



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

NEUTRAL DIVERSITY IN ONTARIO

*Report by the OBA
Working Group on
Neutral Diversity*



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1. Introduction

Arbitrators and mediators (“**Neutrals**”) hired in Ontario do not generally reflect the gender or racial diversity of the demographics of the province or the legal profession. Through this report the Ontario Bar Association (“**OBA**”) has undertaken to understand the depth of this issue within the profession and how to address it proactively. As this report will show, the diversity of Neutrals (defined as Neutrals from racially diverse backgrounds and from various age groups and genders (“**Neutral Diversity**”)) can enhance client experiences with the legal system, improve and enhance the effectiveness of outcomes of alternative dispute resolution (“**ADR**”) and build a stronger, more inclusive legal profession.

While efforts to increase Neutral Diversity have been ongoing in other countries, the issue has until now gone unaddressed in Ontario. This report examines the efforts in other jurisdictions to increase the Neutral Diversity and sets out Ontario data highlighting the lack of Neutral Diversity in the province. It considers the importance of Neutral Diversity and lays out a series of steps that lawyers, law firms, in-house counsel, experienced Neutrals, law associations, government bodies and ADR providers can take to increase both the supply of and demand for Neutral Diversity.

2. Background

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law and in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and delivers over 325 professional development programs to a diverse audience of over 16,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA’s Alternative Dispute Resolution Section (“**ADR Section**”). The ADR Section has over 250 members who, on a daily basis, are engaged in mediations and arbitrations across the province in a variety of areas including civil and commercial litigation, trusts and estates, employment and labour, family law and insurance. The ADR Section struck a working group (the “**Working Group**”) to examine the existence of Neutral Diversity in ADR settings and propose recommendations on how to improve the same in Ontario.

3. Enhancing the Diversity of Mediators and Arbitrators: Lessons from Other Jurisdictions

Around the globe, organizations are finding that mediators and arbitrators often do not reflect the diversity of the populations they serve. The steps other jurisdictions have taken to improve Neutral Diversity provide useful context for the OBA’s work on this issue.

In the United Kingdom

In the United Kingdom, the Centre for Effective Dispute Resolution (“CEDR”), a leading non-profit ADR service provider, released a comprehensive report on gender, age and racial/ethnic diversity in civil and commercial mediation in March 2019.¹ CEDR found that there were significantly fewer women (33.6%) working in commercial mediation than men (66.4%) and that the proportion of racialized² commercial mediators is lower than the general population and under-represented in relation to comparable professions, such as law.

CEDR made numerous recommendations to improve mediator diversity. It focused on addressing barriers encountered by potential mediators, which can prevent a diverse mediator from being selected for commercial cases. CEDR’s recommendations include:

- Initiatives to increase the number of diverse individuals who choose to become mediators, such as greater use of diverse mediator role models to attract new diverse mediator candidates.
- Initiatives in mediator training to improve the success of diverse candidates, including the review of training materials and assessment criteria for unconscious bias.
- Initiatives to assist diverse mediators in obtaining early experience as mediators, including encouraging experienced mediators to provide job shadowing and assistant experience opportunities.
- Initiatives to increase the number of diverse mediators on mediator panels, including the recommendation that panels of mediators have clear and transparent criteria for admission, that the criteria for selection be reviewed to ensure that they are inclusive and focussed primarily on mediator experience and ability, and the use of tiers of senior and junior mediators allowing for newer mediators to more easily enter the profession.

At the crucial stage of mediator selection, CEDR made several recommendations to increase diversity. On the provider side, CEDR recommended that diverse lists be provided to clients and that the list be reviewed annually for diversity. CEDR recommended that clients proactively request diverse lists from providers and reject non-diverse lists. CEDR recommended that client advisors be trained in unconscious bias and how to deal with this, including when the bias originates from a client.

¹ Available online at: <https://www.cedr.com/wp-content/uploads/2019/10/Full-Report-CEDR-Foundation.pdf>

² In the U.K., CEDR did not use the term “racialized” but the acronym “BAME”, which “stands for Black, Asian and Minority Ethnic and is defined as all ethnic groups except White ethnic groups. It does not relate to country origin or affiliation.” <https://www.london.gov.uk/questions/2018/0064>.

In the United States of America

In the United States, the American Bar Association (“**ABA**”) found in 2018 that diversity within dispute resolution “significantly lags the legal profession as a whole”.³ The ABA noted that the diversity of Neutrals selected for popular Neutral panels is significantly lower than the representation of diverse groups in the legal profession as a whole, in terms of gender, race, and ethnicity. Even when added to these panels, women and members of racial and ethnic groups were selected to serve as Neutrals at levels below their representation in the profession. In 2018 the ABA adopted the following resolution:

RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution 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

FURTHER RESOLVED, That the American Bar Association urges all users of domestic and international legal and Neutral services to select and use diverse Neutrals.⁴

A number of major providers of mediators and arbitrators have made recommendations to enhance the diversity of Neutrals. JAMS, the world’s largest provider of Neutrals [based in the U.S. and the U.K.], has stated its commitment to recruit and retain Neutrals of varied ethnic, racial, gender, religious, and sexual orientation backgrounds. They have invited law firms, corporations and legal organizations to:

- Consider women and ethnically diverse mediators and arbitrators when evaluating a case and participating in the selection of ADR professionals.
- Consider utilizing a [Diversity and Inclusion Clause⁵](#) for arbitration contracts.
- Allow JAMS to assist firms in measuring progress by tracking a firm’s Neutral selection data.⁶

The International Institute for Conflict Prevention & Resolution (“**CPR**”), which is based in New York but follows the United Nations Commission on International Trade Law Arbitrations Rules (UNCITRAL Arbitration Rules), has stated that it is “committed to encouraging all forms of diversity, equity and inclusion in dispute resolution, in particular increasing the participation of women and people of color in mediation, arbitration and other dispute resolution processes – especially by increasing the number of diverse Neutrals selected to mediate or arbitrate disputes as well as increasing the opportunities for diverse attorneys

³ Report of the ABA Section of Dispute Resolution, August 2018 in support of Resolution 105, available online at: <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>

