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## **BARRIERS TO PARTICIPATION: CHALLENGES FACED BY MEMBERS OF UNDERREPRESENTED RACIAL AND ETHNIC GROUPS IN ENTERING, REMAINING, AND ADVANCING IN THE ADR FIELD**

*Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr.,  
Christopher M. Kwok, Janice Tudy-Jackson, Roberto Velez\**

### **INTRODUCTION**

Since the 1970s, the alternative dispute resolution (“ADR”) field has gained visibility and acceptance.<sup>1</sup> As the field has evolved, ADR scholars and practitioners, slowly but increasingly, have started to pay attention to the racial and ethnic mix of the practi-

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1. See generally Robert A. Baruch Bush, *Dispute Resolution—The Domestic Arena: Methods, Applications and Critical Issues*, in *BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA* (J. Vasquez, J. Johnson & L. Stamato eds., 1994). According to the Bureau of Labor Statistics, “[e]mployment of arbitrators, mediators, and conciliators is expected to grow about as fast as the average for all occupations through 2014.” U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *OCCUPATIONAL OUTLOOK HANDBOOK: JUDGES, MAGISTRATES, AND OTHER JUDICIAL WORKERS 2* (2006), <http://www.bls.gov/oco/pdf/ocos272.pdf> [hereinafter *OCCUPATIONAL OUTLOOK HANDBOOK*].

tioners in the field.<sup>2</sup> Like many other fields, the availability and presence of a diverse workforce makes good business sense. In fact, diversity has become one of the cornerstones of good business practice.<sup>3</sup>

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2. Since the late 1980s, a number of initiatives have addressed diversity in the ADR field. See, e.g., Marvin E. Johnson, *Report From Participatory Dialogues Regarding Cultural Diversity in Alternative Dispute Resolution*, SPIDR Annual Conference, 1994 and 1995 (on file with authors); Marvin E. Johnson, *Second Report From Participatory Dialogues Regarding Cultural Diversity in Alternative Dispute Resolution*, SPIDR Annual Conference, 1996 and 1997 (on file with authors). The Mediators of Color Alliance Network (“MOCANET”), a formal network whose purpose is to address the needs of mediators of color, was established as a result of the informal discussions held during the annual conferences of the Society of Professionals in Dispute Resolution in the late 1980s and early 1990s. See MOCANET-Mediators of Color Alliance Network, About MOCANET, <http://www.mocanet.org/about.html> (last visited Dec. 2, 2007). In 2002, Professor Floyd Weatherspoon of Capital University Law School started a national conference for minority professionals in ADR. See Capital University Law School, 3rd National Training Institute of Minority Professionals in Alternative Dispute Resolution, <http://www.law.capital.edu/adr> (last visited Dec. 2, 2007).

In 2003, the JAMS Foundation and the ABA’s Section of Dispute Resolution created Access ADR as an “initiative to increase the number of ADR professionals from ethnic and racial groups under-represented in the ADR field who are available for selection by the users of ADR services.” Access ADR, Project Access ADR, <http://www.accessadr.org> (last visited Dec. 2, 2007). In 2005, the New York State Bar Association and the Association of the Bar of the City of New York launched a dialogue titled “Expanding the Pledge,” which attempted to increase awareness for diversity in the ADR Profession. See Posting of Elayne E. Greenberg to NYC-DR@list server.jjay.cuny.edu (Oct. 11, 2005) (on file with authors). In 2006, the International Institute for Conflict Prevention and Dispute Resolution (“CPR”) established a National Task Force on Diversity in ADR “to advocate the greater use by corporations of diverse, nationally prominent mediators, arbitrators, advocates, counselors and other participants in the ADR profession; and to make [the] CPR Institute more welcoming to members of diverse backgrounds and experience.” CPR-International Institute for Conflict Prevention & Resolution, CPR Committees and Their Members, <http://www.cpradr.org/committees.asp?M=4.1> (last visited Dec. 2, 2007) [hereinafter CPR Committees and Their Members].

Two of the leading national ADR organizations have created diversity initiatives. The Association for Conflict Resolution (“ACR”) established a Diversity and Equity Network to implement ACR’s commitment “to diversity and equity in its membership, structure, and organizational work.” ACR-Association for Conflict Resolution, ACR Diversity and Equity Committee, <http://www.acrnet.org/about/committees/diversity.htm> (last visited Dec. 2, 2007). The American Bar Association’s Section of Dispute Resolution established a Standing Committee on Diversity. See American Bar Association, Standing Committee on Diversity, <http://www.abanet.org/dch/committee.cfm?com=DR014700> (last visited Dec. 2, 2007).

3. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, DIVERSITY MANAGEMENT: EXPERT-IDENTIFIED LEADING PRACTICES AND AGENCY EXAMPLES, GAO-05-90 (2005), available at <http://www.gao.gov/new.items/d0590.pdf>; Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks & Hispanics: Companies That Pursue Diversity Outperform the S&P 500. Coincidence?* FORTUNE, July 19, 1999, at 52, available at

For ADR, addressing the representativeness of its practitioners is particularly crucial for a number of reasons.<sup>4</sup> First, ADR as a field champions inclusion.<sup>5</sup> Second, like in many other fields where clients need to trust practitioners, there is growing recognition among ADR practitioners that the pool of individuals providing services should, as much as possible, reflect the demographics of the population they serve.<sup>6</sup> Third, it is important that parties feel that they can trust the neutral third party conducting their ADR process, especially since many ADR processes bring participants together behind closed doors and the discussions involve matters of crucial importance to the livelihood or identity of the parties involved.<sup>7</sup> Fourth, the ADR field is highly unregulated with no universal standards of practice.<sup>8</sup>

Given the importance of the many factors that challenge ADR, there is a heightened obligation to ensure that parties feel comfortable with the professionals administering and conducting the process. Studies show that individuals involved in dispute resolution processes feel more comfortable when they share some aspect of

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[http://money.cnn.com/magazines/fortune/fortune\\_archive/1999/07/19/263098/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1999/07/19/263098/index.htm).

4. See generally Floyd D. Weatherspoon, *Eliminating Barriers for Minority ADR Neutrals*, ACRESOLUTION, Spring 2006, at 32 (discussing the need to eliminate existing discrimination within the ADR field), available at [http://www.law.capital.edu/Faculty/Publications/ACResolution\\_Weatherspoon.pdf](http://www.law.capital.edu/Faculty/Publications/ACResolution_Weatherspoon.pdf).

5. See *id.*; see also Lamont E. Stallworth et al., *Discrimination in the Workplace: How Mediation Can Help*, 56 DISP. RESOL. J. 35, 87 (2001) (“It is also imperative that . . . systems are inclusive and ensure the full and fair participation of racial minorities and women as . . . dispute resolvers. The absence of such . . . will raise serious questions and challenges about the integrity of these programs and . . . the ADR movement itself.”); ACR TASK FORCE ON MEDIATOR CERTIFICATION, REPORT AND RECOMMENDATIONS TO THE ACR BOARD OF DIRECTORS (2004), <http://www.acrnet.org/pdfs/certificationreport2004.pdf> (advocating a process that is accessible to a broad range of practitioners, allows for diversity of practice and people, and “[e]mphasiz[es] the core principles of party self-determination, impartiality and diversity in its broadest sense”).

