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# THE RESOLUTION ISSUE

## The Changing Face of Arbitration



COVER STORY

# The Changing Face of Arbitration

BY JOHN ROEMER

*Special to the Daily Journal*



From top: Angela Reddock-Wright, Lexi Meyer, Hiro Aragaki

**A**rbitration in California entered new territory Jan. 1, when SB 707 took effect to nudge ADR providers toward greater diversity on the rosters of arbitrators they offer clients.

From now on, providers must report arbitrator candidate aggregate data that take account of ethnicity, race, disability, veteran status, gender identity and sexual orientation as reported by the arbitrators.

The issue gained national attention after the rap mogul Jay-Z complained in 2018 that there were nearly hardly any neutrals on a roster of arbitrators in New York available to hear his trademark and contract dispute over a clothing line. In early 2019 a selection of African-American candidates was offered and the beef was smoothed over, demonstrating a point the rapper had made earlier: "Everybody needs a chance to evolve."

But even before the Jay-Z controversy, the ADR industry in California tried to diversify its arbitration panels, a reflection of the state's diverse population and business community.

JAMS was the first major ADR provider to add an inclusion rider option in 2018, seeking to increase the number of women appointed as arbitrators. The clause is modeled on the Equal Representation in Arbitration pledge, which JAMS signed onto in 2016. Said Kimberly Taylor, JAMS' senior vice president and chief legal officer, "We've identified this as a challenge. We can provide a diversity of neutrals, but the parties have great latitude in whom they select. Will reporting the demographics move the needle? We're certainly in favor of anything that helps."

In 2019, Taylor added, JAMS amped up its effort by bringing on a diversity program manager to work with law firms, house counsel and affinity bar organizations to broaden the selection of mediators and arbitrators.

Hiro N. Aragaki joined JAMS last year. He has worked as a neutral since 2001 and teaches international and domestic commercial arbitration and mediation at Loyola Law School. "Very experienced older judges have been the norm in the past," he said. "Now, more sophisticated users of ADR are realizing that just because you were a judge, that doesn't necessarily make you a great neutral."

As for finding Asian-Americans in the field, "It makes sense to have a diverse panel, not just along race and gender but also things like practice background and expertise, but the reality is that there are very few racial minorities working now," Aragaki said. "And although there are lots of successful Asian-American litigators, increasing diversity on neutral provider rosters isn't easy. Even if providers do have diverse rosters, that doesn't mean you'll be selected. For example, Asian parties are not necessarily going to select Asian neutrals, and not all at JAMS are equally busy. SB 707 is a positive development and even though change comes slowly, it's happening."

The new law addresses an old problem. "We've been too traditional. The industry has not been progressive," said Lars C. Johnson of Signature Resolution LLC in Los Angeles. "Go into my office, the neutrals are older guys." Johnson is 46. "I'm darn near the youngest guy doing what I do in Southern California," said the mediator and arbitrator, a former plaintiff-side personal injury trial lawyer. "I connect with the younger lawyers who appear before me. I can bridge ethnic and cultural and



age differences."

Johnson said he represents the future. "Glad to say, my firm took me on enthusiastically. We'd love to see more young people of different backgrounds come knocking. We're pushing change here."

Maria-Elena James joined ADR Services Inc. 18 months ago, following 30 years on the state and federal bench. As a judge and woman of color she sometimes saw racial and gender prejudice directed her way in court, but that hasn't been a problem for her in her new role. "Nobody can deny that bias exists, but I can't complain because I've been doing so well here," she said. "The intent of the new law is a good one — because we serve the public, it really helps to bring diversity into our workplace."

She said she has spoken to younger colleagues of color about joining her in the ADR industry, but finds resistance. "There's an anxiety about whether they'd be chosen [from rosters of neutrals to serve on panels], and it can be hard to address that concern. We're going to need to be able to incentivize minorities to come in."

