through it. Lyft could compel arbitration because the language of the arbitration clause in the second agreement was broad enough to give the arbitrator the power to decide the scope of the arbitration.

RECENT CASE DEVELOPMENTS (CONT'D)

- Finally, Supreme Court has chimed in recently:
 - Epic System Corporation v. Lewis, 138 S. Ct. 1612 (2018): The Court held that neither the National Labor Relations Act nor the Federal Arbitration Act's saving clause suggests that arbitration clauses are unenforceable. Thus, bilateral arbitration clauses in employee agreements are valid.
 - Janus v. American Federation of State, Country, and Municipal Employees, Council 31, 585 U. S. ____; 138 S. Ct. 2448 (2018): Landmark decision where the Supremes held in favor of plaintiff Mark Janus, a child support specialist who worked for Health Care & Family Services, and ruled that public employees cannot be forced to subsidize a union they choose not to join, or strongly object to, because such a requirement violates their First Amendment free speech rights. This means that five million public employees in 22 states no longer have to pay agency fees to public-sector unions as a condition of employment.

IN HOUSE AND OUTSIDE COUNSEL PERSPECTIVES:

- Is there an employer promulgated ADR plan with employees?
- Do business contracts or service level agreements call for ADR?
- What are the client's concerns and experiences with ADR?
- What are specific problems/ challenges of your company or clients?
- Is there a processes for researching and selecting of neutrals within the company and/or your firm?
- Have you ever considered whether diverse neutrals would benefit your company or client much like a diverse judicial officer?
- Should CCWC members assist/ advocate for diverse neutrals? Should you care?
- What has been your experience with neutrals? What have been your perceptions?

WE NEED YOU!



WHY CONSIDER BECOMING A NEUTRAL?

(Side Hustle, Retirement Plan or Passion?)

➤ **The need for diversity among neutrals**

- Resolving disputes is an essential component of a good corporate work culture.
- Cultural differences do not preclude productive conflict resolution; however, cultural patterning looms large – impacts initial and following decisions and the impacts in the workplace, acceptance of decisions and trust in the process
- Our presence is often reassuring to some and tempers posturing, requires accountability of everyone, addresses stereotypes.
- We assist in communicating alternate perspectives and values as well or sometimes the same values or positions a different way.
- We can add credibility to “the process” by effective restatement and aid in helping to bring about understanding perspectives and/or closure in meaningful ways. As neutrals we get to do the good work of helping create solutions as mediators or objectively find truth as the arbitrator.
- Spawns profitability, value (gender and ethnicity), risk reduction and innovative solutions – <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity> and suggest penalty for underrepresentation

➤ **Judicial aspirations?**

➤ **Professional development – Meet new people and learn about new things and industries**

➤ **Flexible practice / work-life balance – Has your practice dictated your life? Should your life dictate your practice?**

WHY CONSIDER BECOMING A NEUTRAL, CONT'D?

- You are a precious commodity.
 - You like helping people resolve disputes or understand each other better.
 - It provides exposure to and across diverse interests, priorities, industries and agendas.
 - It is often a less stressful alternative to litigation in which to utilize your specialized knowledge and skill sets.
 - Have you developed a special understanding or knowledge that you can bring to parties in the resolution of disputes?
 - Where do you see your practice in 5 – 10 years?
 - It's a process that can help secure additional revenue when you slow your career down, but you have to start now!
 - It can be very lucrative.

VARIETY OF SUBSTANTIVE/ PRACTICE AREAS

- Labor and Employment
- Complex Commercial/Business
- Family
- Wills & Estates
- Private and Public Sector
- Sports and Entertainment
- Health
- Oil & Gas
- School
- Elder
- Copyright/Patent
- Civil Rights
- Landlord Tenant
- Construction
- Public Policy
- Telecom
- ERISA
- Property Tax
- Consumer

WHO IS LOOKING FOR YOU?

➤ Roster Opportunities

- NAA
 - JAMS
 - CPR
 - AAA
 - NMB
 - Federal, State and Local Government
 - FMCS
 - FINRA
 - Unions
 - Federal and State Courts
 - Chlarb
- Ad Hoc



TRAINING TO BE A NEUTRAL

- Most states do not have a set licensing standard that governs who can call themselves a mediator.
- Certification / Licensing
- Some states have made some effort to provide for a degree of credentialing
- See <https://nvms.us/wp-content/uploads/2014/11/us-mediation-certification-standards.pdf> for State by State Guide on Court Qualification Standards and <http://www.cifmat.org/stateguidelines.html> for State Guidelines or laws to qualify as mediator

CERTIFICATION/LICENSING: OVERVIEW OF STATE REQUIREMENTS

- Each state varies in its approach to ADR/mediation and its handling of neutrals. Most states use the terms interchangeably or have laws about only arbitrators or mediators. However, after a review of the eighty-six district court laws* there were a few themes:
 - District court law typically require certain requirements and training before becoming court-sponsored neutrals..
 - At least 30 districts require a neutral to have a law degree. Most of these districts require these attorneys to have 5-10 years of experience.

*Not including Guam, Puerto Rico or the U.S. Virgin Islands.

MORE ON TRAINING . . .

- Of the 28 states which require training for civil mediation, 14 require 40 hours, 4 require between 30 and 40, 6 require between 20 and 30, and 2 require less than 20 hours (2 have unclear information).
- In 4 states a law degree is required to be recognized by the court as a civil mediator.
- In 5 states, some other type of education/professional experience (e.g. bachelor's degree plus 6 years management experience) is required. In some cases a waiver may allow an applicant to bypass these requirements.
- Of the 37 states which have standards for family mediators, 13 require relevant education or experience beyond a bachelor's degree. This may include a law degree, an advanced degree or certification in a social or behavioral science (e.g. psychology, counseling), and/or work experience dealing with families and children.

ADR RESOURCES

➤ Administrated by:

- AAA (www.adr.org)
- JAMS (www.jamsadr.com)
- CPR (www.cpradr.org)
- FMCS (www.FMCS.gov)
- NMB (www.nmb.gov)
- USPS (www.usps.gov)
- NAA (www.naarb.org)

➤ Ad Hoc

➤ Local Rosters

- Local practice/industry
 - Construction bar
 - Family law bar
 - Health Care
 - Real Property/ Property Tax

➤ Federal, State and Local Government

QUESTIONS?

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THANK YOU