6. See, e.g., ELAINE PINDERHUGHES, UNDERSTANDING RACE, ETHNICITY AND POWER: THE KEY TO EFFICACY IN CLINICAL PRACTICE (3d ed. 1989).

7. See, e.g., Deborah Henshaw Urbanski & Gloria M. Portela, *Workplace Mediation: Are You Helping or Hindering?*, 70 TEX. B.J. 582 (2007) (discussing the importance of workplace relationships to parties and how mediation can affect those relationships).

8. See generally Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965 (2004); Dorothy J. Della Noce, *The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions*, 19 OHIO ST. J. ON DISP. RESOL. 937 (2004).

their identity with those guiding the process.<sup>9</sup> Increasingly, dispute resolution professionals have begun emphasizing the importance of addressing identity-based concerns by writing about their own experiences.<sup>10</sup> The present reality is that the dispute resolution field does not include sufficient representation of practitioners from all racial and ethnic groups.<sup>11</sup>

This Essay focuses on the exploratory research we conducted on barriers to participation in ADR experienced by members of underrepresented racial and ethnic groups. Those who served as the subjects of this research are involved in ADR in and around New York City, an urban area with a very diverse population.<sup>12</sup> Part I discusses the methodology used to collect data. Part II examines the myriad challenges faced in conducting the research. Part III presents the study's preliminary findings. Part IV delineates some of the remedies identified by our research participants. Part V suggests questions for future research. Finally, Part VI considers the significance of the study's findings.

Overall, there has been a dearth of research regarding the barriers that prevent greater participation of underrepresented racial and ethnic groups in the ADR field.<sup>13</sup> This lack of research may be

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9. See generally Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV 767 (1996).

10. See generally Diversity in Mediation Articles, <http://www.mediate.com/diversity/index.cfm> (last visited Dec. 3, 2007) (discussing cultural issues related to mediation).

11. See Robert A. Baruch Bush & Lisa Blomgren Bingham, *The Knowledge Gaps Study: Unfinished Work, Open Questions*, 23 CONFLICT RES. Q. 99, 106 (2005) [hereinafter Bush & Bingham, *Knowledge Gaps*]; Peter F. Phillips, *ADR Continental Drift: It Remains a White, Male Game*, NAT'L L.J., Nov 27, 2006. See also Lisa Blomgren Bingham, Commentary on the Knowledge Gaps Report: A Discussion of Hewlett-Funded Experts, 8 (Oct. 2004) (unpublished paper, on file with authors) ("[P]articipants discussed the need for work regarding minorities in conflict resolution. This work needed to address both why minorities are under-represented in the profession and among researchers on conflict resolution, and also how these processes have an impact upon minority disputants and issues of race relations . . . . [M]ore work is needed.") [hereinafter Bingham, Commentary]; Joseph B. Stulberg, *Minority Participation in Dispute Resolution: A Project Proposal* (unpublished, undated research proposal on file with authors) (describing both a lack of diversity in the ADR field and the need for more empirical information on actual numbers of minority participants).

12. For information on the breakdown of New York City's diverse population, see New York Quick Facts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Dec. 3, 2007).

13. See Weatherspoon, *supra* note 4. For a bibliography of the relevant literature, see Maria R. Volpe, *Mediation, Conflict Resolution, and Diversity: A Selected Bibliography*, [http://johnjay.jjay.cuny.edu/dispute/pubs\\_bibliographies4.asp](http://johnjay.jjay.cuny.edu/dispute/pubs_bibliographies4.asp) (last visited Dec. 2, 2007). As part of its Diversity Task Force initiative, the CPR Institute for

attributed to the newness of the field and to the fact that researchers have not yet empirically addressed the issue of under-representation.<sup>14</sup> An equally compelling explanation is that there is something inherent in the makeup of the dispute resolution field that makes it difficult to conduct the necessary research.<sup>15</sup>

### I. THE “BARRIERS TO PARTICIPATION” RESEARCH STUDY: METHODOLOGY

The Barriers Research Study, conducted in New York City, examined factors affecting participation, or lack thereof, by under-represented racial and ethnic groups in the “supply” side of the dispute resolution field, which includes practitioners, educators, administrators, and trainers.<sup>16</sup> The study used an exploratory, inductive, and qualitative approach.<sup>17</sup> The researchers gathered ten groups of three to seven individuals for meetings at John Jay College of Criminal Justice of the City University of New York. These two to three hour sessions took place over the course of one year from June 2005 to June 2006. In December 2006, all research participants convened for a final gathering.<sup>18</sup> In total, the researchers interviewed fifty people who have been involved in dispute resolution work as educators, mediators, arbitrators, facilitators, trainers,

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Dispute Resolution has developed an ADR Diversity Survey, which is “designed to be promulgated by companies to their outside law firms to measure and encourage the frequency and use of women and minorities in settlement negotiations, arbitration, and litigation.” CPR Committees and Their Members, *supra* note 2.

14. See generally Bush & Bingham, *Knowledge Gaps*, *supra* note 11; Bingham, Commentary, *supra* note 11; Stulberg, *supra* note 11.

15. See discussion *infra* Part II.

16. This research grew out of 2004 discussions at the final meeting of the Hewlett Foundation-funded conflict resolution centers. Academics present at the meeting considered what ADR-related knowledge gaps remained to be researched. The unpublished transcripts of the Barrier Research Study, conducted between June 6, 2005 and June 21, 2006, and the final gathering on December 12, 2006 are on file at the CUNY Dispute Resolution Consortium.

17. An exploratory, inductive, and qualitative research approach puts the emphasis on the collection of in-depth data from the participants without predetermining the direction of the research inquiry. See Michael Quinn Patton, *QUALITATIVE RESEARCH AND EVALUATION METHODS*, 55-56 (3d ed. 2002). In order to explore the barriers perceived by participants, the research team began each session with an open-ended question that asked each participant to share how he or she became involved in ADR. The research team then engaged the research participants in informal, unstructured small group interviews where the researchers asked general questions about the barriers they experienced and remedies they thought might work. This informal discussion between the research team members and the participants always stimulated subsequent questions and deepened the discussion.

18. All of the sessions, except one, were held during evening hours. Participants received a modest stipend for participating in each of the research sessions.

ombuds persons, and administrators. The research participants were chosen based on information about their status as members of underrepresented groups.<sup>19</sup>

The researchers used open-ended questioning and follow-up discussions in order to explore and further develop hypotheses about barriers to supply-side participation.<sup>20</sup> The researchers recorded the meetings and transcribed the audio tapes. The research team analyzed the transcripts to identify themes in the comments that addressed or refined the team's hypotheses, or suggested alternative hypotheses.<sup>21</sup> The researchers who guided small group meetings also elicited participants' views on how and to what extent barriers to participation could be reduced.

