

**ONE OF THE MOST ATTRACTIVE FEATURES OF AN ALTERNATIVE DISPUTE RESOLUTION PROCESS IS THE ABILITY OF THE PARTIES TO MAINTAIN THE CONFIDENTIALITY OF THE PROCEEDINGS. THIS REVERED FEATURE IS OFTEN CITED AS ONE OF THE ADVANTAGES OF ADR OVER CONVENTIONAL COURT LITIGATION.**

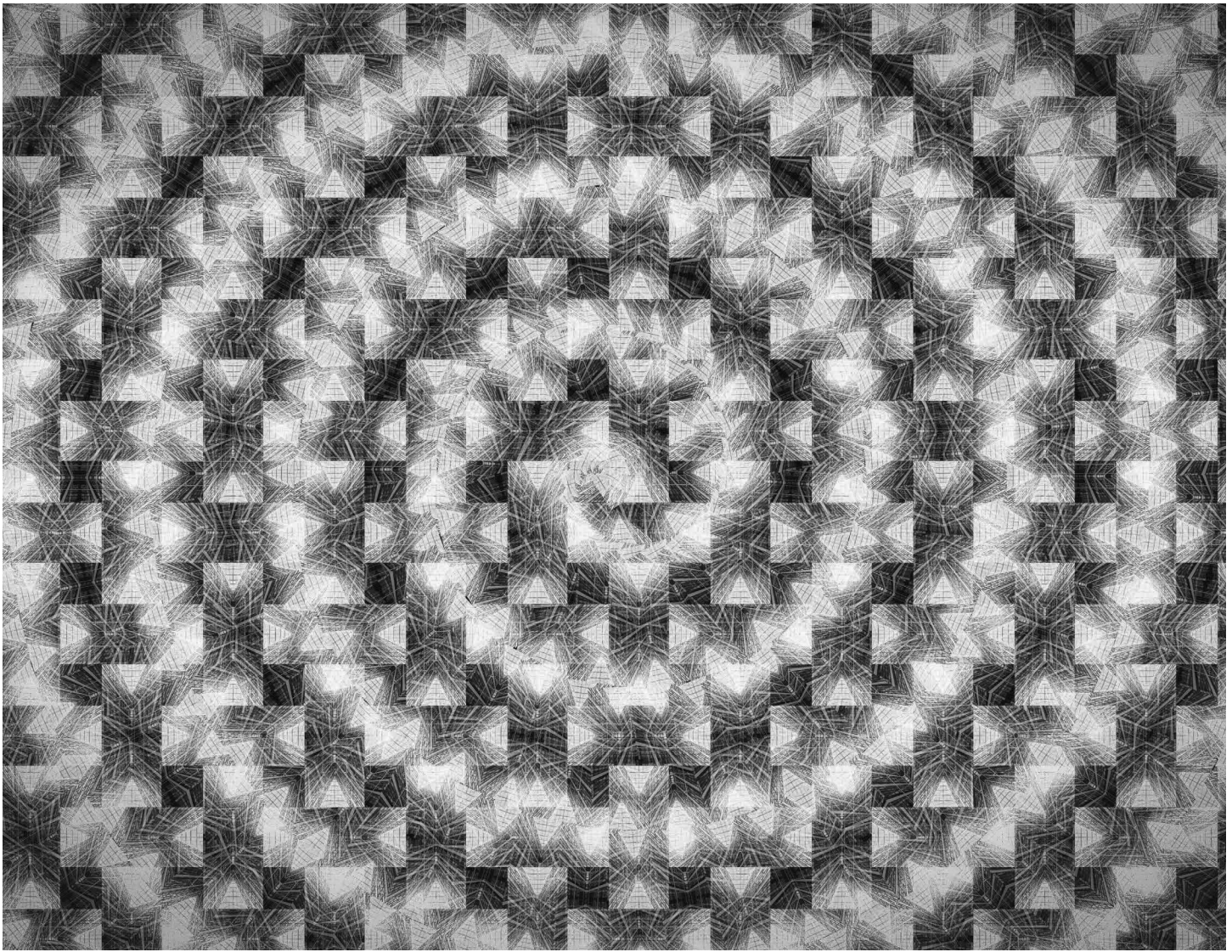
But that confidentiality has recently come under scrutiny, particularly in the case of arbitrating consumer and employment disputes, including those containing allegations of sexual harassment or other related misconduct. Moreover, it is this very aspect of ADR that may be contributing to the lack of diversity in the selection of arbitrators and mediators.

