

WASHINGTON COLLEGE OF LAW

ALTERNATIVE DISPUTE RESOLUTION NEWSLETTER

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Edited By: Debra Berman & Travis Markley



Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. -- Abraham Lincoln, "Notes for a Law Lecture," 1850

WHO WE ARE

The Alternative Dispute Resolution (ADR) Society is a student organization dedicated to promoting student interest in ADR at the Washington College of Law. The society serves to help students gain an understanding of and promote the use of ADR as an effective alternative to litigation. The group provides students the opportunity to hear from prominent ADR experts in the field and to participate in local mediation trainings and competitions. The society also participates in events sponsored by ADR groups at other area law schools.

BOARD MEMBERS

- Debra Berman, Founder and President
- Travis Markley, Vice President
- Ena Marwaha, Secretary
- JR Biondi, Treasurer
- To be filled, 1L Student Representative
- To be filled, 2L Student Representative
- Rajiv Ahuja, 3L Student Representative

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UPCOMING EVENTS & ACTIVITIES

WCL ADR Society Events:

- **September 2005:** Informational Meeting (lunch)
- **September 2005:** One hour basic ADR class taught by Professor Dennis Sharp (lunch)
- **October 2005:** Joint event with the DC Chapter of the Association for Conflict Resolution: Panel of Practitioners and reception on the growing use of ADR in various legal arenas such as employment law and family law
- **October 2005:** Event at Georgetown Law School with panel of practitioners discussing desirable traits in newly graduated ADR lawyers
- **October 14-16, 2005:** FREE 20-hour training to become certified by AU's Mediation Services (AUMS) for on-campus mediations

Events by Outside Organizations:

- **September 22, 2005:** Inter-Agency ADR Working Group's ADR Lunchtime Series at the U.S. Department of Energy, from 12-1:30
- **October 18, 2005:** DC ACR Conference on Technology Applications in ADR, from 9:30-4 at 4301 Wilson Blvd. in Arlington, VA
- **November 12, 2005:** DC ACR Day of Reflection (Mediation and Meditation) at 4301 Wilson Blvd. in Arlington, VA
- **November/December 2005:**
Applications/interviews for ABA
Competition: Representation in Mediation, held in February 2006

COMPETITIONS

The Society hopes to enter teams into a variety of national/international competitions in the future, including the Law Student National Representation in Mediation Competition, the ABA Law Student Essay Contest on Dispute Resolution, and a wide variety of online competitions. We will also be reviewing applications and conducting interviews for the February 2006 ABA Representation in Mediation Competition. If you would be interested in helping us build teams for any of the above competitions, please contact adr@wcl.american.edu.

WORK ACCOMPLISHED BY THE SOCIETY

In the first year of its existence, the ADR Society accomplished a substantial amount. Beyond starting the group and establishing its leadership, the ADR Board began working with Dean Niles, Dean Jaffe, and faculty to improve ADR course offerings at WCL. Furthermore, the group's efforts to gather and select faculty candidates for the planned expansion of the ADR program at WCL resulted in the successful hiring of several adjunct faculty members.

The group has also begun its work on expanding student understanding of ADR processes and their impact on the legal world. Several students completed a mediation training offered by American University's Mediations Services (AUMS) and are now certified to conduct mediations on campus. More broadly, the ADR Society co-hosted a program with the DC Chapter of the Association for Conflict Resolution (DC-ACR) with guest speaker Jeffrey Senger, Senior Counsel in the Office of Dispute Resolution at the US Department of Justice. Mr. Senger made a well-received presentation at WCL entitled "What Law Students (and Lawyers) Should Know About ADR."

The group also collaborated with other organizations at the law school in order to facilitate a broader understanding of the role that ADR may play in broader contexts. To further this goal, the ADR Society co-hosted a program titled "The Ins & Outs of International ADR. Over 50 students and community members attended and heard about different aspects of international ADR.

WHAT IS ADR?

