

Gender Differences in Dispute Resolution Practice

By Andrea Kupfer Schneider and Gina Viola Brown

Many members of the Section of Dispute Resolution have long been concerned that women and minorities are not being selected as neutrals, especially in large and high-stakes cases, as often as their male counterparts. How, exactly, are neutrals chosen? By whom? For what kinds of cases? Does the age or gender of the person or people doing the selecting make a difference?

Thinking about these questions, in 2012 a number of Section members formed the Women in Dispute Resolution Committee, known as WIDR. As a first step toward the ambitious goal of changing the way neutrals are selected to ensure that women and minorities are appropriately included, WIDR members decided to look at the current situation. The result was the Practice Snapshot survey, which in fall 2012 was distributed to lawyers in the Section, aiming to determine how mediators and arbitrators are selected in legal cases and the types of cases being resolved through the many dispute resolution processes available. This article explains the survey methodology, details the demographics of respondents and neutrals involved in particular cases, and, perhaps most important, reports some facts, figures, and information about the respondents' experiences in the selection process.¹ A comprehensive report on the survey data is available on the Women in Dispute Resolution Committee area of the Section's web site.

Methodology

The survey, which asked detailed questions about the last two disputes in which the respondent had been involved within the past year, was sent by e-mail to 6,284 lawyer-members of the Dispute Resolution Section. Participation in the survey was also promoted through listserves and in an advertisement in *Dispute Resolution Magazine*.² We received 743 responses (a response rate of 11.8%), which compares favorably with the rates of reply for other Section e-mail surveys.³

The survey structure was complex, using a design called skip logic; depending upon the responses, the respondent would see different follow-up questions. For instance, if the respondent indicated he or she had served as an arbitrator for the dispute, then the respondent would see questions about how he or she had been selected. If the respondent indicated he or she had served as the advocate, then the respondent would see a different series of questions about the selection process. Therefore, not all respondents answered all the survey questions. A total of 90% of the respondents indicated that they had been involved, as a neutral or advocate, in at least one dispute within the past year. These are the disputes analyzed below.

Demographics of Respondents

Most respondents had spent a significant number of years serving as a neutral or advocate in arbitration, mediation, or other dispute resolution process. An impressive 41% had practiced for more than 20 years, about 31% for 10 to 20 years, and about 28% had practiced in dispute resolution for nine years or less.

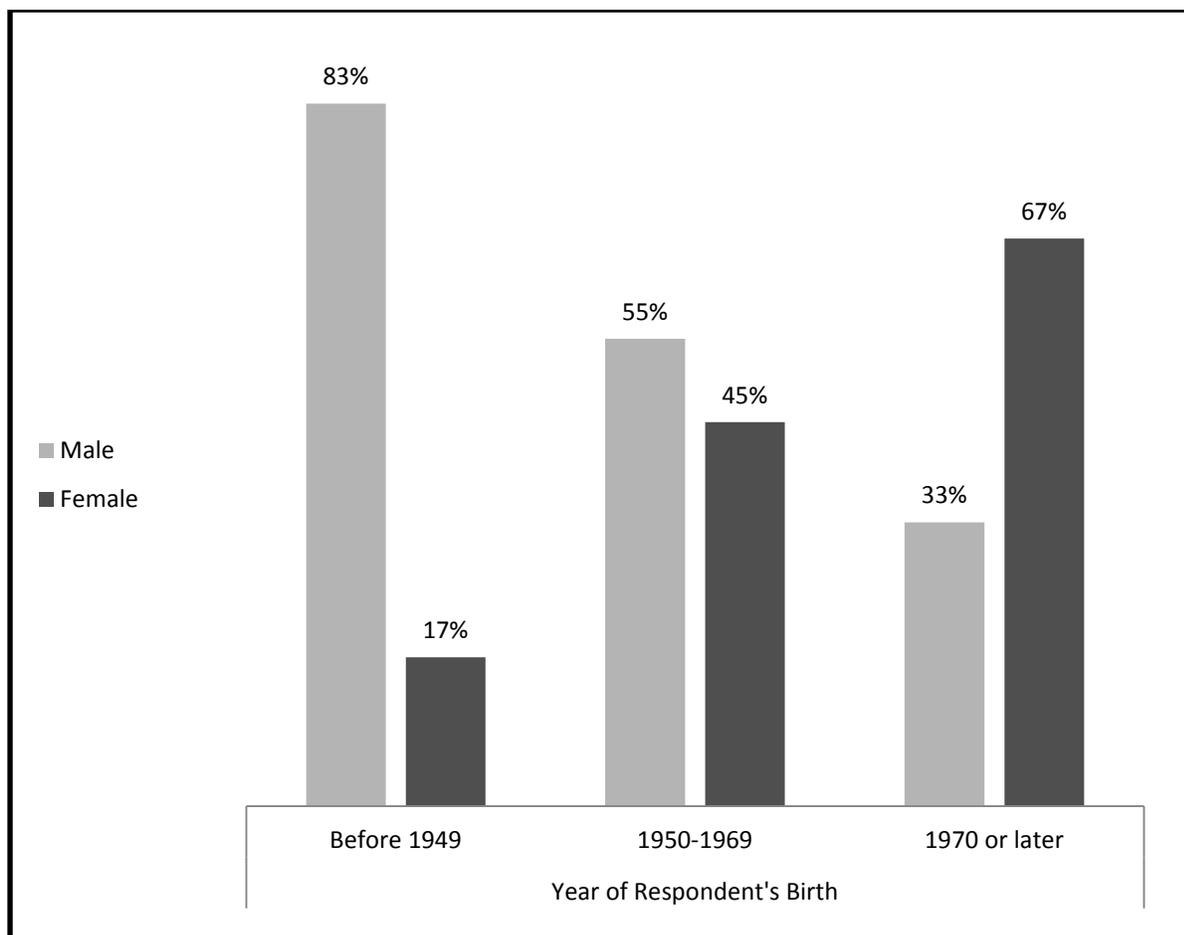
Significantly more men than women responded (66% compared to 34%). These percentages are very similar to the gender breakdown of Section of Dispute Resolution membership⁴ and should be kept in mind when looking at the data that compare the representation of male and female practitioners in further analysis.