⁴ ABA Resolution 105. <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>

⁵ [Diversity & Inclusion Arbitration Clause for Arbitration Contracts | JAMS Arbitration \(jamsadr.com\)](https://www.jamsadr.com/diversity-and-inclusion-arbitration-clause-for-arbitration-contracts/) (<https://www.jamsadr.com/inclusion-clause/>)

⁶ [Diversity and Inclusion | JAMS Mediation, Arbitration and ADR Services \(jamsadr.com\)](https://www.jamsadr.com/diversity/) (<https://www.jamsadr.com/diversity/>)

appearing before Neutrals.”⁷ CPR has published a detailed plan to accomplish its diversity goals, with four prongs: growing the pipeline of diverse Neutrals, supporting the pipeline, promoting diverse Neutrals, and increasing the number of diverse Neutrals selected.⁸ CPR has encouraged members of the corporate and law firm communities to sign its Diversity Commitment, which states:⁹

From The Corporate Community:

We will include diverse Neutrals among any list of mediators or arbitrators we propose and ask our outside law firms¹⁰ and counterparties to do the same. We also ask that our outside law firms discuss with our counterparts the value in diversity and inclusion among those who mediate and arbitrate and emphasize selecting diverse mediators or arbitrators. Finally, to drive accountability and transparency, we will track the selection of diverse Neutrals in our matters.

From The Law Firm Community:

We will discuss with our clients the value in diversity and inclusion among those who mediate and arbitrate our matters on behalf of our clients, which discussion may include the importance of:

- 1) including diverse Neutrals among any list of mediators or arbitrators we propose in those matters;
- 2) selecting diverse mediators or arbitrators in those matters; and
- 3) tracking the selection of diverse Neutrals in those matters.

Other Jurisdictions

ADR organizations in other jurisdictions have also commented on diverse Neutrals. The Association of Corporate Counsel (with 60 chapters around the globe) has published articles on how to increase the diversity of Neutrals, including encouraging in-house counsel to consider and impose diversity requirements, instead of leaving the choice of the selection of Neutrals to outside counsel.¹¹

⁷ [Diversity, Equity & Inclusion | CPR International Institute for Conflict Prevention & Resolution \(cpradr.org\)](https://www.cpradr.org/about/diversity) (<https://www.cpradr.org/about/diversity>)

⁸ [Diversity, Equity & Inclusion | CPR International Institute for Conflict Prevention & Resolution \(cpradr.org\)](https://www.cpradr.org/about/diversity) (<https://www.cpradr.org/about/diversity>)

⁹ [Diversity Commitment | CPR International Institute for Conflict Prevention & Resolution \(cpradr.org\)](https://www.cpradr.org/about/2020-diversity-commitment) (<https://www.cpradr.org/about/2020-diversity-commitment>)

¹⁰ Non in-house lawyers

¹¹ See, for example, [Why Bringing Diversity to ADR Is a Necessity | Association of Corporate Counsel \(ACC\)](https://www.acc.com/resource-library/why-bringing-diversity-adr-necessity) (<https://www.acc.com/resource-library/why-bringing-diversity-adr-necessity>)

In 2015, in recognition of the under-representation of women on international arbitral tribunals, members of the arbitration community around the world drew up a pledge to take action (the “**Equal Representation in Arbitration Pledge**”), which provides:

“The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.”¹²

The Pledge is to take steps reasonably available – and to encourage other participants in the arbitral process to do likewise – to ensure that, wherever possible:

1. committees, governing bodies and conference panels in the field of arbitration include a fair representation of women.
2. lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
3. states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
4. where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
5. gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and
6. senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.¹³

As of 2021, 5,000 individuals and organizations around the globe have signed the Equal Representation in Arbitration Pledge. Other organizations, such as the International Chamber of Commerce, have signed their own versions of a pledge to improve the representation of women in arbitration.¹⁴

¹² [Equal Representation in Arbitration \(arbitrationpledge.com\)](http://www.arbitrationpledge.com) (<http://www.arbitrationpledge.com/about-the-pledge>)

¹³ [Take the pledge \(arbitrationpledge.com\)](http://www.arbitrationpledge.com) (<http://www.arbitrationpledge.com/take-the-pledge>)

¹⁴ [ICC celebrates 5 years of progress since arbitration gender pledge - ICC - International Chamber of Commerce \(iccwbo.org\)](https://iccwbo.org) (<https://iccwbo.org/media-wall/news-speeches/icc-celebrates-5-years-of-progress-since-arbitration-gender-pledge/>)

4. Lawyer Demographics in Ontario

The demographic composition of lawyers working in Ontario is important context when considering or evaluating the diversity of the mediators and arbitrators that these lawyers hire and, in some cases, they themselves will become. In this section, the report summarizes that information. Notably, many (but not all) mediators and arbitrators working in Ontario are practicing or non-practicing lawyers – but precise data is not available as there is no central registry listing all Ontario Neutrals.

Race

Since 2001, the proportion of lawyers identifying as racialized in the Ontario legal profession has more than doubled, rising from 9% of the profession in 2001 to 18% in 2014¹⁵ and 23.7 in 2019.¹⁶ This is compared to 23% of the Ontario population who indicated in the 2006 Statistics Canada Census of the Population that they are racialized, 26% of the Ontario population who indicated in the 2011 National Household Survey that they are racialized, and 29.28% of the Ontario population who identified as racialized in 2016.