Lastly, at the end of all of the small group sessions, the researchers invited all of the participants to a large group gathering where the research team shared its preliminary findings. There, participants had an opportunity to provide the researchers with additional insights and to network with other participants.<sup>22</sup>

The research team framed its study as an inquiry into the validity of the following three hypotheses. First, underrepresented racial and ethnic groups still face discrimination and injustices that are perceived as requiring more aggressive, adversarial methods of addressing concerns. The result of this discrimination and injustice is that individuals from underrepresented racial and ethnic groups with a public interest orientation are less likely to find dispute resolution work meaningful and justifiable.<sup>23</sup> Second, underrepresented racial and ethnic groups still face an unequal economic playing field, and therefore cannot afford to devote substantial time to pro bono, volunteer, or low-paying work that is typical for the dispute resolution field. As a result, the participation of under-

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19. See *infra* Part II.B for a detailed discussion of the definition of "underrepresented" in this research.

20. The small group interview method is an accepted qualitative research methodology. See, e.g., Bush & Bingham, *Knowledge Gaps*, *supra* note 11, at 100; James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 HOFSTRA LAB. & EMP. L. J. 429, 429-31 (2001).

21. Preliminary research findings summarized below do not include a discussion of the proposed or alternative hypotheses for future research.

22. All of the participants were advised that only those who had attended one of the small group sessions would be permitted to attend the large group gathering. By participating in this gathering, they would reveal their identity to other research participants. The attendees did not receive a list of participants.

23. This hypothesis emerged from the work of some minority ADR critics, who see "informal justice" as inconsistent with minority concerns for equality. See, e.g., Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

represented groups in the ADR field is compromised.<sup>24</sup> Third, because of different social or cultural traditions and orientations, core assumptions about human behavior that permeate work in mainstream North American conflict resolution processes do not resonate with underrepresented racial and ethnic groups.<sup>25</sup> For example, there may be differences in views about the relative importance of characteristics such as rationality versus emotion and expressiveness, autonomy versus belonging and community, linear versus cyclical development, structure versus flow, and the material versus the spiritual.<sup>26</sup> As a result of these differences, ADR practitioners from underrepresented groups are pressured to utilize processes based on mainstream premises, which may be substantially different than those processes these practitioners would otherwise employ. This dissonance between the values or cultural orientation of underrepresented racial and ethnic groups and the mainstream discourage their participation.<sup>27</sup>

In addition to the aforementioned hypotheses, the research team discussed with the participants a wide range of topics, including how dispute resolution was managed in their countries of origin, what they focused on while conducting training programs, and how they used their skills in other settings. While this Essay will not analyze the project's findings in depth, the validity of the second and third hypotheses were confirmed by the data. The first hypothesis was not central to the work of the research participants involved in the project. Thus, their comments related to this hypothesis tended neither to confirm nor negate its validity.

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24. See *infra* Part II.A.3 for a discussion of the dominance of volunteerism and pro bono work as an organizing principle for the ADR field.

25. See, e.g., Cherise D. Hairston, *African Americans in Mediation Literature: A Neglected Population*, 16 *MEDIATION Q.* 357, 358-59 (1999) (discussing the need for the development of mediation literature about African Americans).

26. See, e.g., Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 *IND. L.J.* 155 (2005); Christina Cooley, *Maximizing Patient Autonomy Through Expanded Medical Surrogacy Mediation*, 30 *LAW & PSYCHOL. REV.* 229 (2006); Jeremy Waldron, *Particular Values and Critical Morality*, 77 *CAL. L. REV.* 561 (1989).

27. This hypothesis emerged from some commentaries on the values held by traditional and nonwestern cultures. See, e.g., Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings*, in *CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION* 131, 140-41 (D.J.D. Sandole & H. van der Merwe eds., 1993).



## II. CHALLENGES IN RESEARCH

Many of the challenges experienced while conducting the study are similar to those experienced by other researchers conducting qualitative analysis in a wide range of contexts. Among the myriad challenges were creation of research instruments, access to subjects, representativeness of subjects, determination of sample size, coding of data, validity and reliability of data, accuracy of transcripts, and managing biases. Additionally, for small, local research efforts such as this study, there are always concerns about “generalizability” of the data. In our study, the research participants were drawn from a large urban area, and may not have been a truly representative sample of ADR practitioners generally.<sup>28</sup> In short, researchers must be cautious when presenting the findings of qualitative research and should carefully avoid any overly broad, sweeping statements when drawing research-based conclusions.

Central to the success of this research project was the ability of a six-member, ethnically and racially diverse research team to manage a wide range of challenges presented by the composition of the team and the complexity of the study. The researchers learned how to work together as a diverse team—to employ appropriate language; to bring together diverse groups of research subjects; to have frank, open discussions about the most sensitive topics involving race, ethnicity, and other potential barriers; and to keep reminding themselves and others that this was primarily a research project rather than an action-oriented social change effort.<sup>29</sup>

### A. Broad Challenges Inherent in ADR Research

The nature of the ADR field presents a wide range of challenges to researchers.<sup>30</sup> For a variety of reasons, there is no way to readily and easily access research subjects in the dispute resolution field. Partially, this problem stems from the newness of the field and the incompleteness of efforts to develop academic infrastructure for knowledge acquisition and sharing. It can also be attributed to the inaccessibility of scholars, experts, and future practitioners. Other challenges resulted from the nature of the field that has emerged

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28. For example, this research raises questions about whether underrepresented groups in non-urban areas experience the same barriers.

29. On many occasions during the research sessions, participants asked the research team members to pursue remedies in an effort to reduce barriers. Some inquirers assumed that the team members were in a position to do something about the identified barriers.

30. See *infra* notes 31-51 and accompanying text.

through private and informal processes often provided by volunteers in small, low budget programs. Unsurprisingly, several broad challenges inherent in the ADR field affected the Barriers Research Study.

### 1. *No Academic Home*

Most professions have academic homes in the institutions where future practitioners prepare for work in their field.<sup>31</sup> In contrast, the ADR field, for the most part, does not have a high profile academic home in institutions of higher education.<sup>32</sup> While many academic institutions offer a wide variety of ADR courses and have established numerous academic programs in ADR,<sup>33</sup> there is no identifiable “college” of dispute resolution related to any academic institution.<sup>34</sup>

### 2. *No Universally Acknowledged Knowledge Base*

No universal professional organizations, regulating bodies, or educational entities exist to delineate the requisite core knowledge and skills necessary to be considered an ADR practitioner.<sup>35</sup> Without universal standards, identifying who can or should be considered an ADR practitioner remains difficult. Many practitioners

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31. See, e.g., John A. Ramseyer, *A Concept of Departmentalization in a Professional College*, 9 THEORY INTO PRACTICE 261 (1970); Joan S. Stark et al., *A Conceptual Framework for the Study of Preservice Professional Programs in Colleges and Universities*, 57 J. HIGHER ED. 231, 231-32 (1986).

