



# The Dismal State of Diversity

## *Mapping a Chart for Change*

By Beth Trent, Deborah Masucci, and Timothy Lewis

**L**et's be blunt. This is another article about the importance of diversity in our society, the legal profession as a whole, and the ADR profession in particular. And the reason we are writing this article – and you are reading it – is because we have failed to achieve a level of diversity in the legal profession and ADR that even approaches being representative of our society, and that is not acceptable. We could recite numbers that demonstrate our collective failure, but you know them. You know that after decades of near parity in law schools, women are nowhere near parity in law firm equity partner ranks. You know that, as unimpressive as that is, gender is the bright spot in the dismal landscape of diversity in the legal profession. Other “underrepresented groups” are even more underrepresented. As reported in the June 2, 2014, issue of the *National Law Journal*, “African-American partners remain so rare that, at most firms, they can be counted on one hand, even though the average such firm has more than doubled in size in the past two decades.”<sup>1</sup>

While the ADR profession does not consist solely of attorneys, poor performance in attaining diversity in the legal profession as a whole is reflected in the ADR profession. Since lawyers overwhelmingly select neutrals, it is hardly surprising that the ADR profession is still largely a profession of older, white males.<sup>2</sup>

All of this comes at a time when minorities will soon be a majority in the United States. At a time when the growing diversity of our society combined with the dismantling of legal barriers has led to women and minorities filling positions and offices that would once have been virtually unimaginable: President, Secretary of State, Federal Reserve Chairperson, Senator, Homeland Security Secretary, Supreme Court Justice, and Attorney General. Clearly, there can be no question about our capacity to recognize excellence and reflect diversity at the highest levels in both the public and private sectors. Where we seem to stumble is in our ability to recognize talent and achieve diversity on a consistent, rather than exceptional, basis. It is as though we can recognize and accept only the very best, but not the rest.

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White males who reach the apex of their professions rise through and stand on a pyramid of other white males. Women and racial minorities who reach the apex have to be exceptional and often appear to be lonely creatures. If they are not “better or best” at the beginning, they are less likely to get the chance to prove themselves. All too often, the standard applied to diverse candidates is not, “Is this person as qualified as others?” but “Is this person the next A. Leon Higginbotham, Jr.?” or some other exceptional talent by whose measure few of us, regardless of race or gender, would qualify?

We have all heard the explanations and rationalizations. The fundamental problem is that we have been hearing them for decades, at the same time that our society has grown more diverse. And we know that the vague promise embedded in those explanations and rationalizations, that things will somehow change in a “future” world, have not, in fact, come to pass. The simple reality is that unless you are going to stand up and say that women, African Americans, Hispanics, and other underrepresented groups are not as smart or as capable

**A. Leon Higginbotham, Jr.  
(February 25, 1928 – December 14, 1998)**

Judge Higginbotham attended segregated elementary and high schools in a suburb of Trenton, New Jersey, and attended Purdue University and Antioch College. In 1949, he enrolled in Yale Law School. Early in his career, he worked as a law clerk for the Philadelphia Court of Common Pleas and as an Assistant District Attorney in the Philadelphia District Attorney’s office. In 1954, he joined the first African American law firm in Philadelphia, Norris, Schmidt, Green, Harris, and Higginbotham.

President John F. Kennedy appointed Higginbotham commissioner of the Federal Trade Commission in 1962 and later nominated him to the District Court for the Eastern District of Pennsylvania. That nomination was opposed by Mississippi Sen. James Eastland and then lapsed after President Kennedy’s death. President Lyndon B. Johnson later appointed Higginbotham to the Eastern District of Pennsylvania as a recess appointment, and the Senate confirmed the nomination. President Jimmy Carter nominated Judge Higginbotham to the US Court of Appeals for the Third Circuit, where he served until his retirement in 1993.<sup>3</sup>

as white men, you cannot even begin to try to rationalize our profession’s failure to achieve diversity. We can, however, acknowledge our collective failure and, in so doing, lay the foundation for real change.

That is the point of this article: to begin a discussion about how to achieve change. More important, to identify specific, concrete steps each of us can take to achieve change now. Together, these steps can add up to something greater.

