

Washington University Law Review

Volume 98 | Issue 3

2021

Arbitrator Diversity: Can It Be Achieved?

Sarah Rudolph Cole

Moritz College of Law, The Ohio State University

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Dispute Resolution and Arbitration Commons](#), [Law and Gender Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 WASH. U. L. REV. 965 (2021).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol98/iss3/11

This Commentary is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

ARBITRATOR DIVERSITY: CAN IT BE ACHIEVED?

SARAH RUDOLPH COLE*

ABSTRACT

The 2018 lawsuit Jay-Z brought against the American Arbitration Association (AAA) because the list of twelve arbitrators AAA provided in a breach of contract dispute did not include a black arbitrator highlighted ongoing concerns about the lack of diversity in the arbitrator corps. Given arbitration's already less formal structure, one method for enhancing its legitimacy among diverse disputants would be to ensure greater diversity among those empowered to make decisions. Increasing diversity of neutral rosters—and more importantly, of the arbitrators ultimately selected from those rosters—may improve the public's perception of the fairness and impartiality of the arbitration process. Increasing arbitrator diversity will have other benefits as well, including enhancing equal protection, equal opportunity, and complete participation norms.

This Article suggests approaches that arbitration providers and participants in the arbitral process might adopt to enhance diversity in arbitrator selection. In particular, this Article posits that, while party control over arbitrator selection is a hallmark of arbitration, unbridled party selection may play an integral role in reducing diversity in the arbitrators selected. Among other things, winnowing to a single arbitrator, which the parties often undertake with relatively little information, may lead parties to rely on heuristics that incorporate explicit or implicit biases. One way to combat such concerns may be to reduce—at least at the margins—the extent of party control over the selection process. More specifically, adjusting the selection process to include a limited appointment aspect, rather than the traditional strike and rank approach, may substantially promote diversity while still preserving a strong role for party participation in arbitrator selection. In addition to direct arbitrator appointment, this Article explores other approaches that might enhance diversity in the arbitrator corps, including creating permanent panels of arbitrators, publicizing information about individual arbitrators, and implementing arbitrator evaluation processes. The proposed approaches would retain a

* Michael E. Moritz Chair in Alternative Dispute Resolution, Moritz College of Law, The Ohio State University. Thank you to Douglas R. Cole for all of his help and support and to the Moritz faculty who attended my workshop; my research assistants, Tyler Aust and Brianna Soltys; and my Harvard Arbitration Reading Group for all their helpful suggestions.

strong role for party autonomy in the selection process while also providing a greater likelihood for diversity in the outcome of that selection process, in turn enhancing public perceptions of the fairness of arbitration as a dispute resolution mechanism.

TABLE OF CONTENTS

INTRODUCTION.....	967
I. THE IMPORTANCE OF DIVERSITY IN IMPROVING PUBLIC PERCEPTIONS OF ARBITRATION AS A LEGITIMATE DISPUTE RESOLUTION PROCESS....	971
II. ARBITRATOR SELECTION PROCESSES.....	974
III. CURRENT EFFORTS TO DIVERSIFY THE ARBITRATOR CORPS	976
IV. IN LIGHT OF THESE EFFORTS, WHY ISN'T THE ARBITRATOR CORPS MORE DIVERSE?.....	981
V. ORGANIZATIONAL EFFORTS TO DIVERSIFY THE ARBITRATOR ROSTER DO NOT RESULT IN SELECTION OF ARBITRATORS WITH DIVERSE CHARACTERISTICS.....	983
VI. POTENTIAL SOLUTIONS	985
A. <i>Alternative Appointment Approaches</i>	985
B. <i>Increased Implementation of Permanent Panels</i>	988
C. <i>Consolidated Information About Diverse Arbitrators</i>	991
D. <i>Published Arbitrator Evaluations</i>	992
CONCLUSION	994

INTRODUCTION

In 2018, Jay-Z and his company Rocawear sued the American Arbitration Association (AAA) because the list¹ of twelve arbitrators AAA provided in a breach of contract dispute did not include a black arbitrator.²

1. In this article, I will refer to several terms to describe the manner in which arbitrators are selected. An arbitrator “roster” identifies those arbitrators who an institution deems qualified to hear a particular kind of case. For example, AAA has more than 7,000 arbitrators on its employment discrimination roster. When a dispute arises, if the parties do not select an arbitrator on their own, AAA (or other institutions) will create an arbitrator “list”: a set of ten to twelve arbitrators sent to both parties in an arbitration. In a traditional domestic arbitration, each party will strike unacceptable arbitrators from their lists and then rank the remaining arbitrators. The arbitrator with the best joint ranking will be appointed, if that arbitrator accepts the appointment.

2. See Helen Holmes, *Jay-Z Halting His \$204M Lawsuit Over a Lack of Black Arbitrators Could Be Historic*, OBSERVER (Nov. 29, 2018, 3:35 PM), <https://observer.com/2018/11/jay-z-halts-lawsuit-black-arbitrators-historic/> [https://perma.cc/LY33-A55Q]; Petitioners’ Memorandum of Law in Support of the Order to Show Cause for a Temp. Restraining Order and Preliminary Injunction at 2, *Carter v. Iconix Brand Group, Inc.*, No. 655894/2018 (N.Y. Sup. Ct. Nov. 28, 2018) (No. 10) <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=OKWHhclQknoQGpPTpxidCg=&system=prod> [https://perma.cc/98WE-VRVJ]. AAA and other arbitral provider organizations provide parties with a list of arbitrators before the arbitration begins, as described in the previous note. Here, the twelve-arbitrator list provided to the parties did not include a black arbitrator. Jay-Z’s attorneys complained about this, and AAA sent them six additional names. Of those six, however, Jay-Z claimed that one arbitrator was Asian American, another was South Asian, and a third arbitrator was Latino. Only three of the arbitrators appeared to be black—two men and one woman—and one of the black arbitrators was a partner at a law firm representing Jay-Z’s adversary in the underlying arbitration. Holmes, *supra*.

After an unsatisfactory e-mail exchange with AAA, Jay-Z and his counsel argued that the lack of black arbitrators on AAA's complex commercial arbitration roster was a violation of the artist's constitutional rights to equal protection of the laws and equal access to public accommodations. Jay-Z also contended that this absence of diversity violated consumer protection laws by misleading consumers into believing they would be able to receive a fair and impartial adjudication in arbitration. Putting aside the merits of Jay-Z's constitutional and consumer protection claims, as well as the validity of his contention that a non-black arbitrator could not provide him a fair hearing, the underlying concern Jay-Z expressed about the lack of diversity in the arbitrator corps resonates with the public as well as with minority disputants and one-shot players—such as consumers or employees—and their representatives. Many commentators believe that the lack of diversity among arbitrators undermines the integrity of the alternative dispute resolution (“ADR”) process.³ Given arbitration's already less formal structure,⁴ one method for enhancing its legitimacy among minority disputants would be to ensure greater diversity among those empowered to make decisions.⁵ Increasing the diversity rates of arbitrators on neutral rosters—and more importantly, of the arbitrators ultimately selected from those rosters—will likely improve the public's perception of

3. David Hoffman and Lamont Stallworth observed that “the lack of racial and ethnic diversity in the ranks of neutrals may cause society to lose confidence in the fairness of private dispute resolution, leading legislators, regulators and the courts to reverse the policies that now support ADR.” David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 39 (2008). Other commentators levy similar critiques. See, e.g., Theodore K. Cheng, *The Case for Bringing Diversity to the Selection of ADR Neutrals*, 9 N.Y. DISP. RESOL. LAW. 18, 19 (2016), [https://theocheng.com/documents/The-Case-for-Bringing-Diversity-to-ADR-Neutrals-\(NYSBA-New-York-Dispute-Resolution-Lawyer\).pdf](https://theocheng.com/documents/The-Case-for-Bringing-Diversity-to-ADR-Neutrals-(NYSBA-New-York-Dispute-Resolution-Lawyer).pdf) [<https://perma.cc/4M67-82S8>]; Beth Trent, Deborah Masucci & Timothy Lewis, *The Dismal State of Diversity: Mapping a Chart for Change*, DISP. RESOL. MAG., Fall 2014, at 21; Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr., Christopher M. Kwok, Janice Tudy-Jackson & Roberto 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, 119–21 (2008); Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 377 (2014) (“The identity and background of decision makers makes a difference, and our growing understanding of the impact of these elements on process and product in dispute resolution must be communicated and translated into action.”).

4. Arbitration is a dispute resolution process wherein parties select a third-party neutral (or neutrals) to hear the evidence in their case and then issue a final and binding decision.

5. Commentators have observed that the diversity of the arbitrator corps has not kept up with the change in diversity of the workforce. The lack of diversity among arbitrators undermines the credibility of the process because disputants do not believe that the arbitrators can identify with their realities as employees or consumers. Floyd D. Weatherspoon, *The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 801 (2011) (“The pool of neutrals has been primarily white males, especially in labor, construction, and commercial disputes.”); 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 N.Y. ST. B.A. J. 33, 33–34 (2012).

the fairness and impartiality of the arbitration process.⁶ Increasing arbitrator diversity will have other benefits as well, including enhancing equal protection, equal opportunity, and complete participation norms.

Arbitration critics correctly observe that the arbitrator corps does not reflect the racial, ethnic, or gender diversity present in society at large.⁷ Institutional efforts to alter this dynamic have historically been ineffective, although it would appear that recently redoubled efforts are gaining some ground.⁸ Yet there is little question that more could be done.