32. See Brian Polkinghorn, *A Comparative Analysis of Developmental Trends in Graduate Conflict Resolution Programs in the United States and Canada*, 2005 Annual Conference of the Association for Conflict Resolution, Minneapolis, MN (Sept. 29, 2005) (on file with authors).

33. For information about law school courses related to dispute resolution, see the American Bar Association Dispute Resolution Course Offerings Directory, <http://www.law.uoregon.edu/aba> (last visited Dec. 3, 2007). See also Polkinghorn, *supra* note 32.

34. See generally Bush & Bingham, *Knowledge Gaps*, *supra* note 11, at 115; Bingham, *Commentary*, *supra* note 11, at 3, 5-6.

35. See generally John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007), available at <http://law.missouri.edu/lande/publications/Lande%20ADR%20policymaking.pdf>; Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49 (2002) (arguing that voluntary codes of ethics for mediators make unrealistic assumptions about the nature of ethical dilemmas that arise in mediation, including that there are generally “right” and “wrong” responses across contextual settings, when in fact practitioners employ various techniques and have different philosophies and goals, leaving room for much discretion).

enter the field through unique and atypical career paths.<sup>36</sup> For example, in this study, participants included lawyers, therapists, educators, community organizers, youth workers, government officials, and program administrators. For ADR researchers, not having a uniform core body of knowledge makes it challenging to identify who should be included in a study like the one undertaken by the Barriers team.

### 3. *Volunteerism as a Dominant Principle*

Adding to the challenges facing ADR researchers is the dominance of volunteerism and pro bono work as a way to enter the field.<sup>37</sup> This increases the difficulty of accessing practitioners in identifiable venues. Keeping track of volunteers who come and go can be daunting for small, local, low-budget programs. As a result, researchers may be unable to access a large number of subjects. Moreover, in the Barriers Research Study, the need to identify practitioners who were members of certain underrepresented groups exacerbated the challenge.

### 4. *No Database or Clearinghouse*

There is no readily accessible ADR database or clearinghouse—at any level or in any context—that provides accurate information about how many practitioners exist, how many cases they handle, and who exactly handles them.<sup>38</sup> Information about remuneration and case volume in the field is either vague or unavailable. For example, PayScale, Inc. maintains a global online compensation database, “[w]ith the world’s largest database of individual em-

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36. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 571-84 (Stephen B. Goldberg ed., 2007); see also Cindy Fazzi, *Are You Ready to Make Mediation Your Day Job?*, 57 *DISP. RESOL. J.* 87 (2003) (reviewing FORREST S. MOSTEN, *MEDIATION CAREER GUIDE: A STRATEGIC APPROACH TO BUILDING A SUCCESSFUL PRACTICE* (2001)); Arup Varma & Lamont E. Stallworth, *The Use of Alternative Dispute Resolution Mechanisms in the Workplace: An Empirical Study*, 2 *J. ALTERNATIVE DISP. RESOL.* 71 (2000); Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 *ST. JOHN’S L. REV.* 77 (2007).

37. This phenomenon is well known and obvious to anyone who has worked in the ADR field. See, e.g., Andrea Chasen, *After Disaster Strikes: Do I Volunteer as a Mediator?*, 13 *DISPUTE RESOL. MAG.* 1, Fall 2006, at 21.

38. For basic information on conflict resolution, see The Conflict Resolution Information Source, University of Colorado, <http://www.crinfo.org> (last visited Dec. 2, 2007). The database does not include the type of quantitative data mentioned in this Essay.

ployee compensation profiles.”<sup>39</sup> Nevertheless, it lumps mediators, arbitrators, and conciliators into one category.<sup>40</sup> Further, to make possible large-scale research relating to barriers to entry into the field, researchers must have access to numbers of practitioners, areas of practice, levels of compensation, and other verifiable and trustworthy data.<sup>41</sup>

Collectively, all these impediments to a clear understanding of who is an ADR practitioner and how one becomes an ADR practitioner make it difficult for researchers to identify subjects who can participate in a study on the barriers to participation facing ADR practitioners.

### B. Specific Challenges to the Barriers Research Study

In addition to broad challenges presented by the very nature of the ADR field, the Barriers research team experienced a variety of

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39. See PayScale, About Us, <http://www.payscale.com/about.asp> (last visited Dec. 4, 2007).

40. For PayScale’s salary data for mediators, arbitrators, and conciliators, see PayScale—Compensation Data, [http://www.payscale.com/cost-of-living-calculator.aspx?to=New%20York\\_New%20York&jobtitle=arbitrator](http://www.payscale.com/cost-of-living-calculator.aspx?to=New%20York_New%20York&jobtitle=arbitrator) (last visited Dec. 8, 2007). PayScale reports that the salary range for arbitrators, mediators, and conciliators in New York City is from \$45,655 to \$86,332. The Bureau of Labor Statistics reports that “arbitrators, mediators, and conciliators earned a median of \$54,760.” See OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 1. For the most part, information about remuneration and case volume for ADR practitioners remains highly anecdotal with information often shared informally through word of mouth. To provide an overview of which programs offer compensated and pro bono opportunities in New York City, the CUNY Dispute Resolution Consortium has compiled a list of compensated and pro bono opportunities in mediation in New York City to assist those who receive requests for employment in the ADR field. See CUNY Dispute Resolution Consortium (“DRC”) at John Jay College, [http://johnjay.jjay.cuny.edu/dispute/docs/Compensated\\_and\\_Pro\\_Bono\\_List.pdf](http://johnjay.jjay.cuny.edu/dispute/docs/Compensated_and_Pro_Bono_List.pdf) (last visited Dec. 1, 2007). The CUNY DRC’s list does not include detailed information about remuneration for programs that provide compensation, since it is daunting to maintain up-to-date information about ongoing changes that are difficult to track. In New York City, “average fees . . . are \$200 per hour for family mediation, \$200-350 per hour for workplace and commercial cases, and \$100 per hour or \$500-800 per case or session for federal sector cases.” See DRC at John Jay College, Tips for Becoming a Mediator in New York City, [http://johnjay.jjay.cuny.edu/dispute/resources\\_tipsformediators.asp](http://johnjay.jjay.cuny.edu/dispute/resources_tipsformediators.asp) (last visited Dec. 1, 2007).

41. See Bush & Bingham, *Knowledge Gaps*, *supra* note 11, at 113-15; Bingham, Commentary, *supra* note 11, at 11-12. Even when data is available, it is often vague. See *supra* notes 39-40 and accompanying text. The New York Unified Court System’s Office of Alternative Dispute Resolution has compiled comprehensive data about community dispute resolution programs funded by the state in each of its sixty-two counties. See New York State Alternative Dispute Resolution, <http://www.courts.state.ny.us/ip/adr/about.shtml> (last visited Dec. 1, 2007). Even so, information about any dispute resolution efforts outside of state-funded programs, whether involving not-for-profit or for-profit organizations, is not, to these authors’ knowledge, available in any one location or database.

challenges unique to its research project. The following challenges were the most prominent.

