

Alternatives

TO THE HIGH COST OF LITIGATION

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Commentary

Promoting Diversity in Mediation

BY TIMOTHY K. LEWIS

This article is adapted and expanded from a keynote presentation the author delivered at the CPR Institute's Regional Meeting in Philadelphia on April 10. See credit below.

It's a privilege to be here to share a few thoughts about diversity in the dispute resolution arena. I know many people in this room. And I know that most of you have worked hard to promote necessary change, and to help ensure equality of opportunity throughout our profession.

As I've often said, we will do as well as we choose to do in leveling the playing field.

It's important that you understand that. It's up to you; it's up to each of us. It's in our hands.

The truth is that when Ben Picker [senior counsel in Philadelphia's Stradley Ronon Stevens & Young, which hosted the CPR Institute Regional meeting at which this presentation took place] first asked me to speak, I was reluctant and I told him so.

I'm not even sure we know what we're talking about sometimes when we discuss diversity.

It has become a code word with a lot of different meanings, and coded language can be a convenient place to hide from inconvenient truths. I can't do that. I won't do that. I can only share with you plainly and directly about a matter of such consequence.

So let's put the issue squarely on the table in language we can't hide from: We're talking about the vestiges of racism within the legal profession that, in spite of considerable progress, are manifested in conscious and uncon-

scious biases in deciding who to hire. We're also talking about biases that affect women, Asian Americans, Latinos, and the LGBTQ community.



I don't walk around thinking of myself as a "diverse" attorney. I'm an attorney, and I also happen to be black. I don't know anyone who refers to themselves as "diverse." But all of this is a construct created by the prisms we're saddled with at birth, and we have to deal with them.

The way we talk about diversity can be misleading, culturally clumsy, and inherently damaging. So, unless we are striving to see each other as professionals first and foremost, there's no point in having this discussion. That has to be our collective purpose and our ultimate goal.

And we're doing better, but we're nowhere near where we need to be. When we finally get to that point, the prisms of race and gender will die their long-overdue deaths, along with the barriers to opportunity that continue to imprison us all.

FIGHTING INEQUALITY

I was introduced to race and racism when I was three years old. And in one form or another, I've encountered them practically every day since. I've fought against inequality with my fists, with my mind, with my heart,

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and with my faith in humanity for the better part of six decades, and I bear the scars, some known but to me.

I'm fluent in the nuances of race. I wish we all were, and at the same time I wish none of us had to be. But I had to become fluent, just like every other black professional I've ever known. Until we all learn to recognize the nuances of inequality in ourselves and each other, and appreciate how they manifest themselves in our profession, we will make no more than what my friend and fellow mediator, Laura Kaster, an independent neutral in Princeton, N.J., has described as "glacial" progress toward achieving real diversity in alternative dispute resolution.

I've been giving speeches like the one Ben Picker invited me to give for nearly 20 years. And all of that has finally led me to conclude that we need to hear a little less from people like me and more—a lot more—from people like Ben and many of you.

So I said two things to him when he called:

(1) For their own sake and the sake of the cause, it's time for more white men to be the guest speakers on the meaning and importance of diversity at events like this, and for more people of color and women to address substantive dispute resolution issues; and

(2) In spite of that, of course I'll speak because I'll never stop fighting, and because you're my brother and you asked me to. But I'm going in a different direction in doing so. I just want to talk about our collective talent, our humanity, and our responsibility.

In 1944, a 20-year-old man boarded a bus in Pittsburgh. This young man had been denied a chance to attend a local public high school because of his race. Instead, he was sent to study auto mechanics and bricklaying at a trade school.

And now, fresh out of the Army, he was on

his way to a job interview. He opened a newspaper and noticed an article about the GI Bill, then formally known as the Serviceman's Readjustment Act of 1944, which had just been passed.

He never made it to his interview. He got off the bus, turned around and headed directly to wherever you signed up for the GI benefits. Then, and with a trade school education, he somehow talked his way into the University of Pittsburgh. He had no money, but the GI Bill would cover 48 months.

Confronting 'The Sickness'

The presentation: A former federal judge who is leading diversity initiatives targeted to improving ADR practice shares his experiences in confronting bias and discrimination.

The conflict resolution lesson: Mediation needs open-mindedness and varied life experiences.

The ADR practice challenge: 'The way mediators are selected actually penalizes women and people of color.' The author discusses hiring neutrals, the need for candid dialogue, and how his own 'door of opportunity' was opened.

His door of opportunity had been opened, and he went for it. And in those four years, he finished both the undergraduate and the dental schools at Pitt. That had never been done before, and it hasn't happened since.

That man was my father, Dr. James K. Lewis, and I stand on his shoulders today, along with those of many others who opened doors for me. From the time I was born, I had a front-row seat to what can happen when the least likely among us is given a chance to succeed.

And I never, ever forgot that lesson. That's really why I'm here today.

My parents wanted to push that door open even wider. They wanted their children to grow up in the best neighborhood and attend the best schools they could provide. So when I was three years old, our family integrated a fairly upscale neighborhood with a great school.

But this meant that I was the only black student in my class from kindergarten through eighth grade. I had to begin to learn different nuances of race, and I had to fight. Then it was off to an all-male boarding school, where I was the only black student in my class for four more years. I had to learn more nuances of race, and I had to fight. And I had to excel. After college and law school, I went to the DA's office, where I was one of five black lawyers, then to the U.S. Attorney's office, where there were only two of us.

Then I became the only active black federal judge in Western Pennsylvania, and the only active black judge on the Third Circuit until Ted McKee came along.