As the legal and ADR professions have lagged in the area of diversity, many companies have excelled. As those companies look at a diverse society and deal with global business, they have concluded that diversity is a business imperative, essential to their success. Those companies have brought to the issue the same disciplined approach and tools that they apply to managing every other critical element of their businesses.

One example is the Inclusion Initiative, a collaborative network that over five years has grown from 12 to 25 brand-name companies that, in the initiative’s own words, are “committed to immediate and measurable increase in the retention of minority- and women-owned law firms.” Importantly, the growth and success of the Inclusion Initiative is, in part, a direct response to the failure of law firms to achieve diversity independently. Wal-Mart, a member of the Inclusion Initiative, recently moved \$60 million of its legal spending to “diverse relationship partners” after a review found a lack of diversity within its existing law firms. As of August 4, 2014, the Inclusion Initiative reported that as a whole, legal spending with such law firms has grown from an initial \$30 million to \$250 million. Clearly, when general counsels make diversity a business imperative, including tracking, reporting, and support, they succeed.

So how, specifically, are companies driving diversity in the legal profession? The process used at DuPont, a member of the Inclusion Initiative, is illustrative of what a commitment to diversity requires. At DuPont, diversity is defined as a “core value” of its corporate culture. When the DuPont Legal Department initiated a “convergence process” in 1992 to winnow down its law firms and suppliers to a legal network of “strategic partners,” the ability of organizations to identify, recruit, and advance the careers of women and minorities was one of four key measures used by DuPont to identify organizations whose cultures are consistent with its own.<sup>4</sup>

By requiring its “strategic partners” (including law firms) to identify, recruit, and advance the careers of diverse individuals, DuPont, like other companies, is

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enhancing diversity and inclusion beyond its own corporate ethos. At the same time, these companies are establishing the appropriate business model to meet the needs of an increasingly diverse national and global market.

Drawing on the example of the Inclusion Initiative and the DuPont Legal Model, we can identify actionable steps that companies, law firms, and neutrals can take now to achieve greater diversity.

**First, if diversity is important, say it.** And keep saying it. As an individual or as an institution, if you cannot say that diversity is a core value in the way you work, how can you expect other institutions or individuals to work with you to achieve diversity? If you cannot say that diversity is important to ADR, how can you expect others to believe that you are committed to change? Expressing commitment is essential. The National Task Force on Diversity in ADR convened by the CPR Institute, with representatives from many other organizations, including the ABA Section of Dispute Resolution, developed a Diversity Commitment precisely so that companies, law firms, ADR providers, and individual neutrals can make their commitment to diversity and inclusion in ADR explicit.<sup>5</sup> This brings us to the next point.

**Second: Talk is cheap. Action is needed.** The DuPont Legal Department did not simply identify diversity

and inclusion as a core value; DuPont Legal made it clear to law firms and other suppliers that their actions – their ability to identify, recruit, and *advance* careers – would be used to assess their level of commitment to diversity and inclusion.<sup>6</sup> Words alone achieve nothing. It is not enough to be well-intentioned; we must take action to give those intentions substance and meaning.

So what can we do? The Diversity Commitment calls upon law firms to place the names of diverse neutrals on selection lists. This is a good start. But names on lists only hold out the hope of progress; they do not achieve it. We make progress when qualified diverse neutrals are selected from the lists. We must all make conscious decisions to back words with action. Companies do this every day as they strive to compete in an increasingly diverse world. Law firms, as demonstrated by DuPont's success, respond to a requirement that they match a company's commitment and culture. And when they don't, as the Wal-Mart example demonstrates, the business goes elsewhere. It is only when we remain silent or do not back our words with action that change eludes us.

**Third, develop metrics and use them.** Use them to encourage success. Use them to demonstrate success. And use them to hold institutions and people accountable in the absence of success. There is a common saying in the business world: "What matters gets measured." You know it's so. You live it every day. And you know that many assume the opposite is equally true: If you are not measuring, the issue is just not that important. Whether you work at a company or a firm or are an independent neutral, ask yourself this question: When was the last time you assessed how you measure up in advancing diversity in ADR? And how did you measure up? If the results were good, what did you do to help others to replicate that success? If the results were not so good (or nonexistent), what have you done to change that? It is not enough to hold others accountable; you have to hold yourself accountable.