1. *Creation of a Representative Research Team*

At the outset of the project, the most immediate research challenge emerged around the creation of the research team. Related to this was a concern about determining specific groups to be studied. These concerns were interrelated since the composition of the research team needed to match that of the study groups, and the groups chosen needed to be reflective of the dominant underrepresented groupings, not only among minority populations in the New York City metropolitan area, but among practitioners in the ADR field. Assessing the landscape of underrepresented racial and ethnic groups in the New York City metropolitan area is very complicated because of the area's immense diversity. After much discussion, the co-principal investigators resolved the first challenge by selecting representatives from three underrepresented groups in the New York City metropolitan area to serve on the research team, namely African Americans, Latinos, and Asian Americans. It is important to note that in the New York City metropolitan area there is tremendous diversity within each of these groups.<sup>42</sup>

2. *Selection of Research Participants*

Once selected, the research team members engaged in an exhaustive process of examining both the diversity of the ADR field in the New York City metropolitan area and potential groups to study. They paid very careful attention to the wide array of underrepresented groups identified by a variety of characteristics, including race, ethnicity, gender, age, sexual orientation, and disability. The team made a key decision to focus this research project primarily on people of color—the group that has historically been the most underrepresented in many sectors of the United States job market.<sup>43</sup>

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42. See *supra* note 12.

43. See generally Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006). Evidence of underrepresentation of people of color in the workforce, especially in selected professions, is readily available in any literature search focusing on diversity, affirmative action, and discrimination in the workplace. A wide range of educational, job recruitment, and legislative initiatives addressed the disparities in workplace representation in the United States since the Civil Rights Act of 1994. See, e.g., U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov> (last visited Dec. 2, 2007).

### 3. *Language*

At the outset, the research team discussed the language it would use to describe the individuals who participated in the project, recognizing early on that language is a sensitive and important subject in discussions related to people of color.<sup>44</sup> In fact, some of the research team's most profound and project-altering discussions centered on the use of the term "minority." At its first session, the team brainstormed by discussing all of the images the term brought to mind. Included in their list were: unimportant, underdog, insignificant, lesser, powerless, small, minor, different, and underage.<sup>45</sup> Overall, the images were not positive in tone.

The struggle with the language and its proper usage continued throughout the research project. At different points in time, the team used different terms, among them: minorities, underrepresented groups, people of color, racial and ethnic groups, and diversity. While at the outset the team decided to use "people of color" for the project, and used this phrase consistently and prominently, at the final large group session with the research participants some participants objected to the use of the phrase. Throughout the study, the research team emphasized the importance of using non-humiliating language. While the term "minority" embodies a "shortcut" to defining under-representation and is easily recognizable, it also carries humiliating connotations. Thus, the research team decided to use "underrepresented racial and ethnic groups" as the key descriptor of the research subjects.

### 4. *Recruitment of Research Subjects*

Although a stipend was an important incentive, it was not sufficient to attract some individuals to the interview group sessions, primarily because the timing of the interviews was not convenient for them. On the other hand, the team found that snowball sampling techniques<sup>46</sup> did help in recruiting participants. Snowball sampling refers to a research method where the researchers identify research subjects representative of the population and then ask them to identify others who meet the criteria for inclusion. In par-

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44. See, e.g., Philip Gleason, *Minorities (Almost) All: The Minority Concept in American Social Thought*, 43 *AM. Q.* 392 (1991).

45. See also Larry Purnell, *Minority Groups: An Outdated Concept?*, 48 *J. ADVANCED NURSING* 429 (2004), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1365-2648.2004.03224.x> (describing the term "minority" as "carr[y]ing] the connotation of lesser than, or not as important as, the majority").

46. See, e.g., DANIEL F. CHAMBLISS & RUSSELL K. SCHUTT, *MAKING SENSE OF THE SOCIAL WORLD: METHODS OF INVESTIGATION*, 101-02 (2d ed. 2006).

ticular, recruitment was easiest when there were preexisting relationships between research participants and the team members or between research participants and other prospective research participants.

### 5. *Identification of Multiple Identities*

Once the research team agreed to focus on people of color, it continued to face the challenge of identifying those with mixed backgrounds within the broad category of “people of color.” For example, how would the team classify a Black Latino, Black Asian, or Latino Asian? The researchers relied on the research participants to describe their identity.

### 6. *Adequate Representation Within Selected Groupings*

The research team faced a major challenge in trying to identify sufficient participants from specific underrepresented racial and ethnic groups. For instance, Native Americans who are underrepresented in the general population and more specifically in the New York City metropolitan area, by extension were not identifiable as ADR practitioners for this study.<sup>47</sup>

### 7. *Identifying of ADR Practitioners*

Another major challenge arose when the research team attempted to classify what constitutes an ADR practitioner. The ADR umbrella is enormous, with countless practitioners doing ADR-related work, including facilitation, conciliation, mediation, arbitration, and a variety of related hybrid processes such as ombuds-work and med-arb.<sup>48</sup> The research team relied on a very broad definition of an ADR practitioner, so as to include all those who had been trained in any of the ADR processes. All who participated were knowledgeable about the distinctions among the processes. The group of research participants included educators, mediators, arbitrators, facilitators, trainers, ombudspersons, and administrators. On at least one occasion, individuals noted that, although they were trained in an ADR process and remained very interested in the field, they did not consider themselves ADR practitioners because they were not employed in an ADR-specific job.

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47. See generally Laura Rothstein, *The LSAT, U.S. News & World Report, and Minority Admissions: Special Challenges and Special Opportunities for Law School Deans*, 80 ST. JOHN'S L. REV. 257 (2006).

48. See generally GOLDBERG ET AL., *supra* note 36.

### 8. *Homogeneous or Heterogeneous Groups*

The research team labored over how to compose small groups for the interview sessions. In particular, the key concern was whether the groups should be homogenous or heterogeneous. The question underlying this challenge was whether research participants would have different, and more revealing, conversations when situated among people from similar racial or ethnic backgrounds.

### 9. *Protection of Research Lists*

While protection of research participant lists is common to all research projects, once the Barriers Research Study gained visibility, there were many requests to gain access to the lists, since this was the first time such lists had been assembled in New York City.<sup>49</sup> For example, numerous ADR organizations in the New York City metropolitan area were interested in diversifying their rosters and saw the compilation of names as very attractive and useful.<sup>50</sup> The fundamentals of “human subjects research ethics” prohibit the release of identifying information without consent.<sup>51</sup> As a result, the research team felt a strong need to carefully safeguard the anonymity of research participants.

### 10. *Requests to Address Identified Barriers*

Interest in reducing and removing barriers was often apparent, and the research team had to remind the participants that this was not an “action project” designed to remedy barriers to participation. The nature of the group discussions, which identified and examined many frustrating barriers, often led participants into discussions about what could be done to remove these barriers. As a result, on many occasions the research team had to remind the research participants that the goal of the project was to conduct research on the barriers and collect data, leaving the question of

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49. Research participants, as well as dispute resolution program administrators, who became aware of the research project constantly reminded research team members that no one had ever seen extensive lists of underrepresented groups.