This Article will begin by addressing some of the reasons why increasing diversity in the arbitrator corps may serve important objectives, such as enhancing public perceptions of the legitimacy of the arbitral process, augmenting equal protection, and improving opportunity for potential arbitrators. It then considers the various levels in the arbitrator selection process at which diversity concerns can arise—the roster level; the list-creation level, when a list of arbitrator names is provided to the parties in a particular matter; and the arbitrator-selection level, when the parties ultimately select the arbitrator who will hear their case. While arbitration providers have taken significant strides in recent years to increase roster diversity, increased roster diversity is not entirely translating into a corresponding increase in the diversity of arbitrators who are ultimately appointed. Yet, unquestionably, it is the actual selection of diverse arbitrators to hear cases that is essential for achieving the goal of

6. Jennifer Coffman, *The American Arbitration Association's Commitment to Diversity*, 63 DISP. RESOL. J. 31 (2008).

7. Ben Hancock, *A Look at ADR and Diversity; Older White Males Lead the Ranks of Neutrals*, 39 NAT'L L.J. 1, 1–2 (2016) (finding that the arbitrator corps is “arguably the least diverse corner of the legal profession,” and most arbitrators, especially in high stakes disputes, are older white males); F. Peter Phillips, *It Remains a White Male Game (NLJ)*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Nov. 27, 2006), <https://www.cpradr.org/news-publications/articles/2006-11-27-it-remains-a-white-male-game-nlj> [<https://perma.cc/G6MW-9LR4>]; David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity (ACC)*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Sept. 30, 2013), <https://www.cpradr.org/news-publications/articles/2013-09-30-why-bringing-diversity-to-adr-is-a-necessity-acc> [<https://perma.cc/MJ8V-L548>]; see also Deborah Rothman, *Gender Diversity in Arbitrator Selection*, 18 DISP. RESOL. MAG. 22, 23 (2012). Even the Financial Industry Regulatory Authority (FINRA), an organization that regulates U.S. broker-dealers, does not have diverse arbitrators, according to the Public Investors Arbitration Bar Association (PIABA):

There are 6,383 arbitrators, according to FINRA. PIABA's analysis of disclosure reports for 5,375 past and current securities arbitrators from as far back as 1991 found that 80 percent of arbitrators were male. PIABA also analyzed 2,118 disclosure reports it had compiled [sic] from 2013–14. Of those, the average age was 66 and more than 78 percent were men.

Suzanne Barlyn, *Wall Street Arbitrators' Lack of Diversity is Harmful: Group*, REUTERS (Oct. 7, 2014, 9:41 AM), <http://www.reuters.com/article/us-finra-arbitration-idUSKCN0HW1EM20141007>. The College of Commercial Arbitrators (CCA), a group of experienced arbitrators, also has little gender diversity. Approximately 15% of CCA arbitrators are women. Stipanowich, *supra* note 3, at 363–64, 363 n.330 (of the 234 members, 36 are female).

8. F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish than First Thought*, DISP. RESOL. MAG., Spring 2009, at 14.

legitimizing the arbitration process.⁹

The Article next considers why an increase in diversity at the roster level may not be translating into an increase in diversity of selected arbitrators and suggests approaches that arbitration providers and participants in the arbitral process might adopt to address this issue. In particular, the Article posits that, while party control over arbitrator selection is often seen as a hallmark of arbitration, unbridled party selection may play an integral role in reducing diversity in the arbitrators selected. Among other things, winnowing to a single arbitrator, which the parties often undertake with relatively little information, may lead parties to rely on heuristics that incorporate explicit or implicit biases. One way to combat such concerns may be to reduce—at least at the margins—the extent of party control over the selection process. More specifically, adjusting the selection process to include a limited appointment aspect may substantially promote diversity while still preserving a strong role for party participation in arbitrator selection.¹⁰

For example, in most arbitrations, each party receives an identical ten- or twelve-person arbitrator list from which each party confidentially strikes unacceptable arbitrators and ranks those remaining. Upon receipt of that information from both parties, the provider appoints the arbitrator who has the best joint ranking. To achieve greater diversity in appointments, however, the parties could agree—or arbitral institutions could provide, as a default rule—a hybrid selection process. For example, parties could agree to strike six arbitrators from the typical ten-arbitrator list by using three alternate strikes each, and the arbitral provider itself could then select from the remaining four candidates.

Alternatively, rather than ranking arbitrators in strict order, the providers could request the parties to label each arbitrator on the list “acceptable” or “not acceptable,” with the arbitral provider then selecting among those that both parties have identified as “acceptable.” Such approaches would retain a strong role for party autonomy in the selection process while also providing a greater likelihood for diversity in the outcome of that selection process, in turn enhancing public perceptions of the fairness of arbitration as a dispute resolution mechanism.

9. This is not to suggest that the only purpose in diversifying the arbitrator corps is to legitimize arbitration as a process in the eyes of those who are required to use it. Increasing arbitrator diversity will also enhance equal protection and complete participation norms more generally.

10. Direct arbitrator appointment from its National Roster has enabled AAA to create greater opportunity for women and minorities to be selected. According to an e-mail from Neil Currie, AAA’s Vice President in 2019, the National Roster is 33% diverse and appointments from that roster have been 32% women and minorities. E-mail from Neil Currie to author (Feb. 3, 2020, 03:00 CST) (on file with author). These numbers are about 10% higher than when the parties use other selection mechanisms, detailed *infra* Part III.

I. THE IMPORTANCE OF DIVERSITY IN IMPROVING PUBLIC PERCEPTIONS OF ARBITRATION AS A LEGITIMATE DISPUTE RESOLUTION PROCESS

Arbitration scholars, arbitrator providers, and arbitration advocates¹¹ are unified in their interest in and concern about ensuring and advancing diversity among arbitrators.¹² The interest in increasing diversity among the arbitrator corps has been heightened over the last several years—even before the Jay-Z case publicity. Arbitration providers, perhaps in response to public and media pressure and society’s increased focus on the importance of diversity, have turned inward and scrutinized their own practices. Ultimately, all of the major providers have increased focus on diversity, through expanding their rosters, implementing more focused recruiting methods to bring on board more arbitrators with diverse characteristics, and influencing public policy through the creation of diversity pledges, diversity committees, and the like.

When attempting to improve diversity, organizations that provide arbitrators and mediators typically focus on increasing diversity in many forms on neutral rosters.¹³ The AAA Diversity Committee, for example, suggests that diversity¹⁴ encompasses gender, race, ethnicity, age, religion,

11. Alex Spiro, the lawyer who represented Jay-Z, said:

Given that arbitration clauses have become ubiquitous for large corporations and regular people buying Starbucks gift cards, it is crucial that arbitrations operate fairly. . . . Part of what that means is that they protect all people equally under the law. And what that means—at least to me—is that there ought to be some choice for people in the process to at least have the option of selecting among a diverse slate of arbitrators.

Darlene Ricker, *Jay-Z’s ADR Problems: Mogul’s Case Spotlights Lack of Diverse Arbitrators*, ABA JOURNAL (May 1, 2019, 2:50 AM) <http://www.abajournal.com/magazine/article/jay-z-adr-problems> [https://perma.cc/XDS6-NCRQ]. Different groups may have different interests regarding diversification of the arbitrator corps. For example, academics may believe that diversity is important for non-market-based reasons. The provider organizations have financial incentives to ensure that arbitration is widely accepted; they likely wish to do whatever is possible to minimize criticisms of the process. Litigants may be interested both in actual justice and perceptions of justice. Finally, arbitrators—particularly, prospective arbitrators—may have an interest in a diversity push as a means of overcoming historical and status-quo impediments to professional advancement.

12. AAA asserts that its commitment to diversity is long-standing, going back as far as 1968 when it “established the National Center for Dispute Settlement to help ease urban crises through arbitration and mediation” and in 1979 “co-sponsored the first National Women’s Arbitrator Development Program to establish a method for recruiting and training qualified women arbitrators.” *Diversity and Inclusion Initiatives*, AM. ARB. ASS’N (2020), <https://www.adr.org/DiversityInitiatives> [https://perma.cc/CVD4-FNH3] [hereinafter *AAA Diversity Initiatives*]. AAA also describes a recent, multi-year effort to diversify its roster—thus, although its commitment to diversity may be long-standing, AAA became much more focused on its efforts in the last five to ten years.

13. Throughout this article, I will use the term “diverse neutrals” as the ABA defines it in its Resolution 105: “minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” AM. BAR ASS’N, RESOLUTION 105 (2018).

14. Much time could be devoted to defining what “diversity” is and critiquing the definition of “diversity” adopted by the major ADR provider organizations. In a recent article, Maria Volpe—also discussing diversity in ADR—observed that there is little consensus on what “diversity” means and

and sexual orientation, and it seeks to include on its rosters those who have had little opportunity to participate in the dispute resolution field due to their identities.¹⁵

One might ask why dispute resolution provider organizations, and those who utilize arbitration, view as critical the goal of improving diversity in arbitrator appointments. Reference to the arguments Sally Kenney offered in support of greater diversity in the judiciary may be helpful here. Kenney found that diversity among judges is essential, even though women judges do not make decisions any differently than male judges.¹⁶ In particular, Kenney emphasized that the judicial process lacks legitimacy if women are not provided an opportunity to participate, “notions of fairness demand representation” of women on the bench, the symbolism of appointing female judges “breaks a powerful taboo in our society,” women judges disrupt the narrative that only white men can mete out justice, and finally, and most importantly, “gender merits representation.”¹⁷ These arguments offer powerful support for increasing diversity by sex as well as by race in the arbitrator corps, particularly as more and more disputes are sent to arbitration.¹⁸

Although arbitration is under fire for a variety of reasons,¹⁹ the lack of diversity in the arbitrator corps unquestionably adds to the perception of

described it as a “socially-constructed concept [that] has come to have many meanings depending on the context.” Maria R. Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 PEPP. DISP. RESOL. L.J. 201, 203 (2019). The focus here will be on the potential benefits of “diversity” as the organizations have defined it.

15. *AAA Diversity Initiatives*, *supra* note 12.

16. Kenney discusses the research on this topic, citing a number of studies finding minimal differences between how women and men judge. SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2012). One study of federal district judges “found male judges to be more liberal and women more likely to defer to government,” but no “significant differences” between the judges’ rulings involving women’s rights or criminal policy issues. *Id.* at 29 (citing Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985)). After an extensive review of the empirical studies on this topic, Kenney concluded that “[d]ifferences mostly do not exist” between how men and women judge. *Id.* at 42. Interestingly, Pat Chew, conducting an empirical study of arbitrators, found that though research has demonstrated a gender effect for female judges in sexual harassment and sex discrimination cases, there is not a similar gender effect among female arbitrators. Pat K. Chew, *Comparing the Effects of Judges’ Gender and Arbitrators’ Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO ST. J. ON DISP. RESOL. 195 (2017). Other researchers found judges’ gender had an impact on decision-making in sex discrimination cases heard in federal appellate courts. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

17. KENNEY, *supra* note 16, at 176–79.

18. Given Professor Chew’s findings that women arbitrators do not decide sex harassment and sex discrimination cases differently than male arbitrators (as, apparently, judges do), Chew, *supra* note 16, at 216–17, Kenney’s explication of the need for women judges even if there is no gender effect in judging seem especially apt.