There are many ways to resolve conflicts. The movement toward ADR, sometimes referred to simply as conflict resolution, grew out of the belief that there are better options than going to court for settling disputes. Today, the terms ADR and conflict resolution are used somewhat interchangeably and refer to a wide range of processes that encourage nonviolent dispute resolution outside of the traditional court system. The field of conflict resolution also includes efforts in schools and communities to reduce conflict and help young people develop communication and problem-solving skills. Common forms of dispute resolution include:

- **Negotiation** is a discussion among two or more people with the goal of reaching an agreement.
- **Mediation** is a voluntary and confidential process in which a neutral third-party facilitator helps people discuss difficult issues and negotiate an agreement. Basic steps in the process include gathering information, framing the issues, developing options, negotiating, and formalizing agreements. Parties in mediation create their own solutions and the mediator does not have any decision-making power over the outcome.
- **Arbitration** is a process in which a third-party neutral, after reviewing evidence and listening to arguments from both sides, issues a decision to settle the case. Arbitration is often used in commercial and labor/management disputes.
- **Mediation-Arbitration** is a hybrid that combines both of the above processes. Prior to the session, the disputing parties agree to try mediation first, but give the neutral third party the authority to make a decision if mediation is not successful.
- **Early Neutral Evaluation** involves using a court-appointed attorney to review a case before it goes to trial. The attorney reviews the merits of the case and encourages the parties to attempt resolution. If there is no resolution, the attorney informs the disputants about how to proceed with litigation and gives an opinion on a likely trial outcome.
- **Peer Mediation** refers to a process in which young people act as mediators to help resolve disputes among their peers. The student mediators are trained by a teacher or other adult.

BENEFITS OF ADR

While ADR cannot guarantee specific results, there are trends that are characteristic of ADR. ADR processes generally produce or promote:

- **Economical Decisions**
- **Rapid Settlements**
- **Mutually Satisfactory Outcomes**
- **High Rate of Compliance**
- **Comprehensive and Customized Agreements**
- **Greater Degree of Control and Predictability of Outcome**
- **Preservation of an Ongoing Relationship or Amicable Termination of a Relationship**
- **Workable and Implementable Decisions**
- **Agreements that are Better than Simple Compromises or Win/Lose Outcomes**
- **Decisions that Hold Up Over Time**

CONFLICTS APPROPRIATE FOR ADR

ADR can be used to help resolve almost any type of dispute. Family mediators, for example, help people with divorce, custody issues, parent-child or sibling conflicts, elder care issues, family business concerns, adoption, premarital agreements, neighbor disputes, etc. Other types of conflicts that respond well to alternative dispute resolution include workplace disputes, labor/management issues, environmental and public policy issues, international conflicts, and others.

ONLINE RESOURCES

- The ABA Section of Dispute Resolution
<http://www.abanet.org/dispute>
- Association for Conflict Resolution
<http://www.acresolution.org>
- American Arbitration Association
<http://www.adr.org>
- Center for Analysis of ADR
<http://www.caadrs.org>
- CPR Institute for Dispute Resolution
<http://www.cpradr.org>
- The Conflict Resolution Information Source
<http://www.crinfor.org>
- Northern Virginia Mediation Service
<http://www.gmu.edu/departments/nvms>
- U.S. Dept. of Justice Office of Dispute Resolution
<http://www.usdoj.gov/odr>

ADR @ WORK:

Dennis L. Sharp, Esq.