The respondents were primarily White/Caucasian (90%). A total of 5% indicated they were African American, 2% Hispanic, 1% Asian, and 2% “other.” These percentages are also comparable to the ABA membership as a whole.⁵ Respondents were also asked their year of birth. A significant majority (70%) was born between 1940 and 1959; 10% of the respondents were born before 1940, and 20% of the respondents after 1959.

In asking about current work, the survey allowed respondents to select more than one option, reflecting the reality that many dispute resolution practitioners serve in multiple professional roles. A full 54% indicated they are in private practice, but there were some interesting variations in the numbers of men and women in different practice areas. For example, a higher relative percentage of women reported working in law school/academia, government, and nonprofit sectors.⁶

Chart 1 compares the gender and the age of the respondents. The bar graph shows that of the respondents born before 1949, there were far more men than women. Over time the gender distribution switches, so that in the cohort of respondents born in 1970 or later, there are more female respondents than male respondents.

Chart 1: Respondents’ Year of Birth and Gender



The number of years in practice varies depending on the role the respondent played in the dispute reported in the survey. Interestingly, respondents skew younger in mediation, with most of the mediators evenly divided between practicing 11 to 20 years and more than 20 years. In contrast, the majority of arbitrators and advocates have been practicing more than 20 years. As we map gender onto years of practice later in this article, the fact that younger people are involved in mediation shows up again.

Demographics of Neutrals and Cases

To arrive at an overview of a larger number of disputes, the survey asked respondents to discuss their last two cases handled through a neutral and whether the respondent had served as the neutral or an advocate for one of the parties. With these parameters, this article reviews the information for 1,250 cases. Given that not every respondent fully answered each question, the numbers vary slightly.

We compared the gender of the respondents versus the role each respondent played in the dispute. Keep in mind that we are comparing this to the 66% men/34% women overall baseline of survey respondents (and Section members). The percentages of women and men who reported serving as advocates and mediators were similar to the overall baseline. For advocates, 67% were men, and 33% were women; for mediators, 63% were men and 37% were women. In arbitration, however, 80% of the neutrals were men. These numbers become more nuanced as we examine several other factors, including experience level and type of case.

The survey data on the arbitration panels provided a little more information on the gender breakdown. In cases where there was a single arbitrator, women served as the arbitrator in 30 of them (24%). In fact, this number is higher than the overall number of female arbitrators (at 20%), so the issue of representation arises more clearly in multi-arbitrator panels.

Chart 2 shows gender breakdowns on these panels. In all, 66% of the panel arbitration cases reported had three male arbitrators, while none of the reported cases had panels of all women. A total of 26% of the cases had panels of two men and one woman, while 8% of the panel arbitration cases involved panels with two women and one man. Examining the total number of arbitrators in multi-arbitrator panels is even more telling. Of the 294 arbitrators who served on panels in the reported disputes, only 42 (14%) were women.

