

Chicago Daily Law Bulletin®

Volume 160, No. 165

Correcting the neutral selection gender bias

According to new research published in the American Bar Association's Dispute Resolution Magazine, lawyers and their clients are still disproportionately choosing men to act as their arbitrators and mediators.

The article summarizing this research, "Gender Differences in Dispute Resolution Practice," by Andrea Kupfer Schneider of Marquette University Law School and Gina Viola Brown of the ABA Section of Dispute Resolution, details their study collecting data from more than 6,000 neutrals and advocates.

A large percentage of the respondents had practiced for more than 20 years, and the gender breakdown was 66 percent men and 34 percent women, which reflects the membership of the Dispute Resolution Section.

The study showed women lagging in a number of areas. Women are selected less often, both as mediators and arbitrators. Arbitration selection is lower than mediation, as women are selected for only 20 percent of arbitrations.

The starkest difference between the selection of male and female neutrals was in the selection of arbitrators in cases with more than one arbitrator. The study showed that of the 294 arbitrators who had served on three-person panels, only 42 (14 percent) were women.

Schneider and Brown also studied neutral appointments by case type. In mediations, the data revealed that while women receive more than half the appointments as mediators in family and elder law disputes — as well as a smattering of labor, health and energy disputes — male mediators are still usually selected for corporate, construction, insurance and intellectual property disputes.

Men also are selected as arbitrators more often in the areas of commercial, construction and

intellectual property.

One of the most important findings of the study is that if you follow the money, you find that men are appointed for the high-stakes cases. In mediations, of the 166 cases with more than \$1 million in dispute, only 38 (23 percent) were mediated by women.

Another interesting finding was that while men are still disproportionately appointed arbitrators, there was a jump in the percentage of female arbitrators to 33 percent for the \$500,000-\$999,999 range of cases, which appears to be explained by women being appointed in employment discrimination cases.

So what can be done?

The authors of the study offer a number of explanations for these findings and some possible fixes. One fix would be to change the method of neutral selection.

Schneider and Brown found, for example, that when attorneys and clients used their personal networks to choose a mediator, only 29 percent of those selected were women. When they selected the mediator from a court or ADR provider roster, the percentage of women rose to 47 percent.

Deborah Rothman suggests in "Gender Diversity in Arbitrator Selection," published in the spring 2012 issue of Dispute Resolution Magazine, that to correct the imbalance in selection of female arbitrators in high-stakes arbitrations, law firms should integrate women into their construction and banking practices.

Rothman's suggestion is supported in the finding in Schneider and Brown's research that, particularly in construction disputes, parties select neutrals with many years of experience. If women cannot gain meaningful experience early in these practice areas, they have little chance of being selected as neutrals later in their careers.

Rothman further suggests that

BEYOND DISPUTE



TERESA F. FRISBIE

Teresa F. Frisbie is the director of the Loyola University Chicago School of Law Dispute Resolution Program; a mediator and arbitrator at ADR Systems of America; a member of the National Academy of Distinguished Neutrals; and of counsel to DeGrand & Wolfe PC.

providers cannot stop at "merely recruiting women for their arbitration rosters, they will have to find effective ways to address users' implicit biases when promoting their women arbitrators to users of arbitration and to the ADR community as a whole."

Rothman also raises the issue of women's own psychosocial barriers. Women often hold self-limiting beliefs that they are not as worthy in their professions and avoid self-promotion. If the experiments on girls taking math tests are any indication, perhaps female arbitrators and mediators should spend time thinking or writing about what they value just before entering a networking event.

Rothman raises another interesting reason why women arbitrators are not selected even by senior women: After working hard "to succeed in a male-dominated profession, and believing they had to blend in with the males, successful women litigators are sometimes reluctant to support a well-qualified female arbitrator for fear of bringing unwanted attention to their own gender."

Citing USC Law School professor Susan Estrich, she states that when you talk to women at the very top, it becomes clear that "part of their

success is due to convincing men that they aren't like other women."

Schneider and Brown's data indicate that women and men select mediators of their own gender to a certain extent. Specifically, male advocates reported 84 percent of their mediators were male, while female advocates reported 63 percent of their mediators were male.

Schneider and Brown suggest that along with more research in gender differences in neutral selection, several steps can be taken by courts, agencies, law firms and ADR institutions to improve the situation, including:

- Making a real effort to recruit and promote female mediators and arbitrators.
- Using lists of mediators and arbitrators for neutral selection instead of simply e-mailing your network.
- Making sure at least 35 percent of an institution's roster is female.
- Adopting the presumption that for three-arbitrator panels, when considering equally qualified candidates, a woman should be selected for the panel.
- Engaging in awareness training.
- Making meaningful efforts to increase female and minority involvement in certain practice areas such as commercial and construction.

They also suggest that as most lawyers are still likely to ask their colleagues for neutral recommendations, female neutrals should work to promote themselves to their own networks.

Implementing these strategies for correcting the existing bias toward male arbitrators and mediators will directly benefit users of dispute resolution services as they will gain access to a much larger pool of talented neutrals.

A detailed report of Schneider and Brown's survey is available online at goo.gl/jmo8fH.