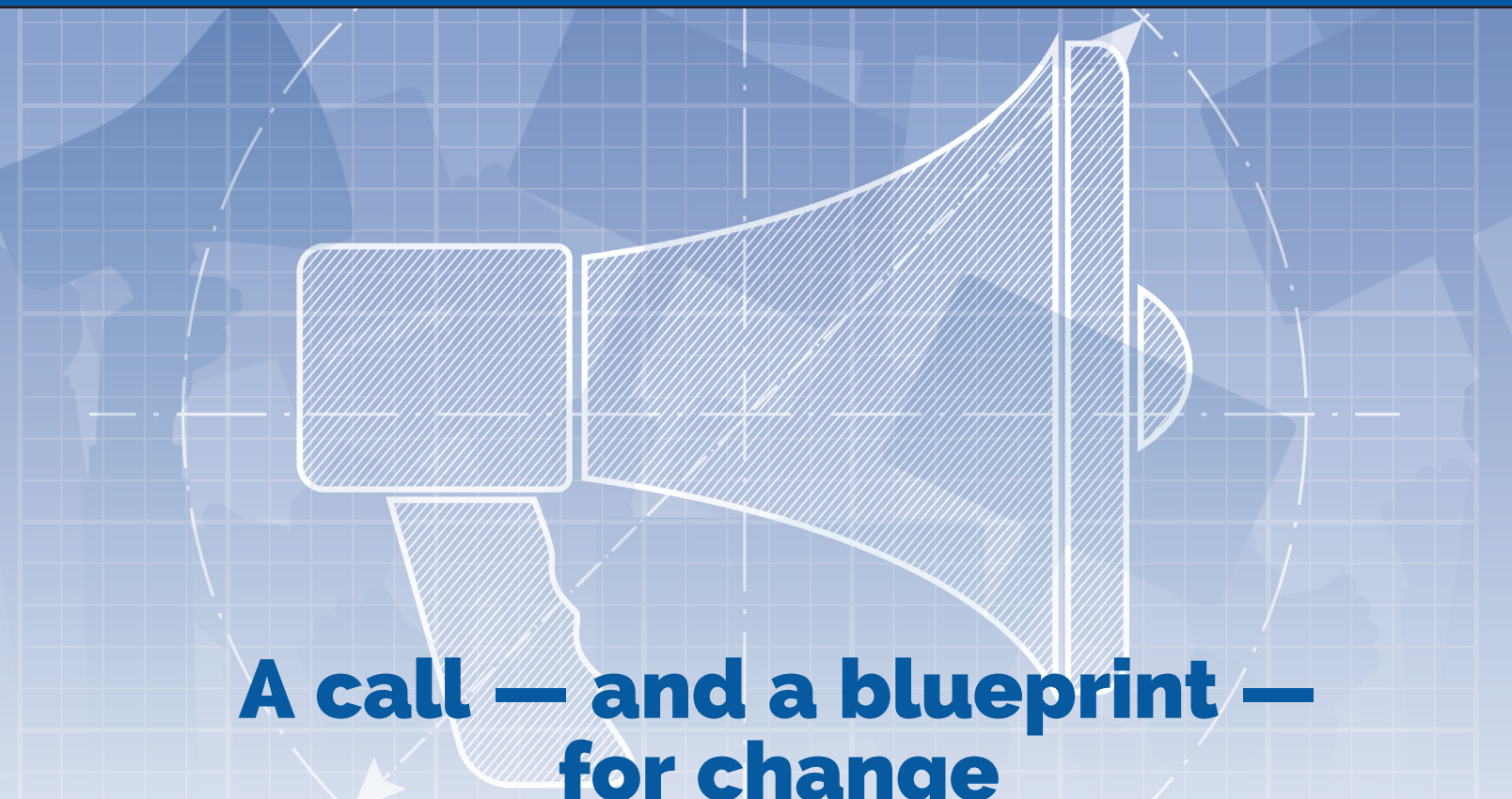

# A call — and a blueprint — for change

*By Homer C. La Rue*

Here is the challenge: if we want to increase the number of persons of color and women who serve as arbitrators, mediators, and other neutrals, we must change the system for selecting these individuals. This means changing the way that advocates choose neutrals and the way that rostering entities formulate the slates from which advocates make their final selection of neutrals. Instead of allowing these gatekeepers, these decision-makers, to prepare and send the traditional lists and letting the advocates choose from a group of neutrals whom they know and who look like them, we must ensure that each slate contains a minimum number of candidates who are persons of color and women.