In 2019, of the 23.7% of lawyers who identified as racialized in Ontario (56.7% were women). In 2019, lawyers who identified as Indigenous were estimated to be 1.43% of all lawyers (56.9% of whom identified as women), but 2.91% of the Ontario population, as compared with 0.6 percent of lawyers in 2001 and 1.0 percent of lawyers in 2006.¹⁷

White lawyers accounted for an estimated 74.9% of Ontario lawyers in 2019, whereas white people accounted for 67.82% of the general population.¹⁸ This represents a reduction from 2014, when 80.9% of all lawyers were reported to be white.¹⁹

Gender

Data about the gender composition of the profession shows large numbers of women entering the legal profession at the start of their careers as lawyers, and then a decline in practicing female lawyers as they age. For example, in 2020 in Ontario, according to the Law Society of Ontario, 55.94% of lawyers were men, and 44.06% were women. Women made up 59% of

¹⁵ Law Society of Upper Canada, “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Profession” (2016), p. 19, available at

<https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>, citing Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Toronto: Law Society of Upper Canada, April 2010) (“Ornstein Report”), available at:

https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/r/racialization_gender_report.pdf and 2014 Statistical Snapshot of Lawyers from the Lawyer Annual Report 2014 at

<http://www.annualreport.lsuc.on.ca/2015/en/the-professions/snapshot-lawyers.html>

¹⁶ Statistical Snapshot of Lawyers in Ontario from the Lawyer Annual Report 2019.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Statistical Snapshot of Lawyers in Ontario from the Lawyer Annual Report 2014, Law Society of Upper Canada, available at:

https://lawsocietyontario.azureedge.net/media/lso/media/lawyers/practice-supports-resources/equity-supports-resources/tab_7-3-1_-_snapshot-lawyers2014_apr13.pdf

lawyers under 30 years of age, 53% of lawyers between 30-39 years old, and 52% of lawyers between 40 and 49 years old. Men made up 59% of lawyers between the ages of 50—65, and 82% percent of lawyers over the age of 65.²⁰

In terms of employment and gender in 2020, there were 2.7 times the number of male partners compared to female partners, nearly the same number of male and female associates, and nearly twice as many male sole owners than women sole owners.²¹

5. Survey Administered by the Ontario Bar Association

Background

Until now, there have been no published reports on the demographic information of Ontario’s mediators and arbitrators. As has been noted in other jurisdictions, confidentiality rules and other features of mediation and arbitration make it impossible to gather a full picture of this data.²² There is no central register of all the mediations that take place in Ontario each year, much less the demographic information of the Neutrals hired to administer them. Additionally, there are no comprehensive lists containing the names of all mediators and arbitrators in Ontario that would allow for further in-depth and detailed research, from which one can gather demographic information about Neutrals, and how frequently each one is hired.

With this backdrop, the OBA administered an online survey to OBA members between April and July 2021, seeking information about the mediators and arbitrators hired by counsel responding to the survey, as well as the demographics and experiences of mediators and arbitrators responding to the survey.²³ The OBA shared the survey link with executive members of OBA sections heavily involved in litigation and ADR, namely the Civil Litigation, Alternative Dispute Resolution, Family Law, Trusts and Estates Law, Labour and Employment Law, and Insurance Law Sections, as well as a number of other litigating members, all of whom were encouraged to complete the survey. The survey results provide a useful snapshot of information received from the 117 respondents who chose to participate in the survey. While the results show some clear trends, they cannot be seen as reflecting the experiences of all lawyers, mediators, and arbitrators in Ontario.

²⁰ Law Society of Ontario 2020 Annual Report, Membership Statistics, available online at: <https://lawsocietyontario.azureedge.net/media/lso/media/annualreport/documents/statistics-membership-2020.pdf>, p. 1, “Lawyers by age and gender”

²¹ Law Society of Ontario 2020 Annual Report, Membership Statistics, available online at: <https://lawsocietyontario.azureedge.net/media/lso/media/annualreport/documents/statistics-membership-2020.pdf> page 3, “Lawyers by type of employment and gender”.

²² “Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research”, Maria R. Volpe, *Pepperdine Dispute Resolution Law Journal*, Vol. 19: 2019, p. 201.

²³ The Working Group decided to focus the survey questions and results on race and gender. Further work in this area may wish to address sexual orientation, disability or other grounds.

Survey Results

Mediators

Respondents to the survey reported that in the last two years, the mediators that they hired were men 70% of the time, and white 94% of the time.²⁴ When proposing a mediator to counsel, respondents indicated that they included women on the list approximately 65.8% of the time, men 77.85% of the time, and racialized mediators 16.17% of the time.

Different trends emerged when responses were considered by practice area²⁵:

- Commercial litigators hired male mediators 80% of the time, and white mediators 98% of the time in the last two years, based on the survey results from 35 commercial litigator respondents.
- Employment lawyers hired male mediators 50% of the time, and white mediators 91.5% of the time in the last two years, based on the survey results from 18 employment lawyer respondents.

Of the respondents who answered the question providing details about racialized mediators hired, a group of 21 respondents indicated they hired a Black mediator a total of 6 times; a group of 18 respondents indicated they hired an Indigenous mediator only once in total; and a group of 27 respondents indicated that they hired a racially diverse mediator 31 times in total.²⁶

Of the 44 respondents who provided information about the gender of mediators they had hired, one person indicated that they hired a mediator who was non-binary, gender non-conforming or other gender identity.

Sixty-nine of 70 respondents answered affirmatively that they would use a mediator they have never used before, with 26 of 42 comments indicating that they would only use a new mediator if recommended by others.

When asked about why women or men are proposed as mediators, respondents expressed the following sentiments:

- When women mediators are proposed they are always rejected (3)
- Lack of familiarity with female mediators in the practice area (9)
- Lack of familiarity with racialized mediators in the practice area (31)
- Retired judges are often hired as mediators, and they tend to be white men (2)

²⁴ The Working Group could not confirm whether respondents assumed the race and gender of the Neutrals used or confirmed that information with Neutrals. While best practice allows individuals to self-identify their own race and gender, the Working Group felt that the reported information is important because it assesses the perceived identity of Neutrals being hired by lawyers; it is that perception that might impact who is in fact hired.

²⁵ There were 12 responses from respondents who practiced insurance law, and 7 from those who practice trusts and estates. Due to the smaller number of responses, a summary of their replies is not included here.

²⁶ While these numbers don't match the total number of mediators who are racialized that were hired, we thought it important to include the reported information. One respondent's responses were not included in these reported results, as the answers provided data wildly outside of the norm presumably to skew results, for instance that 173 Indigenous and 254 mediators of racially diverse backgrounds were hired by this individual. That respondent's comments included statements such as, "True inclusivity and anti-racism requires me to make sure I am not racist"

- The respondent realized through answering the survey that the mediators they use tend to be older, white men (2)
- Female mediators tend to be effective (2)

Some of the more specific comments included:

- “I always propose at least a majority of women and preferably women of colour. Shockingly, I often get a list back of all white men.”
- “I do not seem to be familiar with many women mediators.”
- “I don't have any experience with racialized mediators, and I have never had any recommendations for racialized mediators. I can't recommend to my client a mediator who I have never used or had been recommended to me.”
- “I would like to include more [racialized mediators] but I do not know them and can't ask my colleagues if they're the right fit because nobody else has used them.”
- “I cannot think of a single instance where a racialized mediator has been on a list.”