Dennis L. Sharp, Esq., is a mediator, arbitrator, facilitator, and consultant for Sharp Resolutions in Washington, D.C. His dispute resolution practice focuses on the mediation and arbitration of general civil cases including such subject areas as commercial / business,

employment, real estate, construction and personal injury. He is a former Regional Vice President of the American Arbitration Association's San Diego and Orange County Regional office and a JAMS' neutral, as well as serving as an arbitration consultant for JAMS. Mr. Sharp has served as an expert witness on complex commercial arbitration matters, including conflicts of interest litigation. He also serves as a large group facilitator for companies, associations, and government agencies. He is a former California Dispute Resolution Council president and board member of international SPIDR (Society for Professionals in Dispute Resolution) and the Association of Conflict Resolution. He has also participated extensively in all aspects of the development of mediation confidentiality laws, policy and practice. Additionally, Mr. Sharp teaches and trains extensively in the ADR arena, including as an adjunct law professor at American University's Washington College of Law. Before coming to American University, Mr. Sharp was a professor of law for sixteen years at California Western School of Law where he taught courses in Negotiation, Mediation and Arbitration law.

ADR COURSES @ WCL

LAW-614 Alternative Dispute Resolution (3 hrs.) Examines various dispute resolution techniques, including negotiation, mediation, arbitration, minitrials, and negotiated rule making, as alternatives or supplements to court litigation and administrative agency adjudication. Tactical and ethical issues as well as emerging legal and public policy issues (e.g., use of mandatory arbitration clauses) will be covered, and student participatory role-plays will be used extensively to give the course a practical dimension. *Aldridge, Datz, Lubbers, B. Murphy.*

LAW-651 Lawyer Bargaining (3 hrs.) Studies the lawyer's role in the resolution of disputes through nonadjudicatory processes such as negotiation, mediation, arbitration, and minitrial. The course focuses on theories underlying each form of dispute resolution and the lawyering skills necessary to implement effectively those processes. The lawyer's role and required skills will be explored from the dual perspective of the lawyer as advocate and as impartial dispute resolver. *Milstein, N. Stein.*

LAW-733 Seminar: International Environmental Dispute Resolution (2 hrs.) Surveys the various tribunals to which environmental disputes involving nations or nationals of different states can be presented for resolution. The course considers the ICJ, the European Court of Justice, and the U.S. federal court system, as well as the roles of the General Agreement on Tariffs and Trade, various human rights courts, and the International Labor Organization, along with the potential of alternative dispute resolution and roles of individuals and nongovernmental organizations. *Zaelke, Clark, Hunter*

LAW-789 Seminar: International Commercial Arbitration (3 hrs.) Analysis of the practical legal problems that arise in the arbitration of international commercial disputes. Drafting of arbitration agreements, selection of arbitral procedures and forums, and enforcement of arbitral awards as they arise under both domestic law (in U.S. and other major arbitration forums) and international law. *Sampliner.*

ADR COURSES @ OTHER SCHOOLS

One of the goals of the ADR Society is to increase the number of ADR classes available to students. If WCL does not offer a class you would like to take, you are allowed to take classes at other area law schools and receive credit for them at WCL.

George Washington University

Course	Credits
Environmental Negotiations	2
International Arbitration	2
International Negotiations	2
Consumer Mediation Clinic	2-3
Mediation	2
Alternative Dispute Resolution	2-3
Negotiations	2-3
Mediation and Alternative Dispute Resolution	3
Negotiation and Conflict Management Systems Design	3
International Dispute Resolution	3

Georgetown University:

Course	Credits
Alternative Dispute Resolution Seminar	3/2
Alternative Dispute Resolution: Theory- Practice- and Policy	3
International Negotiations Seminar	2
Labor Arbitration Seminar	3
Mediation Seminar	3
Multi-Party Dispute Resolution Seminar: Consensus Building and other Negotiation Processes	3
Negotiation and Mediation in Public Interest Settings	3
Negotiations and Mediation Seminar	3
Negotiations Seminar	3
Dispute Resolution in Federal Systems of Government	3
Dispute Resolution Under International Trade and Investment Agreements	2
International Commercial Arbitration	2
International Negotiations Seminar	2
Investor-State Dispute Settlement	2

INT'L ARBITRATION PROGRAM AT WCL



International arbitration is today a flourishing legal practice area posing diverse and unique challenges to legal practitioners all over the world and has become the recognized dispute resolution

method for the international business and economic fields. The widespread use of arbitration in bilateral investment treaties accentuates its role in the resolution of semi-public international disputes involving private and state parties.