50. Many ADR program administrators who sought ways to diversify their programs approached research team members.

51. OFFICE FOR HUMAN RESEARCH PROTECTION, *PROTECTING HUMAN RESEARCH SUBJECTS: INSTITUTIONAL REVIEW BOARD GUIDEBOOK*, ch. III.B (1993), available at [http://www.hhs.gov/ohrp/irb/irb\\_chapter3.htm#e2](http://www.hhs.gov/ohrp/irb/irb_chapter3.htm#e2) (“Informed consent is one of the primary ethical requirements underpinning research with human subjects; it reflects the basic principle of respect for persons.”) (emphasis omitted). See generally Human Subject Protection Regulations, 45 C.F.R. § 46 (West 2007).



remedies for those who could pursue a social action-oriented agenda.

#### 11. *Opportunity for All Research Subjects to Meet*

Many of the research participants voiced an interest in meeting all of the other participants to form an alliance for action to remove or lower the barriers. For some, the interview group sessions were the first time they had an opportunity to be in a room with so many others with the same identity. Many participants mentioned that they were often “the only one in the room” from their own racial and ethnic group in ADR settings. In response, the research team decided to address the matter directly by adding a large group session at the conclusion of the research project and inviting all who participated in the small group interview sessions. This large group gathering provided an opportunity for research participants to meet the other participants and discuss matters of mutual interest. This gathering was organized with the full understanding that the participants would meet other participants and that all of them had received assurances of confidentiality. Even though some individuals outside the project had heard about the meeting and wanted to attend, the research team only permitted those who had participated in the research project to join the meeting. At the session, the participants were provided with an opportunity to introduce themselves, to hear a report on the preliminary findings, and to network informally. Additionally, to continue the networking, those who were interested signed up to meet again to discuss and brainstorm possible next steps.

#### **C. Challenges: The Unique Nature of Conducting Qualitative Research on Racial and Ethnic Barriers**

Challenges are common to all research projects. The research on barriers to participation of underrepresented racial and ethnic groups in the dispute resolution field faced many of the challenges experienced by other researchers who conduct emergent, exploratory, qualitative research projects.<sup>52</sup> Generally, in such projects, researchers have to be very cautious about making any generalizations until further work is undertaken. The challenges for the Barriers project were even more difficult because the research study sought to examine a field where the identification of, access to, and

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52. See Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 HOFSTRA LAB. & EMP. L. J. 385 (2001).

recruitment of research subjects remained a daunting and sensitive exercise.

Finally, the research team has found that there is a tremendous interest in better understanding barriers to participation. The team received requests to expand this project beyond the New York City metropolitan area. As a result of this research, the team found that there is a variety of topics that would benefit from further research, including what barrier-lowering initiatives have been attempted thus far and how well they have succeeded.

### III. PRELIMINARY FINDINGS OF THE BARRIERS RESEARCH PROJECT

Mindful of the above caution about avoiding the temptation to draw generalizations from the Barriers research results, this Essay nevertheless presents—as an important and useful starting point for a more systematic discussion—a summary of the preliminary findings with regard to perceived barriers to participation of members of underrepresented racial and ethnic groups in the ADR field. As described above, the research team assembled a set of transcripts of small group meetings and then thematically analyzed those transcripts.<sup>53</sup> The analysis identified themes that emerged as patterns in the transcripts regarding the participants' perceptions of barriers to participation.<sup>54</sup> The themes fell into three general categories organized below in a form easily accessible to the reader along with a detailed discussion of the perceived barriers reported in each category.

It is important to note that the barriers listed below represent *perceived* barriers—conditions perceived by underrepresented racial and ethnic groups as real impediments to their participation in the field. These findings do not claim that the perceptions of the research participants are “proven” in some objective and measured

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53. Members of the research team received audiotape transcripts for each small group interview session. By September 26, 2006, all small group sessions were over, and the whole research team met to discuss the next steps for data analysis. The research team agreed to divide into pairs which would lead comprehensive reviews and coding of up to three transcripts. During the next two months, the team pairs met and identified themes they found in the transcripts they were responsible for. Each pair of researchers also e-mailed its themes to the other research team members. On November 21, 2007, the research team came together to compare the themes and identify common themes across the groups. The research team compiled preliminary results into a presentation to be delivered at the large group gathering of research participants on December 4, 2007.

54. Thematic analysis is an accepted method of qualitative research. See Bush & Bingham, *Knowledge Gaps*, *supra* note 11; see also Folger, *supra* note 52.

sense. At the same time, these perceptions of barriers shared by many of the research participants indicate some likelihood that the listed barriers are real, and therefore, deserve further investigation to confirm their existence and severity.

The three general categories of perceived barriers are: (1) universal barriers that affect all persons interested in participation in the ADR field that are exacerbated for selected underrepresented racial and ethnic groups; (2) specific barriers that affect members of certain underrepresented racial and ethnic groups; and (3) constraints or barriers that particularly affect members of underrepresented racial and ethnic groups already participating in the ADR field. In all of these categories, the barriers identified include obstacles to entering, remaining in, and advancing in ADR. The overview below identifies specific perceived barriers for each general category.

#### **A. Universal Barriers: Exacerbated for Selected Underrepresented Racial and Ethnic Groups**

The study participants identified many barriers that affect all persons who seek to enter the ADR field, regardless of race or ethnicity. The study participants, however, perceived some of these barriers being higher and more daunting for people from underrepresented racial and ethnic groups. Therefore, the research team considered such barriers as barriers to participation within the meaning of this study, even though the research team recognized their effect on other social groups. Barriers in this category generally fall into one or more of the three groups listed below.<sup>55</sup>

##### *1. Informational and Professional Barriers*

Some perceived barriers stem from a lack of accessible information about the ADR field, or from professional influences prevalent in the field.

- *No clear entry point.* It is hard for would-be entrants to find the “door” that leads to a career in ADR. Those who want to enter the ADR field must be able to take an “entrepreneurial” perspective and approach, “marketing” themselves to different types of gatekeepers.
- *No clear career path.* Even if a would-be entrant can find an entry point into ADR, there is no clear path forward with recog-

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55. See *supra* note 53 for an account of the data analysis.

nized educational or professional credentials to pursue—no “yellow brick road.”