Chart 2: Arbitration Panel Member Gender Composition		
Gender of the panels	Number of respondents	Percentage of respondents
Three males and no females	64	66%
Two males and one female	26	26%
One male and two females	8	8%
Three females and no males	0	0%

We also wanted to know whether the representation of men and women varies between case types. Indeed, the numbers of women and men serving as neutrals in different case types vary widely and often from the 66/34 baseline.

We first compared gender versus type of case in mediated cases. Here, even though women represent approximately 36% of all mediators in these reported cases, the numbers have a significant swing depending

on the type of case. Women serve as mediators in more than half the cases dealing with family and elder law, consumer law, and small claims and are well represented in labor, health, and energy disputes. On the other hand, corporate, construction, insurance, and intellectual property disputes are significantly male-dominated.

We then examined the gender versus subject matter of disputes that went to arbitration. In arbitration, women served as the neutral in only 18% of cases overall. Again, subject matters that exceed that baseline of 18% are in family, labor, consumer, and small claims. Similarly, commercial, construction, and intellectual property have even more male arbitrators. More than half of all arbitration cases reported in the survey (186 of 328) are in male-dominated legal practice areas. As we presume that arbitrators are often chosen for their subject-matter expertise, this helps explain the low average number of women.

If you follow the money, the figures are not encouraging. In mediated cases, women serve as neutrals much more often in cases with no money in dispute or in smaller disputes involving claims under \$100,000. Of the 166 cases with more than \$1,000,000 in dispute, women were mediators in 23% (38) of them. Of the 263 non-monetary or smaller dollar-amount disputes, women were the mediators in 54% of these cases. Of the 383 cases involving amounts above \$100,000, women were the mediators in only 25%.

We also looked at arbitration cases and compared the amount of money at stake to the gender of the arbitrator. The arbitration numbers are not quite as consistent as the mediation case numbers. For the low dollar-amount cases, 27% had female arbitrators, exceeding the baseline of 18%. The comparison revealed interesting variation in the distribution: in the \$500,000-\$999,999 cases, the percentage of women was 33%. From the survey data, these cases appear to be employment discrimination cases.

Neutral Selection

One step to fixing gender imbalance is to recognize that there are number differentials between men and women neutrals. The next step is to figure out why.

One potential theory is that the gender differential reflects experience. In other words, one might argue that lawyers and parties select their neutrals based on years of experience. Since fewer women than men have many decades of practice experience, one might argue that this is why women are selected less often, at least in certain type of cases.

This, perhaps, is part of the story in construction disputes, which appear to select quite experienced neutrals and, on the other hand, in consumer or family disputes, which appear to select a mix of ages. (Of course, we cannot tell whether this is causation or correlation for gender.) On the other hand, this does not appear to be the case in commercial disputes, where the difference in years of practice is not nearly as great as the gender difference, or in intellectual property (which skews young but not female) or in energy (which skews more experienced but also more evenly female). So experience does not appear to be a satisfactory answer. Perhaps the neutral's previous work as a judge or in private practice (which skews more male) might also explain some of the neutral selection.

Another theory to explain gender imbalance could be that the way neutrals are chosen contributes to the imbalance in certain areas and reinforces stereotypes in others. Chart 3 shows the gender difference in how mediators are selected. In this chart, the respondents who served as mediators reported how they were selected for the case.

When the mediators were selected by attorneys or clients who looked to their personal network, those choices were apparently more gender imbalanced. Only 29% of mediators selected this way were women. When parties or lawyers chose from a roster of mediators created by an ADR provider or a court, the proportion of women selected as mediators jumps from 29% to 47%.

Chart 3: Mediator Reports on How They Were Selected by Mediator Gender		
Selection Process	Male	Female
Choice – one or all of the parties or their attorneys or pre-dispute agreement	71%	29%
Limited choice or appointment (List or Roster)	53%	47%
Other ⁷	32%	68%
Total percentage of mediators	63%	37%

Chart 4 demonstrates the gender differences in arbitrator selection. Interestingly, the percentage selected through the network or through a list are virtually the same. When attorneys or clients selected the arbitrator from their network, 20% of the arbitrators were women. When arbitrators were selected from a list, roster, or a provider organization, the percentage of women was 19%. This demonstrates an additional concern and also an opportunity for reform. Perhaps the lists themselves are not an appropriate balance if the goal is more inclusion of women.