Arbitral decisions often have a macroeconomic impact with wide-ranging national and international repercussions, and are undoubtedly influencing the fashioning of the law.

Specifically, arbitration impacts inter alia, trade, transfrontier capital, knowledge, goods, natural resources and technological flows, and international relations at large. This phenomenon, in continuous evolution, is necessarily and incessantly raising novel legal questions that need comprehensive consideration in order to address their practical and theoretical implications.

The International Arbitration Program was developed at American University Washington College of Law with the purpose of analyzing the practical and theoretical issues surrounding the development of international commercial arbitration and contributing to the task of better understanding this phenomenon. The Program prepares the legal profession to face these new challenges through the following initiatives:

- By offering courses, seminars for practitioners, and workshops taught by leading practitioners in the field, aimed at providing insights of the practice of international arbitration and the handling of arbitration cases;
- Through courses for credit offered annually as part of the International Arbitration Summer Session, whose faculty will focus each year on

different theoretical and practical aspects of international arbitration;

- By organizing workshops and colloquia with the participation of leading practitioners and international law experts for the purpose of assessing the formation of international procedural and substantive law and rules through arbitral determinations or awards. These meetings will permit in-depth discussions of such issues as; the rules governing the merits of arbitral disputes, the ethics and morality to be observed in the handling of arbitration cases, the recognition and exercise of human rights in arbitration, and the evolution and fashioning of international, comparative and national law.

Created under the direction of **Dr. Horacio A. Grigera Naón**, former Secretary General of the International Court of Arbitration of the International Chamber of Commerce, the Program builds on American University Washington College of Law's commitment to building a world community by identifying transnational legal issues and addressing these issues through the expertise of our accomplished full and part-time faculty, alumni and practitioners.

Arbitration Faculty Spotlight



Dr. Horacio Grigera Naón, is Director of the International Arbitration Program at American University Washington College of Law, serves as an independent international arbitrator and consultant on business and international law matters, and is former Secretary General of the

International Court of Arbitration of the International Chamber of Commerce. He has been a practitioner in the field of international commercial arbitration and international business law for over twenty-five years.

GLOBAL ADR NEWS & INITIATIVES

*Excerpted with permission from:
Mediation News and Updates, July edition by Keith Seat*

U.K. Courts Imposing Costs for Refusals to Mediate *Legal Week Global Edition, June 23, 2005*

The trend toward mediation of commercial cases in the United Kingdom is being propelled by the parties' growing experience and understanding of the benefits of mediation on the one hand and the attitude of the courts in encouraging mediation on the other. Appellate decisions in the U.K. have been increasing the stakes by imposing costs on parties who refuse to mediate after the court recommends mediation, with a court of appeals recently stating that the legal profession "can no longer with impunity shrug aside reasonable requests to mediate."

Australian Executive Dispute Highlights Antitrust Issues *News.com.au, June 25, 2005*

An Australian court-ordered mediation is scheduled for early July between Amcor and the former head of its Australian corrugated cardboard division who was fired for taking confidential information and recruiting other executives to establish a rival consulting business. But what might otherwise be a routine mediation over the executive's \$1.9 million damage claims is gaining more attention due to the executive's assertions that he was forced to engage in illegal price-fixing which he claims was pervasive at Amcor; the company acknowledged that it might have breached antitrust laws only in its cardboard division. The parties and the courts are now trying to determine the extent to which confidential documents seized from the executives may be retained by the company and used in the pending mediation and any litigation that remains after the mediation.