In relation to whether clients have ever expressed a preference for a certain type of mediator, two respondents indicated that a female mediator is preferred for sexual assault cases. However, other comments suggested that non-specific client preferences for male mediators come into play, suggesting that a degree of misogyny may be a barrier to the selection of female Neutrals and highlighting the need for client education:

- “I have received comments from clients that they want a "hardball man" to pressure the other; I explain to clients this simplistic position is nonsense.”
- “Often a man is preferred over a woman.”

Arbitrators

Respondents to the survey reported that in the last two years, the arbitrators whom they hired were men 65% of the time, and white 93% of the time. When proposing an arbitrator to counsel, respondents indicated that they included women on the list approximately 32.87% of the time, men 67.9% of the time, and racialized arbitrators 14% of the time.

Different trends emerged when responses were considered by practice area:

- Commercial litigator respondents hired male arbitrators 82.6% of the time and white arbitrators 100% of the time in the last two years, based on the responses of 35 respondents practicing in that area.
- Employment lawyer respondents hired male arbitrators 66% of the time, and white arbitrators 96% of the time in the last two years, based on the responses of 18 respondents practicing in that area.

Of the respondents who answered the question providing detail about arbitrators who are racialized and were hired, a group of 14 respondents indicated they hired a Black arbitrator a

total of twice; a group of 13 respondents hired no Indigenous arbitrators; and a group of 14 respondents indicated they hired an arbitrator who was racially diverse a total of twice.²⁷

Of the 34 respondents who provided information about the gender of arbitrators they had hired, none indicated that they hired an arbitrator who was non-binary, gender non-conforming or other gender identity.

Forty-four of the 45 respondents to the question “would you use an arbitrator you have never used before?” answered “yes”, with 12 of the 20 responses indicating that they would only use a new arbitrator if that person was recommended by others.

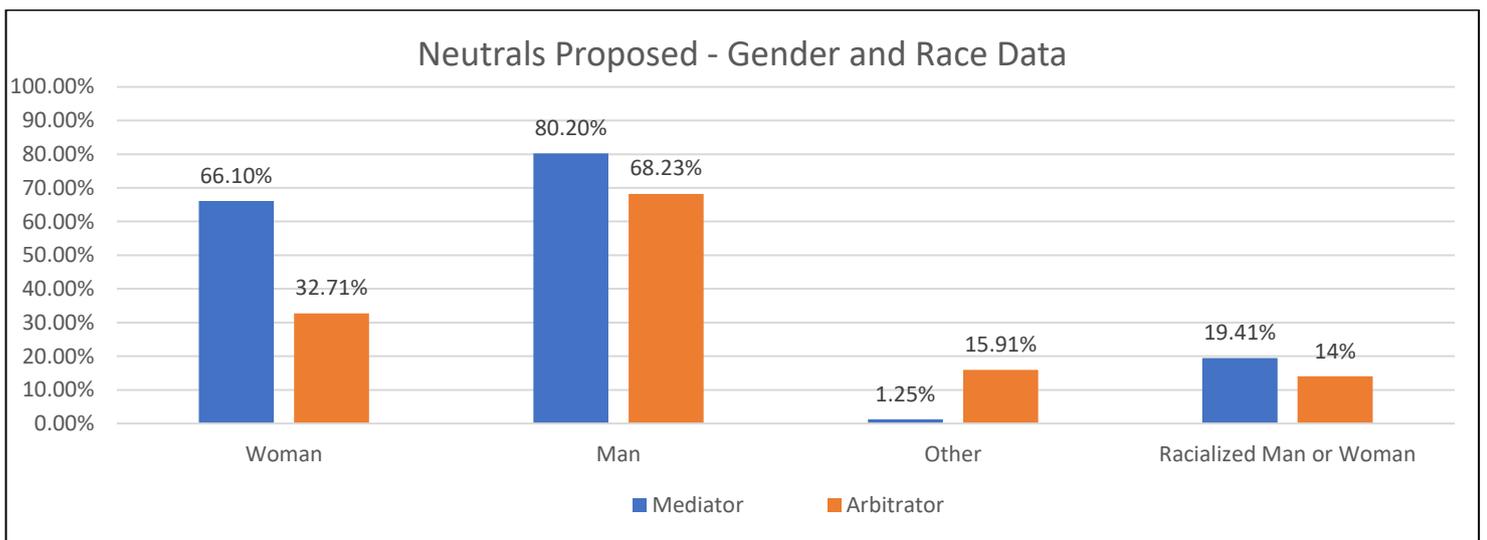
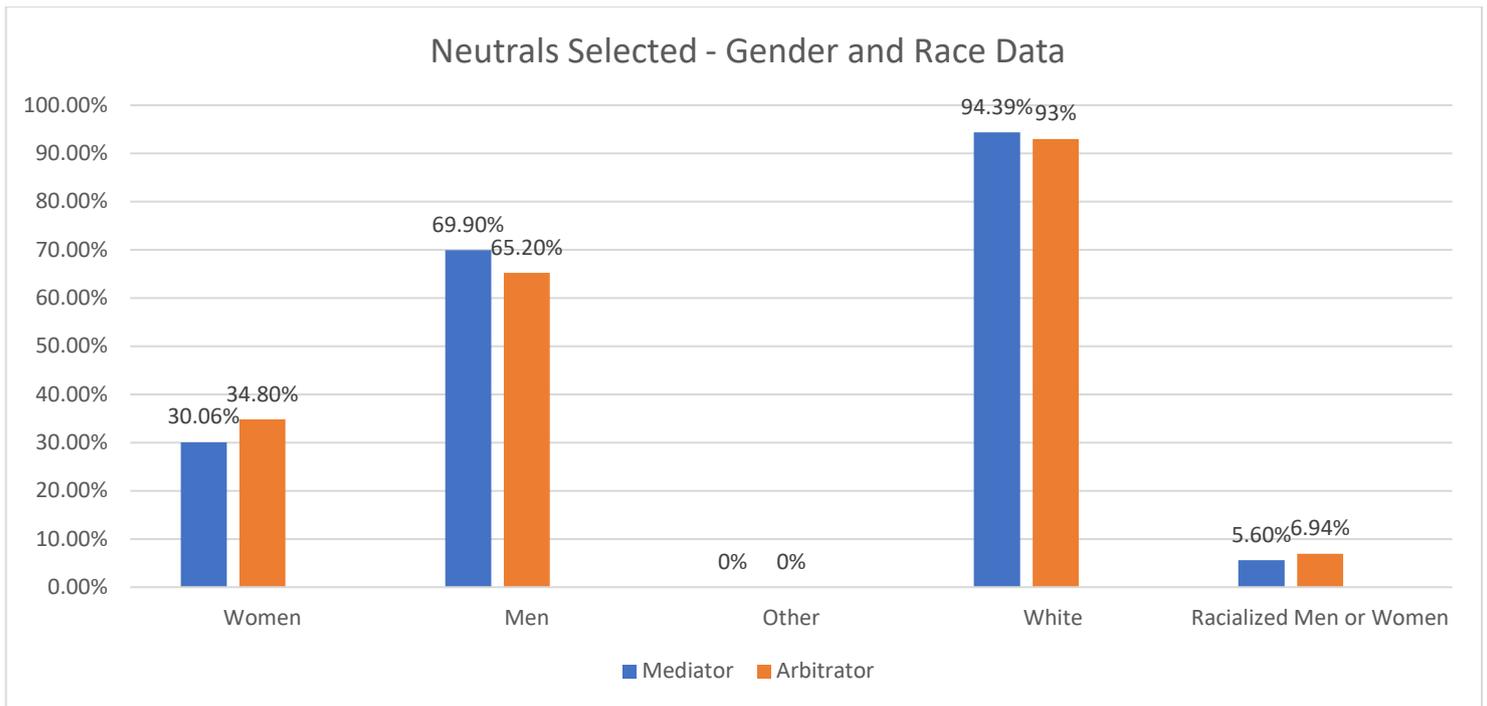
When asked about why women or men are proposed as arbitrators, comments included the following sentiments:

- Not aware of any female arbitrators in practice area (3).
- The roster of arbitrators used are older white men (2), the respondent had not thought about this before answering the survey questions.
- Not enough female judges with commercial expertise, meeting the background of arbitrators used.
- Not aware of any racialized arbitrators (14).

More specific answers included:

- “The roster of arbitrators I tend to use are old white men. I never thought about it. It will change.”
- “The established commercial litigation arbitrators I am familiar with, or whom my partners are familiar with, are all white men.”
- “There just aren't retired racialized judges with commercial expertise, who are typically the arbitrators we use.”
- “I do not know of any racialized arbitrators that are recommended by my colleagues.”

²⁷ While these numbers don't match the total number of racialized arbitrators hired, we thought it important to include the reported information. The responses from the respondent mentioned in footnote 25 were similarly not included, as they again provided dramatically different data from other results, including that the individual hired 85 arbitrators from racially diverse backgrounds, and 24 arbitrators of Indigenous backgrounds.



Neutrals

Twenty-three Neutrals responded to the survey, 18 of whom identified as White, one of whom identified as Black, one of whom identified as Chinese, one of whom identified as East-Asian, one of whom identified as West Asian, one of whom identified as Indigenous (Inuit/Metis/First Nation), two of whom identified as Arab, two of whom identified as Latin American/Hispanic/Latino, and four of whom identified as South Asian. Fifteen of the respondents identified as women, and seven as men. The respondents ranged in age primarily from 40 to 69, with one being 35.

When asked whether they felt their identity (meaning their gender, race, sexual orientation, disability or lack thereof, religion and/or age) impacted their ability to be selected, 56% of the 23 respondent Neutrals said yes. Comments shared in relation to this answer included:

- “I was once asked how I expected to gain traction in the field given my age and sex. The implication was someone who looked like me would not be taken seriously by clients and therefore would not be hired.”
- “When I started as a mediator after practicing law for 16 years, a senior male partner and former colleague in my former large firm, asked me how I planned to get people to hire me since, ‘you are an attractive woman’. I had recently worked with this lawyer, who had been complimentary of my legal work, and know his colleagues had also spoken highly of my legal skills to him over the years. It made me wonder how many other lawyers would be evaluating me based on my gender rather than my achievements and professional reputation.”
- “I have sensed strongly that parties who want an ‘aggressive’ or directive, evaluative mediator will often assume a woman won’t be comfortable with that style.”
- “I have heard that I’ve been rejected as a mediator because I am too ‘empathetic.’”
- “Perhaps age - lawyers may tend to prefer to select a ‘senior’ mediator. Some clients may prefer a younger mediator in certain situations.”
- “I believe I have been rejected as a proposed arbitrator based on my gender. Sometimes parties feel that women in general will not be tough enough.”
- “Initially, I felt at a disadvantage as a more junior woman practicing as a mediator. I felt that some lawyers were looking for an old guy who had retired from the practice of law after many years. Over time, I have learned that people have sometimes chosen me because they have a plaintiff who, for whatever reason, would not react well to an overbearing man and would prefer a female mediator. I have also been told that I have been chosen for my ability to relate to and/or connect with a younger plaintiff, or someone from a racialized background.”

6. Composition of Alternative Dispute Resolution Lists

While there is no one central listing of all mediators and arbitrators in Ontario, there are a number of private and public lists of Ontario arbitrators and mediators. These lists also do not provide a perfect record of Neutrals in Ontario: a small number of people appear on more than one list; the lists do not contain the names of all mediators and arbitrators in Ontario; and there is no way to know which Neutrals from each list are in fact being hired and how often. Nevertheless, the demographic information in these lists provides another data point on the diversity of mediators and arbitrators in Ontario today.