**A word to neutrals on this issue: If you are not part of the solution, you are part of the problem.** On virtually every three-arbitrator panel, two neutrals choose the third. Virtually every person choosing an arbitrator or mediator asks others for recommendations. Whom are you choosing and recommending? Your colleague of 20 years who looks just like you? Or are you opening doors? When you are the neutral, do you give diverse neutrals who are beginning their practice the opportunity to observe and learn (with the consent of the parties)? Do you coach those neutrals, not just on skills, but on

### National Task Force on Diversity in ADR Diversity Commitment

We recognize that our greatest successes come when we value and draw upon the knowledge, experience, and talents of all people by being both diverse and inclusive. To achieve those successes our organization seeks diversity not only in its work force but also in its providers of goods and services.

We see great value in diversity and inclusion among those who represent our organization. We see equal value in diversity and inclusion among those who mediate and arbitrate our matters. Therefore, we actively support the inclusion of diverse mediators and arbitrators in matters to which we are a party or counsel.

To implement our commitment to diversity and inclusion in the selection of neutrals:

"We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of neutrals or arbitrators they propose. We will do the same in lists we provide."

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practice development? Do you sponsor them? Do you recommend that diverse neutrals deliver presentations at conferences with you?

But diversity is not just about giving others a hand up. It requires giving yourself a hand. Most neutrals come to the profession after a successful career in a related area, such as law. But success in that first career does not automatically make anyone a successful ADR professional; it simply provides the foundation upon which to build new success. You need to start early to build on that foundation. Have you developed a systematic approach to building your new career? Are you using your existing reputation and relationships in the optimal manner for your new career? Recognizing that age-old chicken-and-egg issue, that you need to have experience to get cases, are you taking advantage of *pro bono* panel opportunities to gain experience and establish a reputation? Have you identified other panels, including court-connected opportunities and panels relating to industries for which you have relevant experience that may provide easier entrance points? Have you joined every list you can find? All neutrals, experienced and new, need to remember that diversity is not just something that happens around us or to us; it is something we all make. None of us is powerless to contribute to change if we are committed to it.

Commitment to diversity combined with accountability does result in change. No one company, firm, or person can achieve sustainable change alone. We are facing a collective failure that requires that each of us step up in response. Before moving on to your next task, commit to taking one of these steps today. ♦

## Endnotes

- 1 Profession Backsliding on Diversity, NAT’L L.J., June 2, 2014.
- 2 Andrea Kupfer Schneider & Gina Viola Brown, Gender Differences in Dispute Resolution Practice, DISP. RESOL. MAG., Spring 2014, at 13, available at [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/Spring\\_2014\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/Spring_2014_authcheckdam.pdf); Benjamin Davis, Diversity in International Arbitration, DISP. RESOL. MAG., Winter 2014, at 13, available at [http://www.americanbar.org/content/dam/aba/publications/dispute\\_resolution\\_magazine/Winter\\_2014\\_final\\_unified\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/Winter_2014_final_unified_authcheckdam.pdf).
- 3 Aloyisus Leon Higginbotham, Jr. – Biography, Biographical Directory of Federal Judges, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1039&cid=999&ctype=na&instate=na> (last visited Oct. 1, 2014); A. Leon Higginbotham, Jr. WIKIPEDIA, [http://en.wikipedia.org/wiki/A.\\_Leon\\_Higginbotham,\\_Jr](http://en.wikipedia.org/wiki/A._Leon_Higginbotham,_Jr), (last visited Oct. 1, 2014).
- 4 DUPONT LEGAL MODEL, <http://www.dupontlegalmodel.com/> (last visited Oct. 1, 2014).
- 5 Sign The Diversity Commitment!, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, <http://www.cpradr.org/PracticeAreas/NationalTaskForceonDiversityinADR/SigntheDiversityCommitment.aspx> (last visited Oct. 1, 2014).
- 6 See Increased Diversity in ADR Essential to Keep up With Evolving Global Marketplace, JAMS DISP. RESOL. ALERT, Winter 2012, at 4, available at <http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2012-12.pdf>.



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