Amy F. Solomon, a former Girardi Keese partner, signed on at Judicate West in January 2019. "In my 30 years in the legal business I've always been in the minority as a woman," she said. "The profession has been a bit slow in recognizing the importance of diversity. That was a motivating factor when I moved to Judicate West. I had a niche practice representing women in medical malpractice and other cases that were sensitive and specific to women. Clients would sigh with relief when they found a woman to represent them but when we ended up in mediation or arbitration it was very difficult to find a woman neutral. That caused discomfort. Now it's really nice to be that woman neutral who is available in such cases."

Judicate West was looking to create more diverse panels, which is why Solomon chose to work there, she said. "How do

you recruit more of us? That's a multi-faceted chicken-and-egg conundrum. The trick is to make it known that people with diverse backgrounds are wanted in the field, and SB 707 will help accomplish that."

Because so many judges retire to go into dispute resolution, a diversified bench will help transform the ADR field, said Solomon, who sat on the state commission that evaluates judicial candidates. "Jerry Brown put a lot of women and minorities on the bench, which means more of them will eventually become neutrals."

Democratic state Sen. Robert A. Wieckowski of Fremont, an attorney who sponsored SB 707, pointed to a 2015 national survey of practicing employment arbitrators that found 74 percent were male and 92 percent were non-Hispanic white. Wieckowski said Jay-Z's plight did not inspire the California legislation but "certainly highlights the need for more diversity in the arbitration industry."

The law could well reinforce another — SB 766 — that newly boosts the state's profile on the international commercial arbitration circuit by quashing protectionist rules that discouraged the growing practice. As commerce tilts toward Asia, multicultural arbitrators will likely be increasingly in demand in a thriving California market.

The new diversity law is timely and essential, according to the prominent international commercial arbiter Cedric C. Chao. "There are very few Asian Americans in the world of domestic and international big dollar disputes," he said. "SB 707 opens the door by shedding light on the offerings of each institution, and that's all to the good. A client from Asia wants a panel member who can appreciate the different cultures' different ways of expression. In Asia it's not contentious in the same way as in American litigation. Diversity is a helpful factor in approaching this reality."

SB 707 is a potentially potent

## "MORE SOPHISTICATED USERS OF ADR ARE REALIZING THAT JUST BECAUSE YOU WERE A JUDGE, THAT DOESN'T NECESSARILY MAKE YOU A GREAT NEUTRAL"

Hiro N. Aragaki, JAMS

nudge toward better minority recruitment. The law is intended to persuade providers to hire neutrals who don't look like their predecessors. Meanwhile, those already in the vanguard of the new wave of arbitrators show that arbitration rosters can indeed include young folks, females and the racially diverse.

Lexi W. Myer became a JAMS neutral two years ago. At 44, "I'm among the younger arbitrators working," she said. Earlier, she did legal research for the company after a stint as a litigator. "I haven't experienced any pushback. People are increasingly open to folks like myself doing the job. Some of JAMS' clients want contemporaries in the arbitrators' role. Clients come from all kinds of backgrounds, and it is important for us to mold ourselves to fit the diverse community we serve."

Adrienne C. Publicover joined JAMS in 2016 after a quarter-cen-



From top: Sidney Kanazawa, Maria Elena James, Shirish Gupta, Lars Johnson, Phyllis Cheng

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## PROFILES OF CALIFORNIA'S NEWEST MEDIATORS AND ARBITRATORS

### JUDICATE WEST

#### Hon. Jan M. Adler, Ret.

San Diego

Business/Contractual, Class Actions, Corporate Governance, Employment, Intellectual Property, Personal Injury, Products Liability, Securities



Judge Adler served as a United States Magistrate Judge in the Southern District of California between 2003-2018, including as Presiding Magistrate Judge the last two years of his tenure. During this time, he presided over approximately 2,000 civil matters as a settlement judge, handling all types of civil litigation.

Prior to his appointment to the bench, Judge Adler spent 25 years in private practice, including two decades at a national law firm. He has litigated all types of civil matters, focusing on securities, antitrust and consumer class action cases.