19. Arbitration, which is often characterized as a process that is “forced” on consumers and employees, has been under attack for many years for a variety of reasons. For example, critics charge

arbitration as an unfair and unbalanced process that is geared against “the little guy,” particularly when that “little guy” is a woman and/or a member of a minority²⁰ group. Addressing diversity concerns may help convince disputants that an arbitral forum is a fair and neutral setting where justice is done and is *seen* to be done. If this could possibly be the outcome, methods for increasing diversity in the arbitrator corps are certainly worth exploration.²¹

Moreover, the more frequent appearance of diverse arbitrators on rosters and lists will likely normalize these less typical arbitrators and ultimately increase the willingness of litigants and general counsel—who are responsible for arbitrator selection—to step outside their comfort zone and select new arbitrators.²² Diverse rosters, together with more information

that “forced” arbitration is problematic because it is private. See Maria R. Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 PEPP. DISP. RESOL. L.J. 201, 205 (2019) (arguing that parties’ faith and trust in dispute resolvers is more important than trust in decision makers in the public justice system because the informal and confidential nature of arbitration and mediation creates greater concerns about their overall fairness and neutrality). Critics also argue that arbitration typically precludes similarly situated claimants from joining together to pursue class relief against businesses or employers, does not necessarily use rules of evidence and procedure, and provides only limited appeal rights. In addition—and perhaps most troubling—some claim that businesses, who may be repeat players in the arbitration process, have an increased likelihood of success in arbitration because of their greater knowledge of the process and potentially closer connections with the decision makers. See Mark L. Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25150, 2018), <https://www.nber.org/papers/w25150> [<https://perma.cc/5KA9-9WNG>] (stating that securities firms take advantage of their knowledge of arbitrators’ propensities in decision making when selecting arbitrators). Evidence does not support all of these claims, and arbitration processes have been reformed in order to address other concerns. However, there is no question that many currently view pre-dispute arbitration agreements, particularly those governing consumer and employment disputes, as problematic—hence, the phrase “forced arbitration.”

20. In using the term “minority,” I intend to include persons of African-American or Latino descent, who have historically been victims of discrimination and not considered for appointment as arbitrators. See Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 MICH. L. REV. 1005, 1009 n.8 (1997) (quoting Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 861–62 (1995) (defining minorities as African-American and Latino)).

21. To ensure public acceptance of arbitration as an appropriate substitute for litigation, arbitrators should be representative of the individual litigants who appear in front of them. See Burt & Kaster, *supra* note 7; Weatherspoon, *supra* note 5, at 801 (“The lack of diversity in the pool of potential neutrals raises suspicion among minorities who must use the ADR process to resolve their dispute.”).

22. Normalization of gender- and race-diverse arbitrators may well help arbitrator provider organizations reach their goals of diverse arbitrator selection better reflecting population numbers. Something like the NFL’s “Rooney Rule,” which required NFL teams to interview at least one minority candidate when hiring a new head coach, could be applied to arbitration to encourage litigants and their counsel to research a larger pool of arbitrators and become familiar with new and different arbitrators. See *Rooney Rule Leaves a Legacy and Impact Far Beyond NFL*, SPORTS ILLUSTRATED (Apr. 14, 2017), <https://www.si.com/nfl/2017/04/14/ap-fbn-rooney-rule> [<https://perma.cc/MQ5G-QQGN>]; Mike Freeman, *The Rooney Rule 10 Years Later: It’s Worked... Usually, and We Still Need It*, BLEACHER REPORT (Oct. 24, 2013), <https://bleacherreport.com/articles/1822988-the-rooney-rule-10-years-later-its>

about arbitrators (a point to be addressed later), will likely result in greater diversity in the selection of arbitrators.

II. ARBITRATOR SELECTION PROCESSES

Arbitration literature emphasizes that one of the primary benefits of choosing arbitration is the parties' ability to select the decision maker for the dispute.²³ Most disputants use an arbitrator provider organization to administer their arbitration, such as AAA. These provider organizations typically maintain a roster of arbitrators, categorized based on subject-matter expertise and location. In addition to subject-matter expertise, provider organizations ensure that each arbitrator has arbitration or other decision-making experience; a legal background, although this is not a strict requirement; and, more recently, a background or identity that would provide diversity on the roster.

Providers' arbitrator selection processes largely follow the same approach, with the exception of AAA's consumer arbitrator selection process. A typical default selection rule is AAA's Employment Arbitration Rule 12(c). Pursuant to this rule, AAA sends simultaneously to each party a letter containing an identical list of ten names chosen from the Employment Dispute Resolution Roster. AAA encourages the parties to select a mutually acceptable arbitrator from the list as their arbitrator. If they fail to do so, "each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA."²⁴ AAA's Labor Arbitration Rules (R-10 through R-12) and their Commercial Arbitration Rules (R-12c) follow the same pattern. JAMS, another leading arbitration service provider formerly known as Judicial Arbitration and Mediation Services, Inc., uses a similar approach but does not send as long a list to the parties: JAMS Comprehensive Arbitration Rules & Procedures, Rule 15(b) specifies that JAMS will send the parties a list of at least five

-worked-usually-and-we-still-need-it [<https://perma.cc/VL5Y-DCRJ>]. In other words, if diverse arbitrators appear on the lists sent to parties, commercial litigants and their counsel—who tend not to be diverse along race, gender, and socio-demographic lines—would be compelled to research and consider new and different arbitrators. This exposure to diverse arbitrators may help the litigants and their counsel, who do not intend to be consciously biased, become more comfortable with selecting a diverse arbitrator.

23. Although this is often touted as a major benefit of arbitration, it is doubtful that the process of alternate name striking results in either side ending up with their preferred arbitrator. It is more likely that the process will result in an arbitrator who is not particularly well known to either party. If this is true, it undermines the popular rationale for not selecting a diverse arbitrator: that such arbitrators are not well-known to either side. If anything, the existing process should result in the selection of the less familiar arbitrator.

24. AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES R-12(c) (2009) ("Number, Qualifications and Appointment of Neutral Arbitrators").

arbitrator candidates in cases that require a sole arbitrator and ten arbitrator candidates in cases that require a tripartite panel.²⁵ JAMS also provides each party with a brief description of the background and experience of each arbitrator candidate. The parties have seven days to strike up to two names if they are selecting a sole arbitrator and three names if they are using a tripartite panel. Following these strikes, each party must rank the remaining candidates in order of preference.²⁶

AAA takes a different approach to consumer arbitration,²⁷ allowing for direct appointment of arbitrators from AAA's national roster. AAA may have adopted this approach because consumers are frequently unrepresented, have little ability to learn about arbitrators in the short time available, and want to be certain that the arbitrator selection process is not controlled by the repeat-player business. Thus, AAA's consumer arbitration rules allow appointment of an arbitrator from AAA's national roster, unless the parties have agreed on a different arbitrator.²⁸

Under the basic arbitrator selection process described above, diversifying the arbitrator corps could take multiple forms. First, arbitrator provider organizations might focus on diversifying their arbitrator rosters, adding more diverse neutrals to the total number of arbitrators available to the disputing parties. Increasing diversity on the various rosters—employment, commercial, labor, etc.—will enable the arbitrator provider organizations to construct more diverse lists of arbitrators to send to parties.

25. *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (July 1, 2014), <https://www.jamsadr.com/rules-comprehensive-arbitration/> [<https://perma.cc/5R53-XXTE>].

26. CPR follows a similar process. Rule 6.2(b) of the CPR Administered Arbitration Rules states: CPR shall provide to the parties a list, drawn in whole or in part, from the CPR Panels, of not less than five candidates if one arbitrator is to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties.

2019 Administered Arbitration Rules, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 1, 2019), <https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019> [<https://perma.cc/RFK3-L9U7>].

27. AAA applies its consumer arbitration rules

whenever a contract between a business and a consumer specifies the AAA as administrator (or incorporates the AAA rules into the contract) and: (1) the business has a standardized, systematic application of arbitration clauses with customers; (2) the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most of all of its terms, conditions, features, or choices; and (3) [t]he product or service must be for personal or household use.

Christopher R. Drahozal, *AAA Consumer Arbitration*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS* 478, 480 (Samuel Estreicher & Joy Radice eds., 2017).

28. AM. ARB. ASS'N, *CONSUMER ARBITRATION RULES R-16* (2014), <https://adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/GE3J-TANK>] [hereinafter *AAA Consumer Arbitration Rules*].

Second, arbitral providers can take steps to ensure, or at least increase the likelihood, that the ten- or twelve-candidate arbitrator list they provide to parties will be more diverse. Recently, for example, AAA offered parties the opportunity to be provided a list of potential arbitrators that was at least 20% diverse on the basis of sex or race. Finally, most critical to improving diversity in those who hear cases is increasing the *selection* of arbitrators who provide greater diversity. It is at this point that efforts to diversify the arbitrator corps tend to break down, because arbitrator providers typically do not control who is ultimately selected as an arbitrator. Given the emphasis on improving the selection of diverse arbitrators and its importance to providers and others, focusing on both party selection and the processes designed to increase diversity in that selection is especially critical.

III. CURRENT EFFORTS TO DIVERSIFY THE ARBITRATOR CORPS

Historically, few diverse neutrals have graced arbitral organization rosters, particularly for more complex commercial disputes. Each major arbitrator provider has placed considerable emphasis on improving diversity in its arbitrator roster and in the process of arbitrator selection, with varying degrees of success.

AAA, the largest arbitrator provider organization, promotes its arbitrator corps as “the most qualified and exceptional arbitrators—possessing judicial capacity, temperament and extensive industry knowledge, experience and acceptability to parties. Candidates applying to the roster are typically prominent in their fields and have subject matter expertise”²⁹ At a minimum, AAA arbitrators on AAA’s national roster must have fifteen years of “senior level legal, business or professional experience,” educational degrees, experience in area(s) of expertise, and, among other things, training in arbitration.³⁰

More recently, AAA amended its mission statement and policies to encourage greater focus on diversity and inclusion on their neutral roster, as well as in their work more broadly.³¹ In 2012, AAA reported that its Roster

29. AM. ARB. ASS’N, APPLICATION PROCESS FOR ADMITTANCE TO THE AAA NATIONAL ROSTER OF ARBITRATORS I, https://www.adr.org/sites/default/files/document_repository/application_process_for_admittance_to_the_aaa_national_roster_of_arbitrators.pdf [<https://perma.cc/3F59-Z8PP>].