One might expect that, if an arbitration or mediation is commenced with a recognized and reputable administering entity such as the American Arbitration Association (AAA), the CPR Institute, JAMS, or Resolute Systems, the rules and procedures of those organizations would maintain the privacy of the proceedings. Certainly, those rules and procedures impose obligations on the entity's staff and the neutral to protect the confidentiality of the information disclosed during the proceedings. Moreover, the Commercial Code of Ethics for Arbitrators in Commercial Disputes explicitly sets forth an arbitrator's obligations to maintain the confidentiality of the proceedings. Similarly, the Model Standards of Conduct for Mediators mandates that "[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."

However, the parties and their counsel are not similarly bound by the foregoing obligations.

The parties always have a right to disclose the details of the proceeding, unless they enter into a separate confidentiality agreement or unless there is an applicable law or rule to the contrary. Arbitration has been described as a "creature of contract," and, in that regard, the parties to an arbitration clause are free to customize their dispute resolution process with a great degree of flexibility – far more than is available if the dispute were governed solely by court rules and procedures. Thus, if maintaining confidentiality is a concern, the parties may agree to preserve the privacy of any future dispute resolution proceedings by agreement. Similarly, a mediation proceeding may also be governed by a contract between the parties, the agreement with the mediator, the rules and procedures of the mediation program, and/or the applicable law, all of which, more often than not, mandate the confidentiality of the mediation proceedings.

Notably, absent such an agreement or governing rule or law, as is the case in conventional court litigation, the parties would theoretically be free to engage in any disclosure of the proceedings, ranging from publicly speaking about the case to the media to actually revealing information or documents obtained during the proceeding itself. Moreover, unless there is a separately applicable agreement in place between the witnesses and the



parties to the proceeding (e.g., a non-disclosure agreement, a cooperation agreement, etc.), witnesses (and, in particular, third-party witnesses) are neither named parties to the proceeding nor are they signatories or otherwise bound by any of the agreements encompassing the proceeding. Thus, as a general matter, they have no obligation to maintain the privacy of any of the procedural or substantive information to which they are exposed or about which they learn as a result of their participation in the proceedings. Accordingly, it is little wonder that, much like in conventional court litigation, parties to arbitration proceedings have increasingly sought to enter into stipulated protective orders governing the confidential-

ity of the proceedings and/or the designation and use of materials produced by parties (and third-parties) to which access may be circumscribed. As in court litigation, these stipulations are presented to the ultimate adjudicator for approval, or, alternatively, the parties may engage in motion practice before the arbitrator or panel on that issue. Parties to a mediation proceeding also often engage the mediator's assistance in crafting an appropriate confidentiality agreement that protects the privacy of the information exchanged or disclosed during the mediation proceedings.

One of the unintended consequences of this focus on confidentiality has been the lack of access to the details of ADR proceedings to help

fill the “information gap” that exists for neutrals who are women and people of color, regardless of whether they are new to the field or seasoned practitioners. While established, well-known neutrals have their robust reputations and profiles on which to rely, and former judges can point to prior decisions that are usually found through searches in publicly available databases, the work and any work-product attributable to other, less well-known practitioners is largely shielded from the due diligence undertaken (if any) by those who select neutrals, thereby depriving them of additional data points in that

neutrals and (2) interviewing potential neutrals. Particularly because ex parte contact and communications with mediators are generally permissible (unlike the case with an adjudicator like a judge or an arbitrator), it is surprising that these methods are not used more often. Moreover, interviews of prospective arbitrators conducted jointly by the parties and/or their counsel would sidestep the ex parte communication prohibition.