The Working Group sought to provide both race- and gender-based data in relation to these lists. However, limited resources meant that the racial identity of listed Neutrals could not be confirmed with the individuals themselves, but rather only guessed based on website information, personal knowledge and other data points. The report’s authors determined that the risk of error in doing so was too high, and also that not allowing people to self-identify their own race but rather be labeled as “racialized” or “visible minorities” by others was a practice that ran counter to the spirit of this report. Thus, only more easily confirmed gender-based data

in relation to the Ontario mediators' and arbitrators' lists is being provided, which is as follows:²⁸

ADR Chambers

Total: 61
Men: 50
Women: 11 (or 18%)

Arbitrator Dates List

Total: 113
Men: 79
Women: 34 (or 30%)

Arbitration Place

Total: 38
Men: 32
Women: 6 (or 16%)

Nextgen Arbitrators

Total: 12
Men: 4
Women: 8 (or 67%)

Mediator Dates

Total: 93
Men: 62
Women: 31 (or 33%)

Canadian Academy of Distinguished Neutrals

Total: 76
Men: 59
Women: 17 (or 22%)

OMMP Ottawa

Total: 40
Men: 29
Women: 11 (or 27.5%)

OMMP Toronto

Total: 116
Men: 57
Women: 59 (or 50.1%)

²⁸ This information was collected between March and August 2021. The Working Group determined the gender of listed persons by referencing pronouns associated with those mediators and arbitrators online, in the absence of declarative statements regarding the gender of each individual.

OMMP Windsor

Total: 22

Men: 14

Women: 8 (or 36%)

Based on the above information, it appears 32% of the names on lists of Neutrals in Ontario are female, though it is acknowledged that a small number of individuals appear on more than one list.

7. The Value in Hiring Diverse Neutrals

While there are a number of reasons why increasing Neutral Diversity in the province is beneficial for all parties involved, there are two main reasons this report focuses on for supporting the growth of Neutral Diversity in Ontario: diversity enhances outcomes for clients and helps build inclusion within the legal system.

Diversity Enhances Outcomes for Clients

Ontario is one of the most multicultural places to live in the world, with 29.28% of the population being racialized in 2016.²⁹ The ADR profession does not yet reflect Ontario demographics. Greater representation of racialized individuals in any profession can translate into better service. Diverse groups outperform homogenous groups when it comes to decision-making, analysis of problems, and the identification of gaps and new opportunities.³⁰ The Canadian Centre for Diversity and Inclusion found that leaders value diversity as a contributing factor in their organizations' competitive advantage:

*...the majority of Senior Leaders (95%) believe that diversity is a business strategy that positively contributes to innovation, creativity and problem solving. Further, 100% believe that diverse viewpoints add value to their organizations.*³¹

Diversity of perspectives can also add value to legal service providers. Diversity in a mediation or arbitration context increases the number of approaches to the issues and possible solutions available. The American Bar Association highlights the business case for increasing diversity in the legal industry:

The rapid movement of people, financial instruments, culture, technology, and political change across international borders places new expectations on the ability of lawyers, law firms, corporations, and legal institutions to respond and adapt to the multinational and cross-cultural dimensions of legal issues.

²⁹ Statistical Snapshot of Lawyers in Ontario from the Lawyer Annual Report, 2019

³⁰ Professor Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups*

³¹ Canadian Centre for Diversity and Inclusion, National Diversity and Inclusion Benchmarking Study <https://ccdi.ca/media/1979/20190715-research-national-diversity-and-inclusion-benchmarking-study.pdf>

*A diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events.*³²

Indeed, lawyers echo these views in relation to the hiring of diverse Neutrals. Junior Sirivar, a partner in McCarthy Tétrault's Litigation Group and Co-Chair of the firm's International Arbitration Group, explained the value added by using diverse mediators for complex commercial litigation cases:

Getting a preview [of your case] from a diverse mediator is valuable. It is critical to heat check your case against someone who has a different perspective than you and to help you recognize weaknesses in your case. That perspective can help you settle or adjust your strategy in the case. I might be living with a case for 10 years, seeing it in a particular way, and pitching it in a way that doesn't resonate. It's valuable to have the insight of a variety of people. My own brain can skip steps to get to an outcome I want. Logic gaps are easier to identify when diverse people look at it. When everyone on the team has the same background, they are likely to see the same risks and identify the same issues. Diversity helps you to address those gaps.

Some survey comments expressed a similar view, for instance:

You don't need to be old, "senior", white, male, etc. You need to be creative, smart, a good listener, etc. People from different backgrounds are going to be better at offering different perspectives and solutions -- this is a strength. The bar needs to be encouraged to give it a go....

Mediation as a “test run” or “heat check” of a case will only be as helpful as the conditions in which testing occurs. A Neutral with a different background from counsel, or from the client, may offer a new perspective about the case or identify arguments that do not resonate. The judiciary is increasingly diverse as appointments gradually catch up to the demographics of the province. Running a “heat check” in conditions that more accurately reflect the range of possible judges is simply prudent.

Diversity Builds Inclusion in the Legal System

Lawyers who seek out Neutrals who are representative of the general population also bolster the reputation of the profession as inclusive and accessible. Members of the public may mistrust legal teams or institutions that are not representative of the broader Ontario population. Being consistently confronted with lawyers, arbitrators, mediators and experts representing only a

³² The American Bar Association - Presidential Diversity Initiative, Diversity in the Legal Profession; The Next Steps

<https://doc-0s-6o-apps->

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select demographic may lead some clients to believe that there is cronyism or discrimination within the legal profession. Insofar as the choice of Neutral is a largely discretionary exercise, this concern is particularly salient, since ADR, and arbitration in particular, is essentially a private forum for the resolution of legal disputes.

Lack of arbitrator diversity was famously highlighted in the U.S. when rapper and entrepreneur Jay-Z (whose real name is Shawn Carter) challenged an arbitration clause as discriminatory, stating it would force him to select an arbitrator from an American Arbitration Association list nearly devoid of his ethnic group.³³

Quite apart from the value that diverse Neutrals can bring to legal analysis, solutions and other perspectives on a case, some of the survey comments reflected the importance that the identify of diverse Neutrals can have for client experiences in particular cases:

- “I have had family disputes where I felt it would be helpful for the mediator to understand the significance and cultural context of the dispute.”
- “Sometimes I think that a mediator who has the same ethnic or religious background as my client will assist settlement discussions as it removes cultural barriers that may otherwise impede settlement, or it would simply put my clients at ease with a familiar person in a facilitative role.”
- “Some clients, particularly women, have complained about male arbitrators for not listening, or seeming to discount their evidence based in part on gender bias.”
- “Some survivors of sexual assault do not trust men and therefore prefer a female mediator. We will always try to find a female mediator in these circumstances.”