In 2019, counsel for Jay-Z, the hip-hop performer whose legal name is Shawn Carter, filed a petition asking the New York Supreme Court to enjoin a $204 million arbitration he would be involved in because the slate of arbitrators from which a hearing panel was to be chosen contained no Black candidates. Lawyers for Jay-Z claimed that this dearth of Black arbitrators deprived litigants of color a meaningful opportunity to have their claims heard by a panel of arbitrators reflecting their backgrounds and life experiences. This lack of diversity, Jay-Z's lawyer claimed, was because of "unconscious bias" that most people have against people of different races — a bias that itself is a form of racial discrimination.

More than a decade and a half earlier, in 2003, Supreme Court Justice Sandra Day O'Connor wrote, "It has been 25 years since Justice [Lewis F.] Powell first approved the use of race to further an interest in … diversity … We expect that 25 years from now, the use of … [race] will no longer be necessary to further the interest … [of diversity and inclusion]."

Justice O'Connor's deadline, noted in the case of in *Grutter v. Bollinger*,[1] which concerned diversity in higher education, will be upon us in 2028, but Jay-Z's story suggests that many institutions in our society are running out of time to meet her deadline. If the

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dispute resolution community is to make diversity and inclusion more than an everlasting aspiration, the time for hand-wringing is over. The dispute resolution community must embark on a plan of action — a new paradigm — for the selection of arbitrators and other neutrals. For proof of how urgent this is, look no further than the demonstrations all around our country and all around the world protesting unequal treatment of people of color. We in the dispute resolution community should be leaders in bringing about systemic change and helping to bend that arc of the moral universe, of which Martin Luther King Jr. spoke, toward justice in a more timely manner. If not now, when?

This article discusses the Ray Corollary Initiative (RCI),[2] a detailed plan for action with measurable results. To understand the RCI, you must first understand what I call the *front-end* problem, the lack of diversity in the pool of neutrals who are male, are usually older, and are usually white. This reality is obvious and has received extensive attention in this and other dispute resolution publications. But you also need to understand the *back-end* problem, one that leads people to pick arbitrators or mediators they know and creates slates of neutrals who (like most selectors) tend to be older, male, and white. Most important, this article explains how the Ray Corollary Initiative can help address this self-perpetuating situation.

## The back-end problem

A bit of background: the RCI is named for Charlotte Ray, who graduated from Howard University School of Law in 1872 and was the first Black female lawyer in the United States. The RCI seeks a demonstrable commitment from all areas of the dispute resolution community that every final group of candidates for an arbitration or a mediation will include 30 percent people of color, both female and male. Empirical studies have shown that the 30 percent metric significantly increases the probability that a person of color will be selected, although recent research has indicated that the 30 percent figure is still too low.

The RCI is designed to increase the selection of neutrals of color in arbitration and mediation. It is modeled after the Rooney Rule in professional football and the Mansfield Rule in Big Law.

> When the *status quo* looks male, senior, and white, the likelihood is that the selection-outcome will reflect that *status quo*.

The Rooney Rule came about after decades of criticism of National Football League teams' minority hiring practices, when data in 2002 showed that although more than 60 percent of players were Black, only 6 percent of head coaches were. The rule, named after then-Pittsburgh Steelers Chairman Dan Rooney and adopted in 2003, requires teams to interview at least one minority candidate for each head coach vacancy. The Mansfield Rule, named for Arabella Mansfield, the first female attorney in the United States, is an outgrowth of the Rooney Rule and is aimed at increasing diversity in Big Law. It requires each firm to demonstrate that the firm has considered at least 30 percent diverse lawyers — women, people of color, LGBTQ+, and lawyers with disabilities — for all governance and leadership roles.[3]

The 30 percent metric is a benchmark that all institutions can implement to achieve diversity. As the New York-based international law firm White & Case noted on its website when touting success with the Mansfield Rule: "The 30 percent metric and the built-in accountability have had a positive effect on encouraging our leaders to expand the pool of talented lawyers they develop and select as the next generation of leaders."[4]

## The back-end problem diagnosed

The problem is easily labeled: at best, it's unconscious or implicit bias. When the *status quo* looks male, senior, and white, the likelihood is that the selection-outcome will reflect that *status quo*.