30. *Id.* at 3.

31. The AAA’s mission page also emphasizes diversity, promoting “impartial and fair treatment of all people with whom we come in contact, regardless of gender, race, ethnicity, age, religion, sexual orientation, or other characterization.” *AAA Mission, Vision and Commitment to Diversity and Inclusion*, AM. ARB. ASS’N, <https://www.adr.org/MissionVisionCommitment2Diversity> [<https://perma.cc/6LYU-K5LB>] [hereinafter *AAA Mission*]. It also highlights the organization’s efforts to train diverse professionals “who have historically not been included in meaningful participation in the field of

of Neutrals was 23% diverse for gender and race.³² From 2014 to 2017, AAA increased its efforts to diversify its roster and the panels of rosters it sends out to parties for their selection. In 2014, AAA reported that, of the 306 new arbitrators added to the roster that year, 25% were women and 31% were women or minorities.³³ In 2015, 41% of the new arbitrators added to AAA's rosters were diverse by race or gender and 78% of the candidate lists AAA sent to parties were at least 20% diverse.³⁴ In 2017, 45% of new additions to the roster were women or minorities or both.³⁵ AAA reported that its case management teams paid attention to diversity when they sent out lists of prospective arbitrators to parties—albeit sending out lists that were “as diverse as the parties’ requirements would allow.”³⁶ These efforts resulted in candidate lists that had at least 20% diversity of race and gender in 87% of cases. In 2018, AAA reported that its appointments were 27% diverse.³⁷ AAA is clearly aware that while roster diversity is important, the key statistic to actual arbitrator diversity is how many diverse *appointments* are made. Although membership on a roster is a first step to such appointment, the ultimate issue in improving arbitrator diversity is overcoming the hurdle of selection. AAA appears to be making strides in that direction.

AAA's efforts are multifaceted. In addition to active efforts to recruit more diverse arbitrators, AAA has endeavored to increase diversity in other ways. For example, AAA established a one-year fellowship for newer dispute resolution professionals from historically underrepresented groups. This program, the A. Leon Higginbotham Jr. Fellows Program, is intended “to provide training, mentorship and networking opportunities to up and coming diverse alternative dispute resolution professionals who have

alternative dispute resolution.” *Id.* Further, the AAA Diversity Committee's mission, as stated in 2017, was “to promote the inclusion of those individuals who historically have been excluded from meaningful and active participation in the alternative dispute resolution (ADR) field.” *Diversity Initiatives*, AM. ARB. ASS'N, <https://www.adr.org/diversityinitiatives> [<https://perma.cc/KD4W-3L3N>].

32. Carbone & Zaino, *supra* note 5, at 34.

33. AM. ARB. ASS'N, 2014 ANNUAL REPORT & FINANCIAL STATEMENTS 14 (2015), https://www.adr.org/sites/default/files/document_repository/2014_Annual_Report_Financial_Statements_0.pdf [<https://perma.cc/5VHL-MFZV>].

34. AM. ARB. ASS'N, 2015 ANNUAL REPORT & FINANCIAL STATEMENTS 26 (2016), https://www.adr.org/sites/default/files/document_repository/2015_AAA_AnnualReport_Financials_0.pdf [<https://perma.cc/97N5-VL7R>].

35. AM. ARB. ASS'N, 2017 ANNUAL REPORT AND FINANCIAL STATEMENTS 19 (2018), https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_Financials_2018.pdf [<https://perma.cc/D9BX-X3T9>].

36. *Id.*

37. AM. ARB. ASS'N, 2018 ANNUAL REPORT & FINANCIAL STATEMENTS 6 (2019), https://www.adr.org/sites/default/files/document_repository/AAA_2018_Annual_Report_and_Financial_Statement_s.pdf [<https://perma.cc/AM42-LTVB>].

historically not been included in meaningful participation in the field of alternative dispute resolution.”³⁸

JAMS also actively promotes its commitment to diversity. According to its website in 2017, it “outpace[d] the AmLaw 250 with an overall composition of 22% female and 9% persons of color among our distinguished panelists.”³⁹ JAMS encourages the businesses with whom it works to consider using gender and racially diverse neutrals, tracks usage of diverse neutrals, and encourages outside counsel to “consider diversity in their selection of ADR professionals.”⁴⁰ JAMS offers parties “diversity inclusion language” that they can include in dispute resolution clauses. That language is the following: “The 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.”⁴¹

The International Institute for Conflict Prevention & Resolution (CPR), a third major provider of dispute resolution services, created a diversity pledge. Signatories to this pledge confirm their belief in the importance of diversity and inclusion among neutrals and actively support selecting diverse arbitrators and mediators. It also asks that other parties to disputes include “qualified diverse neutrals among any list” of neutrals they propose to the signatories.⁴² In 2018, CPR added a Diversity Statement to nomination letters sent to parties.⁴³ The language of the statement emphasizes CPR’s commitment to diversity and inclusion in dispute resolution, informs parties about the ways diversity improves the quality of decision-making, and encourages them to be aware of the role that implicit bias can play in the arbitrator selection process. In 2020, CPR added a

38. *AAA Mission*, *supra* note 31.

39. *We Embrace Diversity*, JAMS, <http://www.jamsadr.com/diversity/> [<https://perma.cc/W4YX-LAJL>].

40. *Id.*

41. *JAMS Clause Workbook*, JAMS, <https://www.jamsadr.com/clauses/#Diversity> [<https://perma.cc/5BPE-BM8P>].

42. Burt & Kaster, *supra* note 7. The pledge states: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose. We will do the same in lists we provide.” *National Task Force on Diversity: Diversity Commitment*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/programs/committees/diversity-task-force-adr/Diversity-Pledge> [<https://perma.cc/Z2PV-8DXF>].

43. *CPR Adds Diversity Statement to DRS Nomination Letter to Further Promote Diversity in Neutrals*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (July 18, 2018), <https://www.cpradr.org/news-publications/press-releases/2018-07-18-cpr-adds-diversity-statement-to-drs-nomination-letter> [<https://perma.cc/E2HC-6FB3>].

Diversity and Inclusion model clause for parties who wish to pre-commit to a diverse neutral in a three-person panel.⁴⁴ The model clause states:

The parties agree that however the arbitrators are designated or selected, at least one member of any tribunal of three arbitrators shall be a member of a diverse group, such as women, persons of color, members of the LGBTQ community, disabled persons, or as otherwise agreed to by the parties to this Agreement at any time prior to appointment of the tribunal.⁴⁵

In addition, acknowledging that the only path to diversity in dispute resolution is ensuring that diverse candidates are selected as arbitrators, CPR was joined by the Financial Industry Regulatory Authority (FINRA)—which provides arbitration and mediation services in the securities industry, both for claims by customers against brokers and employment claims against brokerages—and the Leadership Council on Legal Diversity, to launch a training program for diverse candidates becoming mediators and arbitrators.⁴⁶ The program, which began in pilot form in 2016, provides diverse participants the opportunity to develop neutral skills and gain access to professional dispute resolution opportunities through “(a) formal training in mediation and arbitration skills and practical observational experience; (b) mentoring by skilled neutrals; and (c) networking opportunities within CPR’s commercial dispute resolution community via attendance at these organization’s events at no cost or at a discount.”⁴⁷

FINRA’s diversity picture is remarkably similar to that of the other providers. FINRA publishes annual surveys that disclose the demographics

44. *CPR Continues to Pioneer in Diversity Space, with Launch of Diversity & Inclusion Model Clause*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Apr. 1, 2020), <https://www.cpradr.org/news-publications/press-releases/2020-04-01-cpr-continues-to-pioneer-in-diversity-space-with-launch-of-diversity-inclusion-model-clause?cldee=Y29sZS4yMjhAb3N1LmVkdQ%3d%3d&recipientid=contact-8d76ca6dd57de011b1bf00219ba6ba46-a2fa66752f7e42e886296df65b92f077&esid=781743a9-0275-ea11-a811-000d3a31ebb1> [<https://perma.cc/G8CN-JYL7>] [hereinafter *CPR Diversity & Inclusion Model Clause*].

45. *Id.*

46. *CPR, LCLD & FINRA Program Aims for Actual Selection, Not Just Training, of Diverse Neutrals*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Sept. 14, 2017), https://blog.cpradr.org/2017/09/14/cpr-lclld-finra-program-to-create-diversity-in-adr-aims-for-actual-selection-not-just-training-of-diverse-neutrals/?_cldee=Y29sZS4yMjhAb3N1LmVkdQ%3d%3d&recipientid=contact-8d76ca6dd57de011b1bf00219ba6ba46-1565aff697a842cc8cd74c8cd7056d0d&utm_source=ClickDimensions&utm_medium=email&utm_campaign=CPR%20Event&esid=3fcf9665-8d99-e711-80f7-00155d407d02 [<https://perma.cc/7BWH-JXKR>] [hereinafter *CPR Program Aims for Actual Selection*]. In 2016, the program trained six participants. In 2017, five participants were enrolled. *Id.* In 2020, CPR reported that the program continues. INT’L INST. FOR CONFLICT PREVENTION & RESOL., 2020 ANNUAL REVIEW 7 (2020), https://www.cpradr.org/about/annual-review/_res/id=Attachments/index=0/FinalAnnualReviewCorrected.pdf [<https://perma.cc/5WLC-F5BY>].