Judge Adler has served on numerous boards and committees. He was a member of the Board of Governors of the Association of Business Trial Lawyers (ABTL), serving as president of the San Diego chapter, and he sat on the Ninth Circuit ADR committee. He is a frequent speaker and panelist in the United States and

abroad on programs concerning mediation and complex civil litigation.

Judge Adler has carried over to his mediation practice the thoughtful and thorough approach for which he was known during his 15 years on the bench. In addition to his ability to discern complex legal and key factual issues, clients appreciate his collaborative approach. One attorney commented: "Judge Adler is an outstanding mediator who not only understands the human frailties and often heightened emotions of litigation but uses his calm and assuring demeanor to facilitate meaningful and productive dialogue in assisting the parties to get to a deal. He is smart and decisive in his approach."

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### COVER STORY CONTINUED

tury litigation career. "Every single arbitration I ever had as a litigator was presided over by a man," she said. "That world was pale, male and stale. But JAMS encouraged me because of my subject matter expertise in health care, insurance and ERISA to train as an arbitrator. They're not just paying lip service to this. Often when I go in now to hear a case, at least half the attorneys are women. Things are changing."

She made the move to life as a neutral to reduce career stress after a health crisis. "People ask what's the barrier to entry and I say poverty," Publicover said. "I had a good book of business, and then I got breast cancer. Work as a neutral was always something I wanted to do, but I thought it would come later in my career. Now I see it as a fabulous profession — even though you go in like a startup and get paid only a proportion of what you bring in."

Angela J. Reddock-Wright transitioned to Judicate West on Jan. 1 after eight years as the founder and managing partner of Los Angeles' Reddock Law Group, specializing in employment and labor law, mediations, arbitrations and workplace investigations. "I'm excited to be among the few women of color in this field," she said. "I consider it my duty to make sure I'm not the last one. Lack of diversity has clearly been an issue in our profession. Here in L.A., lots of employment issues involve litigants of color, but there haven't been a lot of choices among neutrals. Panels should reflect the diversity of the society we live in, not be reserved for a chosen few. SB 707 brings the issue out of backroom conversation into the light."

Melissa Blair Aliotti of Sacramento joined Judicate West in 2018 after more than 30 years as a litigator. "The pipeline lacks females, and women in the field aren't being used as frequently as men," she said. "It has been best

practice for providers to track diversity for years, and it is unfortunate that the Legislature has to mandate that they do it in public. How long are we going to be saying that diversity is the right thing to do — while we haven't done it yet? We used to say things are moving at glacial speed, but glaciers move faster than this."

When Aliotti speaks to youth groups holding mock trials, she encourages them to push themselves to stay engaged with the judicial system. "I tell young people to stay with it. We all have a responsibility to encourage diversity at all levels."

Jay C. Gandhi served for eight years as a magistrate judge overseeing the Central District of California's ADR program before joining JAMS as a mediator and arbitrator in 2018. He was the first federal judicial officer in California from a South Asian family background. "The root of arbitration is in contract law, so SB 707 data should help people select more diverse panels, because better data keeps the topic top of mind," he said. "Inclusivity is an issue that plagues the entire profession, from law firm partnerships to the bench. This is a move on a long road that has a long way to go."

"My background is one factor that keeps me in demand," he added. "I'd certainly like to see more diverse neutrals in the profession. What will help will be public attention married to outreach and the ability of providers to groom minorities for success."