When only one diverse person is in the pool of finalists, the difference between the one and the norm is highlighted. The translation for the advocate selector? Deviating from the norm or *status quo* is risky, so select whom you know. If the advocate's client

loses the arbitration ruling, the advocate can always say he or she tried to select the best neutral, the one the advocate knew and trusted. That neutral (who is usually male, senior, and white) met the *status quo* definition of "most qualified."

Indeed, the empirical data demonstrates that when the *status quo* adds only one diverse person, the likelihood is that a diverse person will *not* be selected. When the pool of candidates, however, contains at least 30 percent diverse persons, the chances of a diverse candidate being selected goes up exponentially.[5] This empirical evidence, as discussed in a recent law review article I co-authored with Alan Symonette, "suggest[s] that we can use bias in favor of the *status quo* to actually change the *status quo*. When there was only one woman or minority candidate in a pool of four finalists, their odds of being hired were statistically zero. But when a new *status quo* was created among the finalist candidates by adding just one more woman or minority candidate, the decision makers actually considered hiring a woman or minority candidate."[6]

## The RCI: A plan for action

The Ray Corollary Initiative is quite simple: expand the work that has been done and the lessons that have been learned through the Mansfield Rule in Big Law and the Rooney Rule in the National Football League to the arbitrator-selection process in the dispute resolution community.

The work in the NFL and Big Law highlights the importance of getting official acknowledgment and promises from important and influential organizations. The lessons learned point to the need for:

- A commitment by and a collaboration among the sections of the American Bar Association to participate in the RCI;
- A commitment among dispute resolution entities that maintain arbitrator rosters to participate in the RCI;
- A commitment from lawyers and others who select arbitrators to participate in the RCI, and
- A commitment from public and private entities that hire the lawyers who select arbitrators and other neutrals to participate in the RCI.

Commitment to participate in the RCI is defined as agreeing to ensure that every finalist selection process has a finalist selection pool that contains 30 percent persons of color, women, and underrepresented groups included in the latest iteration of the Mansfield Rule. In addition, the commitment would mean adhering to a plan of social accountability and transparency. This, in turn, would mean that participating entities would commit to a means for collecting data related to their participation in the RCI.

> "Organizations are already showing support for this initiative."

Organizations are already showing support for this initiative. The National Academy of Arbitrators (NAA) passed a unanimous resolution by its governing body in 2019 to make the RCI a major project of the NAA. The NAA has charged an organizing committee of the academy to assemble a national task force to implement the RCI. A session about the RCI was presented at the American Bar Association Section of Dispute Resolution's Annual Spring Conference in 2020, and the Section's Diversity Committee and the Executive Committee of the Section's Council are studying official support for the measure. As many readers of this magazine know, the Dispute Resolution Section was one of the prime movers in the ABA House of Delegates Resolution 105, which encourages the selection and hiring of minority and women dispute resolution professionals, an idea that the RCI takes from aspiration to action. The International Institute for Conflict Prevention & Resolution (CPR) has also indicated its willingness to participate in the RCI. Indeed, CPR has taken upon itself to implement the 30 percent metric in creating its selection slates.

These institutions have all made their intentions clear, but this is also a personal matter for each and every one in our field. The RCI is a declaration of the intentions, motives, and views of the dispute resolution community, a consensus of that community, that the time to act to make diversity and inclusion real is now. The RCI offers a chance to turn prescriptive aspirations into action, into a program that can be signed onto, with measurable data. If we are committed to diversity and inclusion, to making sure that the people who provide services look like and

understand the people they are helping, we must commit to real action. ■

## Endnotes

1 In *Grutter v. Bollinger*, 539 U.S. 306, 343, the Court held that the Equal Protection Clause does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.

2 The Ray Corollary Initiative and RCI are registered trademarks.

3 For more information about the Mansfield Rule, see the Diversity Lab web site: https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/.

4 See https://www.whitecase.com/firm/awards-rankings/award/white-case-receives-2019-mansfield-rule-certification-plus.

5 Homer C. La Rue & Alan A. Symonette, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63 No. 2 Howard Law J. 215, 231, note 39 (Winter 2020) citing the empirical study done by Stephanie K. Johnson, David R. Hekman, & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired,* Harvard Bus. Rev. Reprint H02U2U, 1 2 (April 26, 2016).

6 *See* La Rue & Symonette.

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