47. *CPR Program Aims for Actual Selection*, *supra* note 46.

of its arbitrators and mediators.⁴⁸ As of 2019, the “overall roster” percentage of African Americans was 9%.⁴⁹ Only 5% of FINRA’s arbitrators and mediators were Hispanic.⁵⁰ And just 29% of FINRA’s arbitrators were female.⁵¹ Like the other providers, FINRA is focusing on diversifying its arbitrator roster, engaging in an “aggressive campaign to recruit new arbitrators” and focusing particularly on recruiting arbitrators from “diverse backgrounds, professions, and geographical locations.”⁵² FINRA is, among other efforts, conducting outreach to numerous minority and women’s organizations and networking and hosting events with diversity-based organizations. FINRA’s executive vice president, responsible for dispute resolution, stated: “It’s vitally important that our pool of arbitrators reflects the varied backgrounds of the parties who use the FINRA arbitration forum. We have bolstered our recruitment efforts, both in terms of increasing the numbers and diversity—in age, gender, race, and occupation—and continue working toward this goal.”⁵³

The American Bar Association (ABA) is also engaging in efforts to raise awareness about the lack of diversity among dispute resolution neutrals and to change attitudes about diversity among those who select neutrals—typically outside counsel in law firms. ABA Resolution 105, adopted in 2018, states:

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.⁵⁴

Resolution 105 identifies numerous action steps for clients, inside counsel, outside counsel, neutrals, and dispute resolution services providers. Clients and inside counsel are encouraged to “[s]elect diverse neutrals whenever possible,” use the JAMS diversity inclusion language in their agreements, take public diversity pledges like the one CPR created, and

48. *Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA*, FINRA, <https://www.finra.org/arbitration-mediation/our-commitment-achieving-arbitrator-and-mediator-diversity-finra> [https://perma.cc/FMY2-KF7Z].

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. AM. BAR ASS’N, RESOLUTION 105 (2018).

raise the diversity issue with outside counsel and with providers.⁵⁵ The ABA encourages outside counsel to do much of the same, and also to ask providers to provide diverse lists of arbitrators and give parties the opportunity to become familiar with diverse neutrals.⁵⁶ Even neutrals have a role—they are encouraged to appoint diverse neutrals as chairs of arbitration panels (where two panelists select the third panelist, who serves as chair of the arbitration panel), nominate or sponsor diverse neutrals for membership in dispute resolution organizations that require such actions, and mentor prospective or active diverse neutrals.⁵⁷

IV. IN LIGHT OF THESE EFFORTS, WHY ISN'T THE ARBITRATOR CORPS MORE DIVERSE?

The most common explanation for the lack of arbitrator diversity is the “pipeline problem.”⁵⁸ For example, while “women make up about half of all graduating law students,” women arbitrators participate in only 6% of commercial arbitrations.⁵⁹ CPR suggests that the “pipeline problem” explains the lack of arbitrator diversity: “The pipeline, in its most basic sense, refers to the chain of education, experiences, associations, and job positions that can ultimately lead to a career as an arbitrator.”⁶⁰ Because women are underrepresented in the professional positions that supply the ADR community—judges, law firm partners, general counsel, etc.—fewer women enter the arbitrator corps.⁶¹ The pipeline hypothesis also explains why minorities are underrepresented in commercial matters. Without the

55. AM. BAR ASS'N, ABA RESOLUTION 105 - DIVERSITY IN ADR: SUMMARY AND ACTION STEPS V. 1 FOR STEERING COMMITTEE CONSIDERATION 3, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf [https://perma.cc/RSD2-WALW].

56. *Id.*

57. *Id.*

58. Caley E. Turner, “Old, White, and Male”: Increasing Gender Diversity in Arbitration Panels, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 3, 2015), <https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels> [https://perma.cc/68KG-SYZ7] (“On the supply side, many scholars blame what is referred to as a ‘pipeline problem’ for keeping women out of the arbitration field.”).

59. *Id.* Additionally, “the Institute for Conflict Prevention and Resolution (CPR) reported that of more than 550 neutrals who serve on its worldwide panels, about 15% are women and 14% are minorities.” N.Y. STATE BAR ASS'N, IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND IN ADR 11 (2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, LAW.COM (Oct. 5, 2016), <https://nysba.org/NYSBA/Sections/Commercial%20Federal%20Litigation/ComFed%20Display%20Tabs/Events/2019/Spring%20Meeting%20Materials/Article-If%20Not%20Now,%20When.pdf> [https://perma.cc/J34Y-CF8F]).

60. Turner, *supra* note 58.

61. *Id.* Another study found that, in 2018, about 23% of law firm partners were women, 2% were black, 3.5% were Asian, and 2.5% were Hispanic. NAT'L ASS'N FOR L. PLACEMENT, INC., 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS 9 (2019), https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf [https://perma.cc/AVV5-R235].

opportunity to gain experience in all aspects of the legal profession, it is challenging to build a reputation as a commercial arbitrator.⁶²

The lack of diversity among arbitrators is particularly stark in the area of commercial arbitration. If parties in a commercial arbitration dispute have determined that expertise in banking and finance law is essential, a prospective arbitrator will only be included on a candidate list if he or she has a requisite level of specialized knowledge in those areas. Keeping with the pipeline hypothesis, it would appear that diverse neutrals are underrepresented in commercial arbitration because they have fewer opportunities to develop the skills and knowledge necessary to navigate these disputes.⁶³ The hypothesis also explains why more women and minorities are appointed to non-commercial arbitrations than to commercial arbitrations.

The AAA reports racial and gender diversity for each of its major divisions: labor (34%), employment (40%), commercial (26%), and construction (17%).⁶⁴ These figures support the pipeline hypothesis; a lack of diversity is most prevalent in fields from which women and minorities have traditionally been excluded.⁶⁵ This hypothesis also explains why fewer women arbitrate “big-money” cases. A 2014 ABA Section of Dispute Resolution study found an “inverse relationship between the amount of money in dispute and the likelihood that a woman would be chosen as the arbitrator or mediator to help resolve the matter.”⁶⁶ If arbitrator experience and/or familiarity with the arbitrator are the critical factors in deciding which arbitrator to appoint when the case involves high stakes, it is not surprising that women and minorities are underrepresented in commercial matters.

62. “The AAA requires that applicants have a minimum of 10 years of senior level business or professional expertise or legal practice prior to being considered for the [National Roster of Neutrals].” AM. ARB. ASS’N, A GUIDE TO COMMERCIAL MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE 6 (2013), https://www.adr.org/sites/default/files/document_repository/A%20Guide%20to%20Commercial.pdf#:~:text=A%20Guide%20to%20Commercial%20Mediation%20for%20Business%20People,mediator%20does%20not%20hold%20evidentiary%20hearings%20as%20would [https://perma.cc/TLW9-V9RG].

63. See Turner, *supra* note 58.

64. E-mail from Neil Currie to author (Oct. 19, 2020, 12:42 CST) (on file with author). AAA’s efforts to diversify its neutrals appear to be bearing some fruit, as the diversity numbers reported in 2012 were “labor (27%), employment (42%), commercial (17%), construction (10%), and insurance (20%).” Carbone & Zaino, *supra* note 5, at 34. With that said, there remains much room for improvement.

65. See, e.g., John T. Baker, *Black Lawyers and Corporate and Commercial Practice: Some Unfinished Business of the Civil Rights Movement*, 18 HOWARD L.J. 685 (1975) (discussing the dearth of black lawyers in commercial and business practices as a result of discriminatory practices and institutionalized racism).

66. Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, LAW.COM (Oct. 5, 2016, 1:09 PM), <https://www.law.com/dailyreportonline/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/?sreturn=20200903151629>.

The pipeline hypothesis also explains why the federal judiciary enjoys somewhat greater racial diversity than the arbitrator corps. In 2019, roughly 13% of active Article III federal judges were African-American, and approximately 9% were Hispanic.⁶⁷ Moreover, approximately 73% of sitting judges were male, while 27% were female.⁶⁸ While commercial disputes require arbitrators to have extensive experience and knowledge in their respective fields of law, judicial appointments frequently turn on other factors. For example, judges need not have any particular legal experience. Moreover, judging is a full-time job, attracting a younger and more diverse group of lawyers seeking full-time work and thus increasing the likelihood of a diverse pool. It is the rare arbitrator who makes her living through arbitration alone—the lack of steady work, together with a routine demand for significant experience in a particular field, draws many retired judges and more senior or retired lawyers with specialized knowledge. Finally, a critical difference between judges and arbitrators is that judges are assigned to cases, rather than appointed. Thus, if diverse judges are on the bench, diverse judges will hear cases. In arbitration, the result is not nearly as probable. Ultimately, then, it appears that the demographic disparities between the arbitrator corps and the federal bench are indicative of a “pipeline problem” aggravated by the existing arbitration selection process.

V. ORGANIZATIONAL EFFORTS TO DIVERSIFY THE ARBITRATOR ROSTER DO NOT RESULT IN SELECTION OF ARBITRATORS WITH DIVERSE CHARACTERISTICS

To address this “pipeline problem,” each of the organizations described above focuses on diversifying the arbitration roster, as described in Part III, while at the same time encouraging clients to commit to selecting arbitrators who are diverse. The creation and use of diversity pledges, diversity commitments, diverse arbitrator recruitment, and mentorships and fellowships for prospective diverse arbitrators are laudable efforts by the various arbitral organizations. In addition, commentators offer other suggestions to the major providers, encouraging them to provide training and mentoring to diverse arbitrators.⁶⁹ They also recommend that diverse

67. Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/#:~:text=Among%20active%20judges%2C%20nearly%2073,percent%20of%20active%20federal%20judges> [https://perma.cc/PT5Z-YXF9].

68. *Id.*

69. See Rothman, *supra* note 7, at 25–26; Carbone & Zaino, *supra* note 5, at 34–35. Another approach might be for lawyers and clients to use a presumption in favor of selecting a gender diverse neutral on a multi-member panel. Gina Viola Brown & Andrea K. Schneider, *Gender Differences in*

arbitrators increase their visibility by pursuing pro bono or reduced fee work along with speaking or teaching opportunities for the lawyers and businesspeople who might ultimately be responsible for selecting arbitrators.⁷⁰ While all of these suggestions are useful, they do not seem sufficient to overcome the major obstacle facing any prospective arbitrator on a roster: being selected. The commitment to diversifying the roster and offering mentoring, training, and networking—admirable as it is—is unlikely to change *who is selected* to be an arbitrator.⁷¹

Nor are entreaties to businesses to select arbitrators from diverse backgrounds likely to change selection outcomes. It is odd that businesses, who long ago committed to ensuring diversity in business and hiring practices,⁷² often abandon that commitment when selecting neutrals.⁷³ Institutional expression of a commitment to the selection of *qualified* neutrals does not seem to translate into the actual selection of *diverse* neutrals.⁷⁴ Even when provided with candidate lists that include diverse neutrals, businesses seem to default to arbitrators who are either judges or experienced litigators—frequently with backgrounds similar to those who select them.⁷⁵ This approach predominantly results in the selection of older, white, male arbitrators, because these arbitrators likely have the most

Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey 21 (Marq. Univ. Law School Legal Studies Research Paper No. 14-04, 2014).