The survey data shows that most of the mediators and arbitrators selected in Ontario are white males. While lawyers cannot control the supply of ADR professionals, by increasing the demand for diverse Neutrals, they can drive change in the profession.

The point of making ADR more diverse is not to give an unfair advantage to any group over another, nor to extend greater opportunity to diverse Neutrals. Rather, the point is that this element of the legal system remains out of touch with the reality of society, the wider workforce, and the legal profession. In the choice of ADR professionals, lawyers and their clients have considerable discretion. The decision to select a diverse Neutral is one way in which lawyers can directly impact this imbalance.

³³ “Jay-Z’s ADR Problems”: Mogul’s case spotlights lack of diverse arbitrators”, Darlene Ricker, ABA Journal, May 1, 2019, available online at: <https://www.abajournal.com/magazine/article/jay-z-adr-problems>

8. Everyone is Needed to Make Lasting Change

Diversity is everyone’s business. Research shows that change cannot be achieved by those who are outside the system without support from those within it: “No one marginalized group has ever successfully advocated on behalf of themselves—alone—to enact change.”³⁴ Diverse Neutrals, acting alone, cannot solve their exclusion.

Some may look to diverse lawyers who are established in the profession as natural allies for those looking to gain experience as Neutrals. The sentiment of “sticking together” may seem logical to those whose cultures encourage and support such behaviour. However, this expectation may not apply in all cultures. Indeed, some cultures may expressly prefer to use Neutrals from outside their own communities.

Irrespective of one’s own cultural practice, studies have shown that when a minority supports the advancement of someone of similar background in the workplace, it can backfire, reflecting poorly on them and affecting how they are perceived. The end result is that diverse people tend to shy away from helping those in their own group. In one study, the research found that

*“clear and consistent evidence that women and ethnic minorities who promote diversity in hiring are penalized in terms of how others perceive their competence and effectiveness. This might help explain why non-White job applicants who include experiences related to their ethnicity on their resumes are more likely to be passed over for jobs — even at companies that openly value diversity. The studies show clearly that it’s risky for low-status group members to help others like them. And this can lead to women and minorities choosing not to advocate for other women and minorities once they reach positions of power, as they don’t want to be perceived as incompetent, poor performers. The harsh reality discussed here highlights the importance of putting appropriate structures and processes in place to guarantee the fair evaluation of women and minorities. The challenge of creating equality should not be placed on the shoulders of individuals who are at greater risk of being crushed by the weight of this goal.”*³⁵

It is unfair and unreasonable to ask members of diverse groups to lead the charge on increasing diversity on their own. To create lasting change, everyone must participate.

³⁴ Cameron Hough, “A Guide for White Allies Confronting Racial Injustice,” June 23, 2015, quoted in Liz Fosslien & Mollie West Duffy, *No Hard Feelings: The Secret Power of Embracing Emotions at Work* (Penguin: 2019), p. 200.

³⁵ Precis of Hekman, David R., Stefanie K. Johnson et al. (2017), *Academy of Management Journal*, “Does diversity-valuing behaviour result in diminished performance ratings for non-white and female leaders?”, <https://www.colorado.edu/business/faculty-research/2018/05/31/women-and-minorities-are-penalized-promoting-diversity>. Full article is available at: http://gmint.informatik.uni-freiburg.de/teaching/st_19/material/Hekman_2017.pdf

9. Recommendations for Improving the Diversity of Neutrals in Ontario

Recognizing that individual lawyers, law firms, ADR professionals, ADR organizations, and legal institutions have considerable influence over the selection of Neutrals, the Ontario Bar Association has made key recommendations aimed at improving diversity of Neutrals in Ontario in two ways: by increasing supply, or the number of diverse licensees who choose to work as a Neutral, and by increasing demand, the rate at which lawyers and clients select diverse Neutrals.

On the supply side, the recommendations focus on actions such as developing a career progression path for Neutrals through training, mentorship and networking opportunities, and otherwise facilitating the success of lawyers from diverse backgrounds.

On the demand side, the recommendations focus on how to recognize and remove barriers to the selection of Neutrals from diverse backgrounds. One major barrier uncovered by our survey results is that most lawyers and law firms tend to select familiar Neutrals that they commonly use and trust. Thus, habit often dictates Neutral selection, despite nearly all survey respondents expressing comfort with the idea of retaining someone new, so long as the proposed Neutral has the requisite experience. Recommendations to increase demand also include educating clients and staff about the benefits of diversity, and promoting diverse Neutrals, so that they are able to obtain experience raise their profile and be more competitive in the marketplace.

A non-exhaustive list of specific recommendations, organized by all those involved with ADR, is below. However, the one overarching recommendation, that applies to all parties involved with ADR in the province, is the adoption of mediation and arbitration clauses.

1. Steps All Professionals Involved with the ADR System Can Take to Increase Neutral Diversity

This recommendation applies to lawyers and organizations alike is the adoption of mediation and arbitration clauses for clients to consider in all contracts. Presently, some arbitration clauses require the hiring of a retired judge, which tends to reduce the number of diverse Neutrals hired. Instead, the OBA recommends the adoption of a clause similar to that recommended by JAMS³⁶:

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse mediators and arbitrators (considering gender, race, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential mediator and arbitrator appointees.