Chart 4: Arbitrator Reports on How They Were Selected By Arbitrator Gender		
Selection Process	Male	Female
One of the parties or clients or attorneys for one of the parties	80%	20%
ADR provider strike list or provider appointment or court	81%	19%
Appointed as umpire by co-arbitrators	90%	10%
Other ⁸	65%	35%
Total percentage of arbitrators	79%	21%

Finally, does the gender of the advocates in the dispute make a difference? Our data indicate it does. Female survey respondents who served as advocates in disputes reported a greater percentage of female mediators for their cases than male survey respondents reported. Male advocates reported that 84% of the mediators in their cases were male. Female advocates reported that 63% of the mediators in their case were male.

Preliminary Conclusions and Next Steps

This survey provides data on women serving in neutral capacities and suggests several different potential avenues of change.

Three preliminary conclusions drawn from this data are – first, the *type* and *subject matter* of the dispute clearly impact neutral selection. As detailed above, certain practice areas are far more male, and certain others are quite female. Second, it appears to matter *how* the neutral is selected in mediation. Networking resulted in only 29% women, while provider lists resulted in 47%. Finally, arbitration and mediation are *not* the same for gender integration and likely need different approaches to improve gender integration, including

focusing on multi-arbitrator panels and the creation of more integrated rosters. The percentage of women serving as arbitrator seems to hold steady at 20% regardless of selection process and decreases even further in panel arbitrations.

A few preliminary recommendations:

- This survey should be replicated with groups that can provide additional information about minority participation in dispute resolution. We hypothesize that most of the remaining recommendations would support minority participation in dispute resolution, but the low number of minority participants in this survey meant we do not have the data to support this hypothesis.
- Clients and lawyers should be encouraged to think more broadly about whom they use as neutrals.
- Neutrals need to be aware that personal networks still appear to be the primary source of referrals and that these networks need to be strengthened and broadened to include women.
- Provider organizations should be commended for improved gender balance in mediation. Courts, provider organizations, agencies, and other organizations that administer and oversee ADR programs should be encouraged to use lists, and the lists themselves should be broadened to include more women.
- In arbitration, provider organizations (a) should also adopt the presumption that for three-arbitrator panels, when considering equally qualified candidates, a woman should be selected for the panel and (b) should have a higher percentage of women on their list so these lists can do more than reflect the current situation.
- These arbitration rosters should aim for at least 35% of the roster being women, similar to mediation rosters. Various ADR organizations such as the Section, CPR, the AAA, and others should encourage their members to work with provider organizations to increase access to rosters as well as encourage members to provide awareness training and be active roster participants.
- Additional efforts in certain practice areas (commercial, construction, etc.) are likely warranted, with a targeted program to identify and encourage women and minorities to serve as neutrals. As these areas are the most heavily represented in the Dispute Resolution Section and also have some of the highest-stakes disputes, these additional efforts could likely have great impact.

This survey is only a first step in the process of understanding how neutrals are selected and assuring that qualified women are chosen as often as men. With the suggestions from above and, no doubt, other reforms that can be implemented, we hope that the current situation can improve. We also hope that this survey will be repeated regularly – and that future surveys will show our progress toward the important goals of equality and inclusion.

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Note from the co-chairs of the Dispute Resolution Magazine editorial board: The editorial board reviewed and adopted this submission pursuant to its published procedures regarding unsolicited article submissions. Authors who are members of the editorial board or editorial staff are excluded from the editorial board review process.

¹ A detailed report on the survey is available on SSRN (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390278) and the web site for the Section of Dispute Resolution Women in Dispute Resolution Committee (WIDR). The authors thank J.D. Hoyle, Section of Dispute Resolution Law Clerk, for assisting us with data analysis and editorial support, as well as Carrie Kratochvil for her superior assistance with the text and formatting of the charts.

² In the fall of 2012 there were more than 7,000 lawyer-members of the ABA Section of Dispute Resolution. The survey was sent via e-mail to the 6,284 lawyer-members who had opted in to receiving e-mail from the Section.

³ The response rate, however, was not sufficiently large for us to know whether the sample was representative of the Section membership.

⁴ About 36% of the Section of Dispute Resolution lawyer-members are women. For comparison, a 2005 study of lawyer demographics indicated that women make up 30% of the profession. Source:

http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.athcheckdam.pdf. Lawyer demographics on the ABA website

http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.athcheckdam.pdf tracks changes between male and female representation as a percentage of total licensed lawyers over time.

⁵ ABA Member Diversity and Inclusion Survey 2013 (distributed August, 2013).

⁶ The detailed survey report, available on SSRN and the ABA web site, provides more information about the respondents' professional roles.

⁷ "Other" answers included a community mediation center roster, human resources, and a judicial colleague.

⁸ "Other" answers included selection by a governmental entity or from an organizational list that was not specified in the survey.