At each stop along the way, I wondered things that none of my white colleagues were even thinking about.

I wondered why they couldn't see all the talent I knew was out there. I wondered why they seemed to question our competence and abilities until they got to know us. Unlike our white colleagues, our competence wasn't automatically presumed. The burden of proof was always on us. If for no other reason than my own father's experience, I knew how absurd this was. Yet I also knew how real it was to them.

The nuances of race are like a web, and it's easy to become trapped. We're all practically born into the trap.

But more than anything, these experiences taught me how to fight against the sickness of discrimination and exclusion because of race, gender, sexual orientation, religion, or any other invalid basis for judging another human being's capacity to be anything, including my friend, my neighbor, my spouse, my partner—or my mediator.

I actually have come to believe that one of the most enriching experiences any person can have is to live as a minority in some context and for some period of time. You learn to see and feel things that you might not feel otherwise. And if your faith in the fundamental goodness of people remains strong, this can

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bring wisdom and, perhaps, just a little more open-mindedness.

In mediation, open-mindedness is critical. Varied life experiences are, too. But the way mediators are selected actually penalizes women and people of color because of some of the things I've just described.

And that's not just sad; it's stupid. It just makes no sense to exclude people who might otherwise bring not only some of the professional characteristics that are so important, but also the life experiences that contribute to finding pathways to resolution of difficult issues.

But the tendency to prefer seasoned, established alternative dispute resolution specialists, the overwhelming majority of whom are white males, makes it extremely difficult for other talented, capable mediators to have even the opportunity to demonstrate their skill.

And when unconscious race and gender bias are factored in, it's no wonder that the ADR profession remains perhaps the single most segregated field in the law.

We know this is wrong, and it must change. But it takes more than Ben Picker and Tom Sager [former Dupont general counsel, a partner in Philadelphia's Ballard Spahr, and namesake of the Minority Corporate Counsel Association annual law firm award for diversity and inclusion] and Rick Palmore [a Chicago-based senior counsel in Dentons and former general counsel of Sara Lee Corp. and General Mills Inc.] and the Leadership Council on Legal Diversity [see www.lclcdnet.org]; it takes more than the CPR Institute's National Diversity Task Force and Shira Scheindlin [an of counsel in New York's Stroock & Stroock & Lavan, and a retired New York federal district court judge who co-chairs the CPR National Diversity Task Force with the author] and the Philadelphia Diversity Law Group [see <https://pdlg.net>], and the many other hard-working, well-intentioned people and groups who have been committed to making a difference. It takes all of us, including each and every one of you.

ADVANCING VALUES

Some of you serve on corporate boards. You might ask yourselves whether you've helped ensure that the senior officers understand

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that, in addition to delivering profits to shareholders, companies have a vested interest in advancing certain values.

As Kenneth Frazier, Merck & Co.'s chairman and chief executive officer, said earlier this spring, "I actually don't see a big conflict between meeting the needs of shareholders and meeting the needs of society." Walmart Inc., with its longstanding commitment to pluralism and equality among its corporate leadership, certainly understands this. So do the corporate signatories to the LCLD's pledge to help build a more diverse and inclusive legal profession.

Some of you serve as general counsel. Have you considered the impact you might have by simply telling your outside counsel that the firm must demonstrate that it has included a woman or a person of color for consideration in every ADR matter, and if that person was not selected, a representative of the firm must explain to you why not?

Some of you are running law firms. In addition to seeking wider diversity in your firms and placing more women and people of color in leadership roles, have you considered sending out a brief but important memo saying that from now on, when the email with the recommended list of potential mediators is circulated for significant commercial disputes, it must include women and people of color? You could do that this afternoon, and it would be good for you, your firm, your clients, and our profession.

Some of you are established neutrals. Are you consulting with any of the service providers for suggestions of women and people of color when you have a conflict of interest?

Are you recommending any of these people when asked by others? Are you bringing them into your network so they, too, can learn and can meet others—just like you did at one time?

The goal here is not to be *included* simply because of race or gender; the goal is not to be *excluded* simply because of these qualities. But in order for us to get there, we have to make a concerted effort, and we must challenge

ourselves, our assumptions, and sometimes each other.

Everyone in this room stands on someone else's shoulders. I don't care who you are, how smart you are, where you went to school, how successful you've been, how hard you've worked—someone paved the way for you and helped to put you in a position to succeed.

Doors were opened and, like my Dad, your talent led you through them toward whatever success you achieved. You have a responsibility to do the same for as many others as you can, especially those who have been historically excluded from active and meaningful participation.

Here is the key: what too many fail to understand is that talent is distributed equally across all races and ethnicities and genders and identities. Opportunity is not. God is responsible for creating talent; we are responsible for creating opportunity. When we do so, we bring honor to ourselves and we improve our profession.

In order to achieve real progress, we must continue to learn each other's language. We must not become trapped by the nuances. We must speak candidly about race and gender. We must discuss openly the role of white men in opening doors of opportunity. We must expect the very best of each other and ourselves, and continue to demand it. And we must do so with mutual respect and an ongoing, shared commitment.

Pluralism and equality of opportunity in this arena and all others must be a common effort steeped in our character, our creativity, and our humanity. We are smart. We are professional problem-solvers. But ultimately, we will do as well as we choose to do. If this matters to you, then years from now perhaps someone, perhaps many, will look back and say, "I stand on *that* man's shoulders, because he opened a door for me and gave me a chance," or "I'm here today because of *that* woman—she gave me the opportunity to let my talent show."

That's the gift, and it's our responsibility to make sure it continues to give. Thank you. 