Sidney K. Kanazawa, who worked for 40 years as a litigator, moved in September 2019 to Los Angeles' Alternative Resolution Centers at the suggestion, he said, of ARC President Amy Newman, a friend of long standing. "There aren't many of us Japanese-Americans in the business," Kanazawa said, "but I am finding it personally very satisfying. I'm glad I made the move." He said the disclosures required by SB 707 are likely to improve the profession. "The bill provides sunshine,

### JAMS

#### Hiro N. Aragaki, Esq., FCI Arb

Los Angeles

Business & Commercial, Construction, Employment, Entertainment & Sports, Financial Markets, Intellectual Property, International/Cross Border, Personal Injury, Professional Liability and Fee Disputes



Hiro N. Aragaki, Esq., FCI Arb is a distinguished JAMS neutral with more than 20 years of experience, including almost a decade of full-time law practice at global law firms and service as a neutral since 2001. He is an internationally recognized expert in arbitration and mediation who has trained judges and lawyers and is frequently called upon to consult on alternative dispute resolution (ADR) reform projects around the world. He brings energy, sharp analytic skills and a talent for thinking outside the box. He is particularly well known for shrewd case management, something he credits to the influence of the Hon. Fem M. Smith (Ret.), for whom he served as a law clerk. He has expertise in business & commercial, employment, securities, international/cross-border, intellectual property, entertainment, sports, personal injury, professional liability, and fee disputes.

As an arbitrator, Mr. Aragaki strives to design and manage the optimal procedure for a particular dispute. He believes in getting to a hearing on the merits as efficiently as possible and without over-lawyering or

relying on technicalities, while remaining open to a variety of process enhancements aimed at achieving accurate results, such as tentative rulings and draft awards. He is familiar with civil and common law adjudicative approaches.

As a mediator, Mr. Aragaki is known for investing extra work prior to the mediation to narrow the issues and ensure that parties and counsel come fully prepared. He sees his role as helping parties make the best-possible decision about settlement based on careful case evaluation, reality-testing about litigation risks and transaction costs, and creative problem-solving. He is accustomed to using a wide range of directive and facilitative interventions, as appropriate.

Mr. Aragaki is a citizen of the U.S. and Japan, and an overseas citizen of India. He has lived in the U.K., Germany and France.

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## JUDICATE WEST

### Angela Reddock-Wright, Esq.

Los Angeles

Business/Contractual, all types of Employment Disputes including Wage & Hour & Equal Pay Class Actions, Government & Public Sector Disputes, Hazing & Bullying, Title IX

A practicing attorney for nearly 25 years, Angela Reddock-Wright became a full-time neutral and workplace and Title IX sexual assault investigator in 2011 with the opening of her own dispute resolution firm. Prior to that time, Angela was an employment and labor law litigator for 15 years where she represented clients in the full array of cases including wrongful termination, harassment, discrimination, public policy and wage and hour claims. She also developed specialties in handling highly sensitive hazing and bullying cases involving K-12 schools, colleges and universities. She litigated two of the nation's leading hazing, wrongful death and personal injury cases involving two top sororities. She also handled the appeal in a high-profile juvenile criminal case involving a wrongful death resulting from teen bullying.

Additionally, Angela has worked on some of the most compelling projects in the Los Angeles area, including serving as a co-administrator for the Project Labor Agreement (PLA) for the So-Fi Stadium where the NFL's Los Angeles Rams and Los Angeles

Chargers will play; working with the Screen Actors Guild (SAG-AFTRA) to assist in updating its member policies relating to sexual harassment reporting; and serving as the compliance manager for the multi-billion dollar LAMP construction project at the Los Angeles International Airport.

Angela has demonstrated her commitment to the field of mediation and conflict resolution by her service as a volunteer mediator with the U.S. District Court, Central District of California; her service as the 2019 President of the Southern California Mediation Association (SCMA) and board member for several years prior; and as an Adjunct Professor in the Negotiations, Conflict Resolution and Peace program at California State University, Dominguez Hills.

Angela's passion for people, peace and resolution is a driving force behind her practice as a neutral and underlies her compassionate and direct style.