³⁶ This clause is a recommendation by JAMS and can be found on their website at: <https://www.jamsadr.com/inclusion-clause>

2. Steps All Lawyers Can Take to Increase Neutral Diversity

- i. Request diverse names when seeking recommendations for Neutrals.
- ii. When proposing Neutrals to opposing counsel, include diverse candidates.
- iii. Network with Neutrals from diverse backgrounds to determine whether they have the experience and qualifications required for your case.
- iv. If you are wary of retaining someone new, consider hiring unfamiliar or less senior Neutrals to mediate smaller value or simpler cases as a way of gaining comfort.
- v. Help promote Neutrals from diverse backgrounds to colleagues (or on social media, such as an endorsement on LinkedIn) when you have positive experiences.
- vi. Include younger and diverse lawyers in the mediator selection process to get their perspectives, and discuss with them the importance of presenting a diverse slate of Neutrals.
- vii. Educate clients about the benefits of using Neutrals from diverse backgrounds, e.g., different perspectives can help you identify gaps in your case and avoid group thinking.
- viii. When drafting ADR clauses:
 - a. consider requiring that Neutrals from diverse backgrounds be considered for mediation or arbitration; and
 - b. consider whether the credential requirements in your mediation or arbitration clause are unnecessarily excluding diverse candidates. For instance, the requirement that a former judge be used.

3. Steps Law Firms and Litigation Departments Can Take to Increase Neutral Diversity

- i. Take steps to gather information, track or review the diversity of mediators and arbitrators used by firm lawyers. Consider surveying lawyers or retaining diversity experts or consultants to assess the firm's current record.
- ii. Set a goal and review it annually with a view to achieving year-on-year improvements in the retaining of diverse Neutrals. Communicate the goal and the firm's progress to the firm's lawyers, to ensure accountability and transparency.
- iii. Cultivate and promote the talent of diverse lawyers. Ensure the firm hires diverse lawyers and gives them opportunities to rise to prominent positions, such that they may become available to serve as respected arbitrators or mediators, as they ascend to more senior ranks.
- iv. Develop and implement a diversity pledge committing to use diverse mediators and arbitrators where possible.
- v. Educate lawyers and staff about the benefits of using diverse Neutrals, and of diversity in general. Consider offering CPD programming in this regard.

4. Steps Corporations and their In-House Counsel Can Take to Increase Neutral Diversity

- i. Instruct outside counsel to familiarize themselves with the availability of diverse Neutrals.
- ii. Instruct outside counsel to include diverse Neutrals in lists of Neutrals they propose and encourage selection of diverse Neutrals where appropriate.
- iii. Track how often diverse mediators and arbitrators are proposed and selected in company litigation matters.
- iv. Include a diverse Neutrals clause in ADR clauses in standard contract templates, so that there is a default to require a diverse slate. For instance, such a clause might require that one member of a tripartite panel be diverse, such as the CPR model clause.
- v. Consider mediation in smaller cases including Small Claims Court claims as an opportunity to try new mediators.
- vi. Consider adopting a Diversity Commitment such as that developed by the International Institute for Conflict Prevention & Resolution, which states:

We will include diverse Neutrals among any list of mediators or arbitrators we propose and ask our outside law firms and counterparties to do the same. We also ask that our outside law firms discuss with our counterparties the value in diversity and inclusion among those who mediate and arbitrate and emphasize selecting diverse mediators or arbitrators. Finally, to drive accountability and transparency, we will track the selection of diverse Neutrals in our matters.

5. Steps Experienced Neutrals Can Take to Increase Neutral Diversity

- i. Build a culture of mentorship: welcome junior mediators, including diverse candidates, to shadow or co-mediate with you.
- ii. Create networking opportunities.
- iii. When impressed by a diverse mediator, promote them in your network or on social media.
- iv. When two arbitrators are asked to select a third, select a diverse arbitrator.
 - v. Refer cases to diverse Neutrals when appropriate.
- vi. Continue education to build awareness about diversity and inclusion.

6. Steps ADR Providers Can Take to Increase Neutral Diversity

- i. Seek out qualified candidates with diverse backgrounds for the list.
- ii. Provide clear and transparent criteria for admission to the list, and review criteria annually to ensure they are inclusive and focused on experience and ability.
- iii. Consider tiers of junior and senior Neutrals, allowing for newer Neutrals to get experience in and enter the profession.
- iv. Contribute to the professional development of candidates from diverse backgrounds through training, shadowing and networking opportunities.

- v. Promote diverse and newer candidates.
- vi. Include candidates from diverse backgrounds on every list of proposed Neutrals sent to clients, whenever possible.
- vii. Provide the opportunity for diverse members to self-identify as a member of an equity seeking group should they wish to so do.

7. Steps Law Associations Can Take to Increase Neutral Diversity

- i. Promote mediators and arbitrators from equity-seeking groups through awards.
- ii. Recognize law firms' commitments to diversity through awards or rankings.
- iii. Invite diverse Neutrals to speak on their areas of expertise at organizations such as the OBA, LSO, TAS in order to that build brand awareness, expertise and name recognition as a thought leader.
- iv. Promote and deliver CPD programs on the benefits of diversity.

8. Steps Government Bodies Can Take to Increase Neutral Diversity

Tribunals

- i. Consider whether mediation may be helpful to expand the use of diverse Neutrals; and
- ii. Prioritize the selection of qualified diverse candidates for mediation, and ensure diverse candidates are present on any lists maintained.

Courts

- i. Include qualified diverse mediators on any lists maintained;
- ii. Identify qualified diverse mediators and share information with judges; and
- iii. Educate judges through CPD programming to promote use of diverse Neutrals.

Mandatory Mediation Program/Ministry of the Attorney General

- i. Consider amending form 24.1 with a question that can be optionally answered, providing the mediator with the opportunity to self-identify as a member of an equity-seeking group so that this information can be tracked over time to measure progress on increasing the use of diverse Neutrals in Ontario.
- ii. Review the roster for diversity and ensure diverse Neutrals are included on the list.
- iii. Ensure roster mediators are appointed on a rolling basis without so that all roster mediators get equal opportunity for cases.

10. Conclusion

If the legal profession is to reflect the community it serves then improving diversity across the board, from legal recruiting and retention to Neutral development, retention and selection, should be a priority. By following the recommendations in this report, the diversity of mediators and arbitrator hired in Ontario can be improved with positive results for clients, lawyers, Neutrals and the legal and the ADR professions as a whole.

APPENDIX “1” TO REPORT ON NEUTRAL DIVERSITY IN ONTARIO

The Ontario Bar Association would like to thank and acknowledge the members of the ADR Section’s Working Group on Neutral Diversity for their hard work and keen insights in preparing this report:

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