First Court-Annexed Mediation Center Opens in India

The Hindu, June 10, 2005; June 27, 2005

The first court-annexed mediation center in India opened in the State of Tamil Nadu on April 9. Housed at the Madras High Court, the Tamil Nadu Mediation and Conciliation Centre will mediate a broad range of cases, including commercial, property, partnership and family disputes. Judges may refer cases to mediation, which are typically to be conducted within 60 days, by mediators who will be paid a "nominal sum" set by the court. The Centre organized a training program in which two U.S.-based mediation trainers trained 40 former judges and lawyers as mediators. The Chief Justice expects the program to be extended to other types of courts soon and indicated that eventually every court in the state will have a mediation center.

JAMS and CEDR Form Transatlantic Alliance *Lloyd's List International, June 8, 2005*

The Centre for Effective Dispute Resolution (CEDR), Europe's biggest provider of mediation services (with 700 cases last year), and JAMS in the U.S. (with 7,000 mediations) have formed an international alliance. In addition to referring work to each other, both firms have expressed interest in further developing co-mediation and in pursuing insurance disputes together.

Indian Chamber of Commerce Developing ADR Ties in U.S. *Telegraphindia.com, June 14, 2005*

The Indian Chamber of Commerce (ICC) is establishing connections with the (U.S.) Council of State Governments and the University of Kentucky in order to expand beyond arbitration and begin offering mediation services for international commercial disputes involving India. A 12-person team from the ICC will visit the United States in July for training and meetings with experts on mediation, reconciliation and arbitration at Harvard Law School, the American Arbitration Association and Northern Virginia Mediation Service.

ARTICLES

Below are two short articles submitted by a practitioner in the ADR field and a student on the Society Board.

Lawyering, Dispute Resolution, Problem Solving, and Creativity for the 21st Century

by: Carrie Menkel-Meadow,
*Professor of Law at Georgetown University, and
 Chair of the CPR-Georgetown Commission
 on Ethics and Standards in ADR*

(Taken with permission from 19 *Alternatives to High Cost Litig.* 52, 2001)

From the beginning, a number of us had a broader vision of the purposes and goals that might be achieved by reorienting our approaches to dispute resolution and business and transactional planning as advised or conducted by lawyers. Instead of merely maximizing individual gain from the credo of zealous advocacy, lawyers might find professional fulfillment by solving problems, developing creative solutions and seeking to accomplish joint gain whenever possible.

Some of us focused on new hybrid processes designed to explore parties' needs and interests rather than legal positions. Others were interested in looking at how innovative substantive outcomes to particular legal issues might be developed out of these processes.

So from the beginning, the ADR movement has consisted of several different important strands, seeking quantitative (reduced cost) and qualitative (better and more value-added) results through both procedural and substantive innovations to the legal system.

As ADR processes have become more accepted, encouraging a culture of problem solving, joint gain and value creation, we have now turned more attention to how those processes might be used to foster creative solutions to human and legal problems. There are several disciplinary approaches that inform conventional ADR thinking and suggest new forms of legal problem solving, decision making and judgment that might enhance the quality, as well as the legitimacy, of outcomes in legal disputes and transactions.

One body of work has rigorously explored the barriers to achieving good negotiated solutions. Cognitive and social psychologists have productively explored how adversarial thinking--such as overcommitment and overconfidence; primacy,

availability and recency in information processing; reactive devaluation and labeling; differences in loss and risk aversions; and conflicting interests between agents (lawyers) and principals (clients)--can prevent parties to a dispute or transaction from achieving optimal results. Recent education efforts, in law schools and continuing legal education programs for lawyers and judges, are focused on making negotiators and dispute resolvers aware of these phenomena so they may be corrected for, as appropriate.

Others are exploring both the rational and the affective (emotional or non-rational) aspects of decision making and problem solving to explore how decision making may be made more effective from both rationalistic and naturalistic (as they occur in the world) perspectives. The disciplines of decision-making and judgment are now regarded as learnable and teachable for business and law students, perhaps, as well, for those who are already businesspeople and lawyers.