- *Elusiveness of the ADR profession.* It is not clear what constitutes an ADR occupation or position, given the many and varied forms of ADR.
- *Raising the bar on credentials.* With increased pressure for “quality assurance,” the tendency to raise requirements for participation becomes a barrier that affects underrepresented ethnic and racial groups in particular, because this pressure eliminates interested ADR practitioners, raises training costs without increasing prospects of employment, and reduces openness to the field for underrepresented ethnic and racial groups.
- *Ambiguity about what constitutes acceptable credentials.* Apart from increasing credential requirements, there is no consensus about what credentials “count.” Therefore, acquiring credentials does not necessarily improve chances for participation.
- *Domination of the ADR field by the legal profession.* Because of the previous two factors, ADR services are increasingly connected to courts, with lawyers dominating the field.<sup>56</sup> Since racial and ethnic groups are underrepresented in the legal profession, this affects participation in the increasingly lawyer-dominated ADR field.<sup>57</sup>

## 2. Social and Institutional Barriers

Some perceived barriers result from particular social and institutional patterns that exist in the ADR field. Research participants indicated that the following prevalent arrangements posed barriers to their participation:

- *Limited access and penetration of established networks.* Although there are networks of ADR providers which have established identities and client bases, there is little access to these

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56. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 21-27 (2001); Deborah R. Hensler, *In Search of ‘Good’ Mediation: Rhetoric, Practice and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 236-37 n. 30 (J. Sanders & V. L. Hamilton eds., 2001); see also Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3, 6-7 (1993); Brad Spangler, *Alternative Dispute Resolution (ADR)*, BEYOND INTRACTABILITY, June 2003, <http://www.beyondintractability.org/essay/adr/>.

57. See EXECUTIVE SUMMARY, COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, AMERICAN BAR ASSOCIATION, <http://www.abanet.org/minorities/publications/milesummary.html> (last visited Dec. 1, 2007).

networks, especially for underrepresented racial and ethnic groups.

- *Limited access to compensated rosters.* The previous factor applies with equal or greater force to gaining positions on rosters for compensated work.
- *Limited opportunity for repeat selection.* Even when an individual gains access to networks and rosters and is selected for work, repeat selection does not necessarily follow, especially for underrepresented racial and ethnic groups.
- *Lack of mentors.* Entrants into the ADR field have difficulty finding mentors, whether from their own racial or ethnic groups or not. Since there are a very limited number of established “minority” ADR professionals, the difficulty in finding mentors with whom one shares an identity is greater for underrepresented racial and ethnic groups.
- *Difficulty in finding role models.* Unsurprisingly, the previous point applies with equal force with regard to finding role models, especially from one’s own underrepresented group.

### 3. Economic Barriers

Some barriers exist because of the economic arrangements that prevail in the ADR field. Among the economic barriers identified in this research are:

- *Limited amount of paid work because many systems depend on volunteerism, low-paid, or pro bono work.* The ADR field, including mediation and arbitration, relies on high levels of volunteers or low-paid service by providers, which makes the opportunities for appropriately paid work very scarce. Because of economic factors, it is harder for underrepresented racial and ethnic groups to pursue such unpaid or low-paid opportunities if they do not lead to compensated work.
- *Lack of information about compensated work.* Even when opportunities for paid work exist, information about such opportunities is hard to find. In particular, it is difficult to find information on how much work exists, how one gets work, and the level of compensation for that work.
- *Underdeveloped market.* The overall market for ADR is small—smaller than many of its advocates have envisioned and claimed. Consequently, there is less “pie” to divide, and the division usually disfavors people from underrepresented racial and ethnic groups.

- *Lack of public knowledge about ADR.* Along the lines of the previous point, promotion of ADR has not penetrated the public. Therefore, marketing to clients cannot rely on general knowledge of the provided ADR services.

### **B. Specific Barriers Perceived by Selected Racial and Ethnic Groups**

The study's participants perceived some barriers as specifically affecting underrepresented racial and ethnic group members who seek involvement in the ADR field. Barriers in this category fall under one or more of the three types listed below.<sup>58</sup>

#### *1. Informational and Professional Barriers*

Some barriers stem from a lack of accessible information about the ADR field among people in underrepresented racial and ethnic groups or from professional influences that operate in the field to their disadvantage.

- *ADR is perceived as a "gated" community.* The field seems closed to outsiders since many ADR activities occur behind closed doors, and it is hard to see what is going on inside. Because of the barriers related to career paths and access to information about the field, the walls around the field seem impenetrable for all, and especially for young individuals in underrepresented racial and ethnic groups who might be interested in pursuing a career in the field. This barrier seemed to capture the essence of many of the other perceived barriers.
- *Limited likelihood of being chosen for ADR work.* "Gatekeepers" who select mediators or arbitrators usually do not belong to underrepresented racial and ethnic groups and tend not to know many "minority" ADR providers. Therefore, they are unlikely to choose individuals from underrepresented racial and ethnic groups for the work they control. The perception is that the classic "old boys' club" operates in the ADR field and limits opportunities for "minority" participation.
- *Not enough ADR work, and unequal distribution of the work that does exist.* As noted above, due to poor marketing and development of the field, the overall ADR "pie" is smaller than it could be and, just like the overall economic pie in the United States, is unequally distributed.

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58. See *supra* note 53 for an account of the data analysis.

## 2. *Social, Institutional, and Cultural Barriers*

Some barriers result from particular social and institutional patterns that specifically affect members of underrepresented racial and ethnic groups seeking involvement in ADR.

- *Cultural views about working without being properly compensated.* Strongly held values and attitudes make it difficult for underrepresented racial and ethnic groups in the ADR field to feel satisfied about accepting unpaid or low-paid work. Since a great deal of entry-level ADR work is volunteer or low-paid, this serves as a barrier to participation. Such cultural views include, for example, the following: (1) No pay/low-pay work is connected to some extent with “exploitation” and could very well be seen by African Americans as a reminder of slavery and racial exploitation; (2) The struggle to achieve a college degree should lead to paid jobs; (3) Family pressure creates expectations for job security, a regular paycheck, and low-risk—for example, government—employment.
- *No role models in “my community.”* Communities of color include very few individuals who have succeeded in the ADR field and thus can serve as role models for others from underrepresented racial and ethnic groups.
- *No recognition for ADR as a “status” profession.* For people in underrepresented racial and ethnic groups and for members of immigrant communities, access to high status professions is important as a matter of social and economic progress. For a variety of reasons, ADR does not yet have the recognition of a high status profession, in particular, because consumers do not respect free services.
- *Language and accent (when English is a second language).* Even when members of underrepresented racial and ethnic groups are proficient in English, if English is their second language, their lack of native fluency and their accents cause many gatekeepers and potential clients to pass them by.
- *Clients’ prejudice.* Continuing racial and ethnic bias results in regular and humiliating incidents. Gatekeepers and even clients mistake highly qualified ADR professionals from underrepresented racial and ethnic groups for support staff, suspect them of incompetence, distrust or openly challenge their qualifications, or otherwise treat them in a degrading fashion.
- *General institutional biases that also impact the ADR field.* For ADR opportunities “embedded” in institutions, such as courts and businesses, any racial and ethnic biases that infect such insti-

tutions affect ADR “departments” of those institutions, and create barriers to underrepresented racial and ethnic groups’ participation in ADR work for those institutions.