70. Carbone & Zaino, *supra* note 5, at 35–36.

71. Deborah Rothman explained that women arbitrators are rarely selected because women are not represented well among major litigation partners and in-house counsel—those most likely to select arbitrators. Rothman, *supra* note 7, at 24. Also working against women arbitrators is that most major law firms keep records and information about arbitrators they have previously selected. Because a lawyer does not want to be blamed for picking an arbitrator with whom others are unfamiliar, new arbitrators, who are often women or minorities, are often overlooked. *Id.* at 24–25. Rothman also suggests that implicit bias may prevent well-qualified women from being selected as arbitrators. *Id.* at 25.

72. Theodore K. Cheng has noted that corporations and their legal departments have committed to diversity, often requesting that proposals for legal work include diversity among those who will likely work on the matter. Cheng, *supra* note 3, at 18.

73. See Burt & Kaster, *supra* note 7. Cheng observes this phenomenon as well, noting that “corporations persist in pursuing an outdated approach to the selection of diverse neutrals,” often outsourcing selection, together with the drafting of dispute resolution clauses, to outside counsel. See Cheng, *supra* note 3, at 19. Professor Michael Z. Green observed that companies with robust commitments to diversity often ignore those diversity policies when their representatives are selecting arbitrators in favor of selecting well-known arbitrators who they think will give them the best chance of winning the case for their clients. Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 *FORDHAM L. REV.* 2255, 2270–73 (2020). This disconnect between party and representatives often leads to the selection of non-diverse arbitrators. *Id.*

74. Christopher K. Poole, *Talking Diversity: An Important Topic for ADR*, JAMS ADR BLOG (July 14, 2011), <https://www.jamsadr.com/blog/2011/talking-diversity-an-important-topic-for-adr> [https://perma.cc/76E8-WMVA].

75. Hancock, *supra* note 66 (summarizing a quote from an arbitrator on the JAMS roster who said that “attorneys [are driven] to select not only neutrals who are retired judges or former litigators with established track records . . . but individuals who share their own background [and are] ‘a mirror image of themselves’”).

experience and name recognition.⁷⁶ So, it seems unlikely that continuing to leave the selection process entirely to businesses will result in increased diversity among selected neutrals.⁷⁷

VI. POTENTIAL SOLUTIONS

Lack of diversity in the arbitrator corps raises the greatest concern in what has come to be known as “forced arbitration,” where consumers and employees mandated to resolve disputes in arbitration face more powerful and experienced opponents. Four possible solutions might address the lack of diversity among arbitrators in these kinds of cases: using alternative approaches to arbitrator appointment, creating permanent panels of arbitrators, publicizing information about individual arbitrators, and implementing arbitrator evaluation processes.⁷⁸

A. *Alternative Appointment Approaches*

First, arbitral institutions, like AAA, could expand their rules to permit direct appointment of arbitrators in more cases.⁷⁹ For example, AAA’s consumer arbitration rules authorize AAA to appoint an arbitrator from its national roster instead of allowing the parties to select the arbitrator using

76. Lawyers in law firms or in-house counsel control the disputes in arbitration. Because these “gatekeepers” are disproportionately white, “they tend to appoint someone like themselves, someone white, a lawyer, and usually male.” Hoffman & Stallworth, *supra* note 3, at 41. Prejudice, together with concern about the quality of minority and female neutrals, may also be an issue. Weatherspoon, *supra* note 5, at 802–04. *See also* Poole, *supra* note 74 (“In terms of selection, the problem stems from the fact that attorneys are typically most comfortable recommending to clients . . . [an] arbitrator they have previously worked with.”). Poole also raised the issue of supply. *Id.* Fewer minorities and women appear on JAMS rosters because JAMS draws arbitrators who are typically judges or senior partners at law firms with ADR experience, and women and minorities are underrepresented in those careers. *Id.*

77. While it would be nice to think of this as purely a timing problem that will resolve itself in fifteen or so years—when more women and minorities are law firm partners due to diversity pushes by businesses—changes in diversity in law firms and businesses have not occurred at as fast a pace as proponents of greater diversity hoped.

78. Another potential solution is the “Ray Corollary,” promoted by prominent labor and employment arbitrators Homer C. La Rue and Alan A. Symonette in their article *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63 HOW. L.J. 215, 239–40 (2020), in which they suggested the creation of a national task force that would require the collaboration of the ABA, provider organizations, lawyers who select arbitrators, and entities who hire such lawyers to develop and implement a plan that would require consideration of candidates from underrepresented populations before making a final arbitrator selection in labor and employment cases.

79. For example, JAMS rules simply assure consumers that they will have “a reasonable opportunity to participate in the process of choosing the arbitrator(s).” JAMS MEDIATION, ARB. AND ADR SERVS., CONSUMER ARBITRATION MINIMUM STANDARDS (2009), <https://www.jamsadr.com/consumer-minimum-standards/> [<https://perma.cc/HF6Z-NC9T>]. The AAA’s new rules differ from the approach taken in traditional arbitration, where an alternative striking method is utilized. *See supra* note 1. This process typically does not result in the selection of a diverse arbitrator. *See supra* notes 58–62 and accompanying text.

the traditional striking process.⁸⁰ Although AAA follows the parties' selection process, many parties incorporate AAA's consumer arbitration rules into their contracts instead of creating their own selection processes.⁸¹ Because AAA has made strides in increasing the diversity of its arbitrator roster, and because most entities who use AAA opt in to AAA's default rules, one would expect to see greater diversity among the arbitrators actually appointed to consumer arbitration cases. In fact, this hypothesis has been borne out. In never-before published data, AAA reported to this author that using this approach, it has diversified the National Roster so that 33% of its members are women or minorities, and 32% of consumer arbitrator appointments are to women or minorities.⁸² Thus, it would appear that greater diversity can be achieved with the use of direct arbitrator appointment.

In employment disputes, by contrast, AAA follows the traditional process for arbitrator selection. If the parties have not appointed an arbitrator themselves, AAA sends out a list of arbitrators taken from the Employment Dispute Resolution Roster. That roster is diverse by "gender, ethnicity, background, and qualifications."⁸³ Next, the parties strike arbitrators they deem unacceptable and rank the remaining arbitrators in order of preference. Then, AAA appoints the arbitrator with the best

80. Under AAA Consumer Arbitration Rule 16, this appointment process is a default. If the parties identify another approach to selection, AAA will follow that approach. In addition, the rule enables either party to object to an arbitrator's appointment. *AAA Consumer Arbitration Rules*, *supra* note 28, at R-16 ("Appointment from National Roster"). Prior to 2014, AAA appointed an arbitrator if the parties failed to identify a different process for arbitrator selection but did not indicate which roster AAA would use to appoint the arbitrator. *See* AM. ARB. ASS'N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES C-4 (2005), <https://www.adr.org/sites/default/files/Consumer-Related%20Disputes%20Supplementary%20Procedures%20Sep%2015%2C%202005.pdf> [<https://perma.cc/8DUX-G6RT>] ("Appointment of Arbitrator").

81. *See Consumer Clause Registry*, AM. ARB. ASS'N, https://apps.adr.org/ClauseRegistryUI/face/s/org/adr/extapps/clauseregistry/view/pages/clauseRegistry.jsf;jsessionid=hAFcehxXEkMzDmmpzSIHXmp9WXMABG-eC7WzF9_pUvQe3rPtJzK!-150655465?_ga=2.129907977.481484299.1602789569-148294854.1548256249 [<https://perma.cc/4C3J-WPEA>] [hereinafter "*AAA Consumer Clause Registry*"]. AAA requires any business wishing to use AAA arbitrators and administrative services to pay a fee to have its consumer arbitration clause reviewed by AAA. Once AAA reviews the clause and finds that its content is consistent with AAA rules and the Consumer Due Process Protocol, the clause is included in the Consumer Clause Registry. *See id.* As of October 10, 2020, 638 companies have clauses included in the Registry. *Id.* A review of the Consumer Clause Registry demonstrates that most businesses allow AAA to appoint the arbitrator in consumer disputes. For example, 1st Franklin Financial Corporation permits AAA to appoint the arbitrator. *See* Alternative Dispute Resolution (Arbitration) Agreement for 1st Franklin Financial Corporation, https://www.adr.org/simplefileandpay/docopenservlet?DocID=19084419||NYV-PMPRODUCM26151627|No|Y%20&%20MainContentId=NYV-PMPRODUCM26151627%20&%20NewFlag=No&_afLoop=758204488433367 [<https://perma.cc/7XXQ-4HNN>].

82. Currie, *supra* note 10.

83. *See* AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES R-12 (2009) ("Number, Qualifications and Appointment of Neutral Arbitrators").

(lowest) composite ranking.⁸⁴ This process provides no guarantee that a diverse arbitrator will be chosen. As noted above, one way to improve diversity among arbitrators selected to hear cases would be for AAA, and other major arbitral institutions like JAMS and CPR, to adopt AAA's direct approach to arbitrator appointment for consumer disputes in employment, commercial, and construction cases. If parties are reluctant to give up the ability to select arbitrators in all cases, the arbitral provider organization could apply direct arbitrator appointment until a certain threshold—for example, in cases with claims of \$100,000 or less. Parties could still opt out of the arbitrator appointment rule, but if they did not, they would be much more likely to see an arbitrator of a different gender or race presiding over their dispute.

A concern with this approach is that parties choosing arbitration to resolve their disputes do so partly because of the opportunity to select the decision maker.⁸⁵ If businesses are not inclined to give up this opportunity, another approach might be to ensure that the arbitrator lists sent to the parties are 40% to 50% diverse.⁸⁶ If this were the case, the ranking process might very well result in more frequent selection of diverse decision makers. Why might that be? First, recall that the selection process involves choosing a single name from a list of ten potential arbitrators. If eight or nine of those on the list are non-diverse, as a matter of basic math, the likelihood that one of the one or two diverse candidates would be selected is relatively low. Increasing the number of diverse candidates to the 40% to 50% range cannot help but increase the likelihood that one of those diverse candidates will ultimately be selected. Second, there is another potential effect over time. Historically, arbitrator selection lists contained a fairly non-diverse group of arbitrators, primarily including former judges and experienced lawyers from major law firms.⁸⁷ As a result, today, a given list may have only one female name on it, subtly (or not so subtly) reinforcing the notion that

84. *Id.* at R-12(c).