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## JAMS

### Hon. Glen M. Reiser (Ret.)

Los Angeles

Estates/Probate/Trusts, Environmental Law, Family Law, Business & Commercial, Real Property, Agricultural Business, Personal Injury/Torts

Hon. Glen M. Reiser (Ret.) joined JAMS with vast experience adjudicating and resolving thousands of complex trust, commercial, and real property/environmental disputes as a respected trial judge and litigator. Judge Reiser spent more than 20 years on the Ventura County Superior Court, serving as both supervising probate/trust/conservatorship judge and California Environmental Quality Act (CEQA) judge for more than a decade. Prior to his appointment to the bench, over two additional decades he litigated hundreds of civil cases to successful conclusion in trial and appellate courts throughout California.

Judge Reiser is sought-after as a mediator and arbitrator throughout the state. He does not bill for travel time or expenses. Counsel who have mediated with Judge Reiser note:

"I greatly appreciated your assistance with this mediation. Your pre-mediation telephone conference was extremely valuable, as well, to discuss the specifics of the case, the claims, and settlement

postures taken by the parties and counsel, in advance. I felt that we immediately hit the ground running when we began that morning."

"Your professionalism, approachability and sage counsel kept things on track, and it appeared that you were able to see through literally decades of smoke and discern the family dynamic at issue."

"Yet again, you did a masterful job in reading the parties and counsel involved; kept us talking productively at all times; used your experience on the bench to help the parties adjust their pre-existing 'I'm not going below...' expectations by having them confront new information and its impact on their pre-determined strength of their case; and then made the call at the right time to separate parties to put everyone on shaky ground, which led to all parties incentivized to reach a global settlement."

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## LAMPS PLUS CONTINUED

mutual consent to class arbitration. *Lamps Plus*, 139 S. Ct. at 1411. Such consent must be manifested by a contractual agreement to arbitrate class claims. *Id.* Silence on the matter of class arbitration in an arbitration agreement has been declared a legally insufficient basis to conclude the parties consented to class arbitration. *Stolt-Nielsen*, 559 U.S. at 687.

The question then arises as to "whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of such arbitration." *Lamps Plus*, 139 S. Ct. at 1412. For the same reasons set forth by the court with respect to silence on the issue of class arbitration, the court has held that ambiguity cannot form the necessary contractual basis for compelling class arbitration. *Id.* at 1416. Ambiguity arises when some clauses support one interpretation of an issue and other clauses support a different interpretation of the same issue but both interpretations are reasonable under the circumstances. *Id.* at 1414-15. The court has held that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." *Id.* at 1415. Moreover, a state law doctrine, known as *contra preferendum*, which provides that ambiguities are resolved against the drafter, cannot be used to compel class arbitration where the agreement is ambiguous on that issue because class arbitration which is "manufactured by [state law] rather than consen[t], is inconsistent with the FAA." *Id.* at 1412 quoting *Concepcion*, 563 U.S. at 348.

Thus, the preferred method for dealing with class arbitration is to do so expressly within the arbitration agreement. If the parties wish

to exclude class arbitration from the scope of arbitral issues, they would be well served to expressly manifest their intent within the arbitration agreement. This applies with equal or greater strength if the parties wish to include class arbitration within the scope of the arbitral issues as the courts will not infer that intent from silence or ambiguity. This analysis highlights the importance of reviewing the arbitration clause in its entirety, searching for possible ambiguities, and clearly and unambiguously setting forth the parties' intent. *Lamps Plus*, 139 S. Ct. at 1418.

## State Laws and Court Decisions that Limit Parties' Ability to Waive Class Action

### Proceedings in Arbitration Are Generally Preempted by Application of the FAA

Parties often enter into agreements that waive their right to class proceedings. The question arises as to whether a "refusal to enforce such a waiver on grounds of public policy or unconscionability is preempted by the FAA." *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014). In other words, can such waivers be appropriately written into arbitration agreements or will state law or court decisions prevent the enforcement of class action waivers? The evolving case law suggests that state laws prohibiting the enforcement of class action waivers on the grounds that they violate public policy or unconscionability are preempted by the FAA. *Id.* at 360.

### Discover Bank Rule Invalidated by *Concepcion*

Beginning in 2005, by virtue of the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), California had what was known as the *Discover Bank* rule. That rule "re-