In short, the confidential nature of ADR proceedings makes them less subject to scrutiny. By contrast, take a look at the Federal Judiciary

**THE CONFIDENTIAL NATURE OF ADR PROCEEDINGS MAKES THEM LESS SUBJECT TO SCRUTINY. BY CONTRAST, TAKE A LOOK AT THE FEDERAL JUDICIARY WHERE THERE HAS BEEN PUBLIC AND POLITICAL DEMAND FOR DIVERSITY AND INCLUSION. AS THE STATISTICS MAINTAINED BY THE MCCA POIGNANTLY ILLUSTRATE, PRESIDENT OBAMA, FOR EXAMPLE, APPOINTED MORE WOMEN AND MINORITIES IN TOTAL TO THE FEDERAL BENCH THAN ANY OTHER PRESIDENT BEFORE HIM.**

due diligence process. As currently practiced by those in a position to choose the neutral, the selection process is largely based upon individual profile and reputation. Attorneys and parties typically use a combination of informal and formal due diligence methods, including soliciting feedback from colleagues (e.g., word of mouth, underground information, e-mails sent around law firms, etc.); soliciting feedback from other neutrals; conducting social media research (e.g., LinkedIn, Twitter, Facebook, etc.); and consulting other publicly available information (e.g., generally researching the internet, conducting Westlaw/LEXIS searches, retrieving publicly available awards, etc.). Two other methods worth noting are (1) sending out questionnaires or e-mail queries to potential

where there has been public and political demand for diversity and inclusion. As the statistics maintained by the MCCA poignantly illustrate, President Obama, for example, appointed more women and minorities in total to the federal bench than any other president before him. Specifically, he appointed more Asian Americans to the bench than the combined total of all 43 prior administrations. He also appointed 136 women, while a grand total of 294 had been appointed by all presidents before him. In sum, President Obama more than doubled Asian Americans on the bench and was responsible for just under 50% of all female appointments. At the same time, although women make up in excess of 30% of the federal bench, in arbitration matters

over \$1 million dollars, less than 20% of selected neutrals are women. And women only make up 10-15% of the arbitrators on international disputes.

Thankfully, there are initiatives currently in place and under development to help fill the “information gap.” For example, the International Mediation Institute ([imimmediation.org](http://imimmediation.org)) maintains feedback evaluations on mediators it certifies that are available to the public on its website; Arbitrator Intelligence ([arbitratorintelligence.org](http://arbitratorintelligence.org)) is a non-profit organization founded at Penn State Law that is helping to develop resources to promote transparency, accountability, and diversity in the arbitrator selection process; Dispute Resolution Data ([disputeresolutiondata.com](http://disputeresolutiondata.com)) is an online data subscription service providing access to closed international arbitration and mediation process information; and the GAR Arbitrator Research Tool ([globalarbitrationreview.com/arbitrator-research-tool](http://globalarbitrationreview.com/arbitrator-research-tool)) is a database of information on arbitrators maintained by Global Arbitration Review. More can and should be done.

With respect to arbitrations, administering entities can also work with parties to try and release as much of an issued award as possible, with appropriate redactions as necessary. For example, for the most part, FINRA arbitration awards are publicly available in a searchable database maintained by FINRA. The AAA also makes all employment arbitration awards publicly available, redacting the names of the parties and witnesses unless a party expressly agrees to have its name made public in the award. Many state employment/labor relations agencies also make arbitration awards involving public employment disputes publicly available. Finally, under the rules of the International Centre for Settlement of Investment Disputes (ICSID), the parties may agree to publish the award (or other material in the case) on ICSID’s website. When an award is not made

public by the parties, the Centre will publish excerpts of the award’s legal reasoning. Greater movement towards consensual releasing of more awards would provide additional, helpful information to those who are engaged in the neutral selection process.

Of course, any bargained-for or law/rule-imposed confidentiality may, in fact, turn out to be fleeting if, after the issuance of an award or the consummation of a settlement agreement, one or both parties seek confirmation/vacatur of the award or enforcement of the agreement in court. In those circumstances, the contents of the pleadings, which would undoubtedly attach the award or settlement agreement itself, as well as any information derived from the underlying proceeding, would generally be publicly disclosed. Courts have long espoused the presumption that judicial documents should generally be accessible to the public, typically weighing such access against any privacy interests that are at stake.

There are likely other work-around solutions that can help ameliorate the unintended consequence of furthering the “information gap” with respect to neutrals who are women and people of color, while also upholding one of the core principles of private dispute resolution, namely, confidentiality. We should all strive to think creatively about such solutions in an effort to improve the lack of diversity with respect to the selection of neutrals.



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