85. Recent evidence suggests that parties may be more willing to give up this privilege, at least in the context of a three-arbitrator panel. CPR recently announced its new Diversity & Inclusion Model Clause, which allows parties to pre-commit to the selection of a diverse arbitrator on a three-person panel. The clause requires the parties to have “at least one member of any tribunal of three arbitrators [who is] a member of a diverse group, such as women, persons of color, members of the LGBTQ community, disabled persons, or as otherwise agreed to by the parties” *CPR Diversity & Inclusion Model Clause*, *supra* note 44.

86. Providing diverse arbitrator lists may be difficult in some areas, like complex commercial disputes and banking/finance. As a result, arbitrator provider organizations may need to expand their recruiting. The organizations might follow the lead of FINRA, which has a broader advertising campaign to encourage potential arbitrators to apply to become FINRA arbitrators. This past year, for example, I received a postcard from FINRA encouraging me to find others to apply to become FINRA arbitrators.

87. See, e.g., Nicole Buonocore, *Resurrecting a Dead Horse—Arbitrator Certification as a Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483, 483 (1999) (“In 1985, the average arbitrator was 59.3 years old, 91.5% of all arbitrators were male, and 96.5% of all arbitrators were white.”).

arbitrating is a largely male endeavor. Repeated exposure to lists of names reflecting greater gender balance may normalize the notion of female arbitrators, making it more likely over time that parties will seriously consider using female arbitrators.

Another alternative to the traditional strike-and-rank method would be to request that parties label each arbitrator on the list “acceptable” or “not acceptable,” with the arbitral provider then selecting among those that both parties have identified as “acceptable.” Further, even if traditional strike-and-rank methods were favored, yet another approach would be for providers to adopt a default hybrid selection process (that parties opt into by incorporating the provider’s rules in their arbitration agreement), in which the parties confer to strike six arbitrators from the typical ten-arbitrator list using three alternating strikes and then allow the arbitral provider itself to select among the remaining four candidates. Both of these approaches retain strong party autonomy in the selection process, while also providing a greater likelihood for diversity in the outcome of that selection process.

B. Increased Implementation of Permanent Panels

Another way to diversify the arbitrator corps would be to create a greater number of permanent panels of arbitrators that reflect the diversity of the population at large.⁸⁸ Permanent panels are already a staple of labor arbitration in both the public and private sectors.⁸⁹ In labor arbitration cases, each side (union and management) identifies potential arbitrators. Both sides then vet the arbitrators and, if they are acceptable to both sides, randomly assign or assign by rotation the panel arbitrators to arbitrations as disputes arise—typically over a period of time, such as the life of the collective bargaining agreement.⁹⁰ Because both union and management are

88. As David Hoffman has noted, permanent panels are one of the three methods for administering workplace dispute resolution. The other two approaches involve the use of an independent organization, like AAA or JAMS, to supply a list of prospective arbitrators. Another approach is to select arbitrators ad hoc as cases arise. Hoffman & Stallworth, *supra* note 3, at 38. In labor and employment disputes, parties may also “agree on a single individual to serve as a permanent umpire to handle all arbitration disputes or a permanent panel of arbitrators from whom they will select an individual to hear a particular matter.” Timothy J. Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243, 280 n.161 (1987).

89. The American Federation of Government Employees and the Social Security Administration, for example, maintain permanent panels of arbitrators. See also Charles A. Borell, *How Unions Can Improve Their Success Rate in Labor Arbitration*, 61 DISP. RESOL. J. 28, 31 (2006) (finding that permanent panels are common in labor arbitration); Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, 48 ARB. J. 8, 9 (1993) (noting that there are large numbers of permanent panels in labor arbitration); Heinsz, *supra* note 88, at 280 n.161.

90. As previously indicated, in the unionized context, the parties might create a permanent panel

committed to the creation of a diverse panel, parties are much more likely to see women or minority arbitrators than they would if the panel was created by a private arbitral organization. Other institutions utilize permanent panels for certain kinds of cases, usually those that are less complex. As in the labor-management context, permanent panel arbitrators are assigned on a rotating basis to cases, and both sides must agree to an arbitrator becoming a member of a permanent panel.⁹¹ Utilizing arbitrator panels—as opposed to the current approach in most consumer and employment cases, which focuses only on diversifying arbitrator rosters—creates greater diversity in arbitrator selection.

Establishing a permanent panel of arbitrators to enhance diversity among arbitrators in employment disputes is not a new idea. In 2008, David Hoffman and Lamont Stallworth recommended the creation of national and regional arbitrator panels as a means to improve the diversity of arbitrator rosters. But their proposal focused primarily on the question of how to improve recruitment, selection, and mentoring of minority dispute resolution professionals. The authors identified two programs that were offered to achieve these goals: a National Consortium of Minority Workplace Neutrals, an initiative proposed by one of the authors; and Access ADR, a program created by neutrals that was actually—albeit briefly—implemented.⁹² While there is no doubt that increasing the number of minority dispute resolution professionals is a laudable goal, programs like Access ADR have not been particularly successful, because they exist separate from the mainstream dispute resolution providers.⁹³ To change the nature of arbitrator rosters that parties actually use—and, more importantly, the arbitrators they select—businesses, consumer and employee groups, and the dispute resolution providers must work together to achieve the same goal. Resources providing access to minority or gender-diverse neutrals are a mere starting point. Only if permanent panels of diverse neutrals are created by the arbitral institutions, together with support from businesses and input from employees, consumers, and the entities that advocate on their behalf, might we experience the kind of diversity among arbitrators that will make the arbitration process more acceptable to diverse disputants and more effective overall.

of arbitrators to adjudicate grievances during the life of a collective bargaining agreement. Permanent panels may be used in complex commercial construction projects, too, where speedy resolution is essential. Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 815 n.148 (2013) (citing Thomas H. Oehmke & Joan M. Brovins, *Arbitrator Selection and Service*, 97 AM. JUR. TRIALS 319, § 8 (2005)).

91. See Carbone & Zaino, *supra* note 5, at 37 (describing permanent panels).

92. Hoffman & Stallworth, *supra* note 3, at 43.

93. I could find no evidence that Access ADR still exists in a 2020 Internet search.

But how can we ensure that consumer or employee advocacy groups, or groups created by plaintiffs' lawyers, can replicate the efforts of unions to propose inclusion of diverse arbitrators on arbitrator panels and promote their selection? Bill Gould, former Chair of the NLRB and an experienced arbitrator, suggested that employees' representatives in particular could be in a position to identify arbitrators for panels and, later, for selection. He believed that, after the landmark Supreme Court case *Gilmer v. Interstate/Johnson Lane Corp.*,⁹⁴ "the plaintiffs' bar in most major cities is able to act as an adequate surrogate for organized labor. That is to say, counsel, like union representatives, will pass information about their experience and judgments about particular arbitrators to one another just as employers do in both settings."⁹⁵ A recent review of AAA consumer arbitration cases suggests that this may be happening. In a study of over 5,000 consumer complaints filed with AAA between 2009 and 2013, researchers found that "repeat-playing plaintiffs' lawyers" may have "growing clout" in the arbitrator selection process.⁹⁶ These lawyers could work with AAA and business counsel to establish a more diverse panel of arbitrators, who could then be assigned randomly to cases. Even if a panel was not possible, one would hope that the growing influence of repeat-playing plaintiffs' lawyers will serve to ensure selection of arbitrators with more diverse backgrounds, as lawyers will likely work to select arbitrators who they believe share experiences and beliefs similar to their clients.

94. 500 U.S. 20 (1991) (promoting arbitration as an adequate substitution for litigation).

95. William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 659 (2006) (expressing concern that an employee who cannot afford counsel might have difficulty selecting an arbitrator because he or she would be unlikely to have access to the resources necessary to make a knowledgeable choice). *But see* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011). In this article, Colvin found that repeat-player employers had an advantage in arbitration involving employees. *Id.* at 11–13. One of the reasons for a repeat-player advantage, Colvin concluded, was that the "plaintiff attorney bar" was not able "to play a substitute role as a repeat player on behalf of employees in employer arbitration akin to the role played by unions in labor arbitration." *Id.* at 21. Colvin speculated that plaintiff attorneys might be able to play this role if the time came when there were a "sufficient number of plaintiff attorneys experienced in employment arbitration accessible to employees to be able to counteract employer advantages in this area." *Id.*

96. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 121 (2015). This research debunks the belief that arbitral bias against the one-shot players is prevalent. According to Horton and Chandrasekher, there is "little proof that private judges are prejudiced against consumers. In fact, our research goes further and casts doubt on existing evidence of arbitral bias." *Id.* at 120–21. There is also some doubt as to the continued existence of the repeat-player advantage in arbitration. *See id.* at 121. According to Horton and Chandrasekher, repeat players do not have as much control over the arbitration process as they did in the past; their study considered 1,279 different arbitrators who had presided over 4,839 arbitrations (in part because of the AAA arbitrator appointment process). *Id.* at 121. Thus, the authors concluded that "companies no longer have much control over the identity of the private judge." *Id.* Although Horton and Chandrasekher did not examine the identity of the arbitrators, one might also imagine that more minority and female arbitrators presided over these arbitrations, given that so many different arbitrators were assigned to resolve disputes.

C. Consolidated Information About Diverse Arbitrators

Another important facet of increasing arbitrator diversity is information dissemination. One way to increase information about available arbitrators is to develop a website or clearinghouse and invite arbitrators to create profiles for free or a relatively low cost. For the arbitrator provider organizations, like AAA, information about which arbitrators are on their rosters is only available *after* the parties engage the services of AAA. Of course, arbitrators are free to post résumés on their own websites, but the vast majority affiliate with organizations that make information about arbitrators available only to those who use their services. And even then, information about arbitrators is relatively scarce. The arbitrator résumé provides fairly basic information about academic and practice background, experience in arbitration, representative cases, and hourly rate. Recently, AAA offered arbitrators the opportunity to create and post a two-minute video about themselves on the AAA webpage. Although this opportunity was not explicitly created in order to improve the selection rate for diverse arbitrators, one might expect that seeing and listening to an arbitrator with whom a party or lawyer is not already familiar might make parties more comfortable with selecting that arbitrator.