### 3. *Economic Barriers*

Some barriers exist because of the economic organization or lack of organization in the ADR field as it functions today, and these barriers make participation in the field particularly hard for people of color, who already suffer from economic inequality in society.

Perhaps most important of all the barriers that affect underrepresented racial and ethnic groups, is that ADR participation requires accepting entry-level work that is volunteer or low paid, and even after that offers little access to higher paid opportunities, and still less access to steady, repeat work. Even though this is true for all in the field, these economic factors affect those from underrepresented groups much more powerfully, for several reasons: (1) Family economics do not permit no pay/low pay work; (2) Training costs require investment with no guarantee of paid work to follow; (3) Conference costs for networking, which are important, add further up-front, economic investment; and (4) Lack of job stability or security disadvantages those who require such security because there is little accumulated wealth to fall back on.

#### **C. Constraints Perceived by Selected Racial or Ethnic Groups in Established ADR Roles**

Certain barriers are seen in the perceived constraints that affect people of color who have succeeded in gaining good positions in the field, and who want to help in increasing access for other “minorities,” but face difficulties in doing so, including the following.<sup>59</sup>

- *Isolation from other selected racial/ethnic groups since they are often the “only one in the room.”* For individuals from underrepresented racial and ethnic groups, the phenomenon of being the only one in the room from their group—whether at a business meeting, a conference, a workshop, etc.—is a common one, and this sense of isolation makes it hard to help others “up the ladder.”
- *Difficulty in accommodation and risk taking with respect to other selected racial or ethnic groups.* As an extension of the previous point, “gatekeepers” who are themselves members of underrepresented racial and ethnic groups, and who make special ef-

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59. See *supra* note 53 for an account of the data analysis.



forts to help others from such groups, may fear putting their own positions at risk due to bias in the institutions in which they work. They may thus refrain from taking action to bring about social change and betterment of the “minority” ADR population as a whole.

- *Constraints from choosing only selected members of racial or ethnic groups when hiring.* This is a consequence of the previous two points, and it reduces the chance for those who best understand the barriers to “minority” participation to be of help in lowering these barriers. Often, as the only one in their workplace, usually as a trailblazer, “minority” gatekeepers cannot risk being seen as hiring only underrepresented racial and ethnic groups.

#### IV. PRELIMINARY SUGGESTIONS FOR REDUCING BARRIERS IDENTIFIED IN THE BARRIERS RESEARCH STUDY

It was not part of the agenda of this research project to speculate on what kinds of measures might be helpful in reducing the barriers identified in the research. Despite this fact, the very method of research, involving small groups of individuals meeting together to discuss their perceptions of barriers, inevitably led to discussions about how to reduce these barriers. As noted above, although the research team always informed the participants that this was not the aim of the project, cutting off such discussion was neither possible nor desirable. Therefore, several themes emerged regarding the participants’ views as to how steps could be taken to overcome the barriers described above, in general and in particular. Some of the most prominent suggestions included the following.<sup>60</sup>

- *Network among “ourselves.”* The recognition was clear that there is strength in numbers, both in terms of idea-generation and in terms of mobilizing for action; the group of participants in this project saw the potential for creating a network among themselves that could serve as a core for such a mobilization of ideas and numbers.
- *Network with “others.”* Just as the participants saw the potential for a network among themselves, they saw the need to make deliberate efforts to expand their network with others.
- *Step up to the plate.* The participants felt that they themselves could break down barriers and gain access by assuming responsibility for activities that would make them more visible and prom-

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60. See *supra* note 53 for an account of the data analysis.

inent in the field. Such activities could include: co-authoring articles with established colleagues; giving presentations at conferences and workshops; seeking appointments at academic institutions to gain visibility, including positions to administer ADR clinics, and teach ADR courses.

- *Create awareness initiatives to bring attention to the need for diversity among ADR professionals.* Professional associations, organizations, and programs should develop additional initiatives to raise awareness of the need for greater racial and ethnic diversity among the ADR population.
- *Establish clear entry or career paths.* An effective network of “minority” ADR professionals could take the lead in establishing and advertising entry points and career paths into ADR work. Additionally, such a network could play a leadership role in efforts that would reduce barriers and increase access to the field for underrepresented racial and ethnic group members. Such efforts could include: clarifying ADR professions for those interested in the field; increasing the amount of compensated ADR work; improving data on the actual amount of compensated ADR work; establishing what constitutes acceptable credentials; proceeding with caution on creation of credentials; opening access to established networks; increasing access to compensated rosters; increasing opportunities to be selected as an ADR professional; and increasing the number of mentors and role models.

## V. QUESTIONS FOR FURTHER RESEARCH

Since all of the above-reported findings are only preliminary, the research team has not yet fully analyzed, much less digested, those findings. It is premature to specifically identify further research directions. Nevertheless, some questions that have emerged certainly deserve consideration as possible topics for further inquiry. Among those questions are:<sup>61</sup>

- Which of the barriers reported here as “perceived” by members of underrepresented racial and ethnic groups are “real” and not just perceived?
- What objective measures and methods can confirm that these barriers exist?
- What are distinctions in their perception of these barriers among different underrepresented racial and ethnic groups?

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61. See *supra* note 53 for an account of the data analysis.

- What are distinctions in their perception of these barriers among members of a particular underrepresented racial and ethnic group?
- What projects addressed barriers in the past, and which of the barriers reported here have they tried to overcome?
- What have been the successes and failures of such projects? What is their history? What has been their impact? Which barriers have been addressed? What works and why?
- How many practitioners from underrepresented groups are in the ADR field? What is a specific breakdown, in numbers and proportions, of different underrepresented groups who do ADR work?
- How many ADR cases are there? Stated differently, how big is the ADR “pie”? What portion of that pie represents volunteer or low-paid work, and what portion represents work paid at professional levels?
- Finally, is the work differentially distributed among different underrepresented groups?

### CONCLUSION

This project overcame substantial methodological challenges in gathering data from a small but important sample of ADR professionals from underrepresented racial and ethnic groups, regarding their perception of barriers that make it hard for them and others from their groups to enter, remain, and advance in the ADR field. A cooperative effort enabled the multi-racial and multi-ethnic research team to overcome significant challenges in designing and conducting the research that stemmed from the complexity of the research subject and focus.

The preliminary findings of this research project represent a unique addition to the store of knowledge about the ADR field. For the first time, ADR professionals from underrepresented groups identified the barriers to their full participation in the ADR field, through a study by a research team composed primarily of individuals from such groups. The result is a rich and detailed catalogue of perceived barriers. Moreover, it seems quite likely that many, if not most, of these barriers are not only perceived, but real.<sup>62</sup> These findings underscore a pressing need to further examine barriers affecting underrepresented groups' participation in

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62. Additional research should address the distinction between perceived and real barriers.

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*BARRIERS TO PARTICIPATION*

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dispute resolution work. The findings also emphasize the need to reduce the barriers and open the gates of ADR for full participation by all those who want to take part in the socially important work of dispute resolution and to enrich the diverse pool of ADR professionals.