The JAMS website contains considerably greater information about its arbitrators, including a profile picture and a résumé featuring educational background, practice experience, and dispute resolution experience. One of the more helpful innovations on the JAMS website is “counsel comments,” a platform where counsel who have utilized the services of a neutral may offer comments that can be displayed (presumably with the neutral’s approval) on the website. The JAMS website is accessible to the public and would allow prospective parties a considerably greater opportunity to make a diverse choice, because—to some degree—they can identify diverse arbitrators from their pictures and résumés.

CPR’s full list of neutrals is only open to its organizational members. The public does, however, have access to its franchise and employment panels. Yet even that information is minimal. The panel information does not include a picture or any comments; instead, it contains basic information about education, professional experience, primary practice areas, dispute resolution experience and training, selected honors/awards, publications, and participation in professional and civic associations. The section does not contain demographic information.⁹⁷

97. See *Find a Neutral*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/neutrals/find-a-neutral> (last visited Oct. 10, 2020). If you wish to find a neutral on this site, you must first register with CPR.

Rather than relying on arbitral organizations to provide information about arbitrators—given their interest in continuing to allow parties the freedom to select the arbitrator they prefer—it may make sense to develop a separate website, something akin to arbitralwomen.org. That website is an international platform focused on providing greater information about international commercial arbitrators who are women.⁹⁸ Instead of focusing on merely one group of people, however, a future website could focus on collecting information about diverse neutrals, as defined in ABA Resolution 105. Such a website might make available pictures, videos, blogs written by arbitrators, or even a party review area. Rather than just positive quotes about the dispute resolution neutral, this website could feature a series of questions answered by parties and counsel following an arbitration, including questions like: Did the arbitrator issue the award by the deadline? Was the award complete? Did the arbitrator offer reasons for the decision? Did the arbitrator manage the hearing efficiently? Did the arbitrator have special requests (for example, asking for every document to be mailed as well as e-mailed, including any case cited in briefs)? Did the arbitrator pay attention during the hearing? Did the arbitrator “split the baby”?

Similar to arbitralwomen.org, a website of this type already exists for federal district court judges and magistrates. Known as “The Robing Room,” this monitored website allows lawyers to rate, on a scale from 1 to 10, federal judges and magistrates on a variety of criteria, including: temperament, scholarship, industriousness, ability to handle complex litigation, punctuality, evenhandedness in civil and criminal litigation, flexibility in scheduling, involvement in settlement discussions, and varied criteria related to criminal cases.⁹⁹ The website also permits lawyers to make comments and give judges overall star ratings. The website operator, North Law Publishers, reserves the right not to publish a comment or rating if it determines that it was not made in good faith or was libelous.¹⁰⁰

D. Published Arbitrator Evaluations

Arbitral organizations could also begin creating evaluation programs for arbitrators, similar to those some states have adopted for monitoring judicial performance. The National Center for State Courts has determined that seventeen states and the District of Columbia have official programs for evaluating judicial performance.¹⁰¹ Of those seventeen states, seven share

98. ARBITRAL WOMEN, <https://www.arbitralwomen.org/> [<https://perma.cc/8WF9-FAFD>].

99. THE ROBING ROOM, <http://www.therobingroom.com> [<https://perma.cc/R78G-XA8J>].

100. *FAQs*, THE ROBING ROOM, <http://www.therobingroom.com/FAQs.aspx> [<https://perma.cc/JQ5U-22WQ>].

101. See NAT'L CTR. FOR STATE CTS., RESOURCE GUIDE: JUDICIAL PERFORMANCE EVALUATION, <https://cdm16501.contentdm.oclc.org/digital/collection/judicial/id/524> [<https://perma.cc/29AB-7FT7>].

judicial performance reviews with the voters when a particular judge is subject to a retention election.¹⁰² For example, Iowa adopted a merit system for selecting judges in 1962. Since that time, the Iowa State Bar Association has conducted a Judicial Performance Review as a means to convey relevant information to voters about judges subject to retention votes.¹⁰³ In order to rate a judge, attorneys must appear in front of that judge frequently. Those attorneys can then rate the judges on six to eight qualities relevant to their professional competence, including “knowledge and application of the law, perception of factual issues, attentiveness to arguments and testimony, management and control of the courtroom, and promptness of rulings and decisions.”¹⁰⁴ Ratings “range from 1 to 5 with 5 being ‘excellent’ and 1 being ‘very poor.’”¹⁰⁵ Attorneys also rate, on the scale of 1 to 5, various aspects of the demeanor of a particular judge, including whether that judge

avoids undue personal observations or criticisms of litigants, judges, and lawyers from the bench or in written orders; decides cases on the basis of applicable law and fact, not affected by outside influence; is courteous and patient with litigants, lawyers, and court personnel; deals with pro se litigants and pro se litigation fairly and effectively; and treats people equally regardless of race, gender, age, national origin, religion, sexual orientation, socio-economic status, or disability and demonstrates an awareness of the influence of implicit bias.¹⁰⁶

A similar system could be put into place by any arbitral organization or by an independent organization. The system could be comparable to the judicial performance evaluation programs described above, which are

102. *Id. But see Judicial Performance Evaluation in the States*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <https://iaals.du.edu/judicial-performance-evaluation-states> [https://perma.cc/7758-628X] (only identifying six states that provide such information for retention elections). States providing such information to voters include Missouri and Colorado. *See, e.g.,* Farrah Fite, *Missouri Judicial Performance Review Findings Available to the Public at yourmissourijudges.org*, YOURMISSOURIJUDGES (Sept. 25, 2018), <http://www.yourmissourijudges.org/missouri-judicial-performance-review-findings-available-to-the-public-at-yourmissourijudges-org/> [https://perma.cc/6XKS-CQKC]. Other states collect responses to their JPEs, but do not share the information with voters. Instead, several states provide the information to persons responsible for reappointing judges. Other states provide the evaluation information to individual judges for self-improvement purposes. And two states provide summary information—without specific information about individual judges—to the public to enhance confidence in the judiciary. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra*.

103. The Iowa Bar Association website contains the last twenty-four years of performance evaluations for Iowa’s state court judges. *Judicial Evaluations*, IOWA STATE BAR ASS’N, <https://www.iowabar.org/page/JudicialEvaluations> [https://perma.cc/APF8-658E].

104. IOWA STATE BAR ASS’N, JUDICIAL PERFORMANCE REVIEW 1 (2020), <http://nebula.wsimg.com/37e8c51bd3c12a8b424bd2f0389b2fa8?AccessKeyId=42FEDB903B3EA90283F3&disposition=0&alloworigin=1> [https://perma.cc/6J3U-CK2C].

105. *Id.*

106. *Id.*

intended to provide information about individual judges based on characteristics that the Institute for the Advancement of the American Legal System and the ABA have deemed relevant. These criteria include command of relevant substantive law and procedural rules; impartiality and freedom from bias; clarity of oral and written communications; judicial temperament that demonstrates appropriate respect for everyone in the courtroom; administrative skills, including competent docket management; and appropriate public outreach.¹⁰⁷ Of course, in creating a system for arbitrator performance review, any organization should be mindful of criticisms levied at such systems. Several commentators have reported that the performance review process (based on an ABA model) is systematically biased against women and minority judges.¹⁰⁸

CONCLUSION

While the arbitrator selection process rarely inspires the kind of headlines that Jay-Z's case generated, in the world of arbitration, the media, lawyers, and provider organizations have increased focus on ensuring that parties have the opportunity to select from diverse neutrals when appointing an arbitrator. Organizing groups of plaintiffs' lawyers so that they might collaborate to develop permanent panels of diverse neutrals and an increased use of direct arbitrator appointment may well lead to increased diversity among arbitrators actually appointed to hear consumer, employment, and other disputes—indeed, direct appointment already

107. See *Judicial Performance Evaluation: How It Works*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <https://iaals.du.edu/judicial-performance-evaluation-how-it-works> [<https://perma.cc/68Y5-7B27>]. The ABA has issued black letter guidelines for the evaluation of judicial performance, focusing on similar attributes with greater detail. See AM. BAR ASS'N, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005), https://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelinesjpe.pdf [<https://perma.cc/P85H-2HE2>].

108. Jennifer K. Elek, David B. Rottman & Brian L. Cutler, *Judicial Performance Evaluation: Steps to Improve Survey Process and Measurement*, 96 JUDICATURE 65, 67 (2012) (reporting that some preliminary empirical evidence supports the argument that JPE surveys are biased against minority and women judges and that lack of control over who responds—and based on what information—likely increases responses based on racial or gender stereotypes). The Report also identifies shortcomings in the Judicial Performance Evaluation (JPE) tool that most courts utilize. Among other things, the survey is problematic because it uses double-barreled items (i.e. compound questions), such as “judge listens with *patience* and *attentiveness*,” and language that is too abstract, such as “judge demonstrates appropriate demeanor on the bench” and “judge promotes public confidence in the judiciary.” *Id.* at 68. Other commentators have also found JPEs problematic in regard to race and gender considerations. See, e.g., NATALIE KNOWLTON & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION 2 (2012) (finding that women and minority judges tend to score high in four states' JPEs, but in a few areas tend to score lower, which may be the result of implicit bias, and offering suggestions for improvement); Christine M. Durham, *Gender and Professional Identity: Unexplored Issues in Judicial Performance Evaluation*, 39 JUDGES' J. 11 (2000) (claiming that one-third of female judges in Colorado believe they receive less respect from fellow judges and lawyers than do male judges, which may help to explain disparate JPE results).

appears to have a positive effect in AAA consumer arbitration cases. If increasing diversity among arbitrators is integral to ensuring the procedural integrity of the arbitration process, then arbitral organizations should increase their efforts to push businesses to draft arbitration clauses that authorize direct arbitrator appointment, alternative selection approaches, or permanent panels. Additionally, efforts could be made to increase visibility of diverse arbitrator candidates and evaluate current arbitrators. As long as arbitral organizations are committed to developing and maintaining diverse rosters of arbitrators, these approaches will ensure that a much larger percentage of arbitrators from diverse backgrounds are actually appointed to hear cases—rather than languishing on the arbitrator rosters, never to be chosen.