In the new century, as we reexamine what lawyers need to know, the focus on alternative dispute resolution methods has led us to recognize that lawyers traditionally trained as advocates and adversaries may be cutting themselves off from other ways of thinking and assisting in solving human problems. Advocacy is an important element of lawyering--and remains important *53 in many forms of ADR--but there are other ways of thinking as well, which could and should be married to lawyers' sharp analytical tools.

Recently, some legal educators have been exploring how lawyers can be taught to think creatively, about substance as well as process, as we add creative and synthetic teaching to the normal curriculum of analytic and critical "thinking like a lawyer." With Howard Gardner's important work on multiple intelligences (*Intelligence Reframed: Multiple Intelligences for the 21st Century* (1999)), we know that lawyers as problem solvers, transaction facilitators and dispute resolvers must draw on more than critical, rational analysis. Imaginative, breakthrough thinking can be enhanced in lawyers, judges and law students as we explore both historic examples of legal creativity--

such as new causes of action, new transaction clauses and new entities--and teach ways of developing new ways of thinking.

As lawyers develop new concepts, find the words to construct new theories and legal entities, and learn to take account of all of the needs or interests represented in a situation, they need to combine analysis with synthesis, and creative process with a great deal of substantive knowledge. Really listening to clients and others involved in legal situations permits lawyers to see the opportunities in challenges where it may look like the parties are in conflict, but where, after closer examination, their interests may allow trades, contingent agreements or whole new solutions to emerge. In exciting 21st century developments, we are learning that we can actually teach lawyers and judges new tricks, both new ways of thinking (process) and new solutions (substance) to some old problems.

Sophisticated work in dispute resolution has taught many lawyers that compromise may not be necessary: The word implies that parties must give up something they want. Rather, parties to a dispute or transaction should look for ways they can both meet their needs and interests and expand the pie (i.e., create value) before they may have to slice it.

By involving others in the problem--those affected by a resolution, taxing authorities, capital providers, investors, insurers--more solutions, or at least financing for solutions, may emerge. By focusing on the why, where, when and who of a legal dispute or transaction, creative lawyers can expand the parties, the res of the dispute and the possible sources of solutions to the problem at hand.

In addition to learning how to think more creatively as legal problem solvers, lawyers of the 21st century have learned, from their dispute resolution work, that most modern-day problems are no longer simply between two parties. From Justice Louis Brandeis, we have now learned that the good lawyer is a "lawyer for the situation," considering what is best for his client not only in the short run, but over the long run, anticipating continued relations among all parties.

Thus, the ability to effectively manage meetings, to develop consensus processes, and to forge multiparty agreements have increasingly become necessary and now studied skills of the *54 modern lawyer. Negotiation theory and practice has moved from an

exclusive focus on dyadic processes, to the more complex aspects of coalition bargaining, contingent and monitored agreements, and the relation of constituencies to representatives in issues with large numbers of stakeholders.

In the 21st century, lawyers will need to be effective representatives and problem solvers in a wider variety of settings, not just in courts and board rooms, but at town hall meetings, negotiated rulemaking processes, budgetary negotiations, international trade and peace negotiations, start-up venture capital planning, mergers, acquisitions, and public-private partnerships, to name a few. Work in these different settings will require the old skills of argument, advocacy and analytic thinking, but lawyers will also have to be effective problem-solving negotiators and neutrals (as meeting managers, consensus builders, mediators, arbitrators and peace makers) who can look for good, substantive outcomes that enhance the value of interactions for all parties to a dispute or transaction. Our very future and survival depend on lawyers learning how to be multi-taskers in ways that draw on creative, optimistic and empowering activities, rather than the more conventional argumentative and critical approaches so common in traditional lawyer thinking.

The ideas and actions that spawned the first 30 years of the ADR movement and the 20 years of James F. Henry's leadership of CPR, are still with us--productive use of legal resources to solve human problems through less contentious, more participatory forms of dispute resolution and transaction planning. In the decades that follow we have the opportunity to build on that work and explore how good dispute resolution skills and processes can take the lawyer's role as process architect to new levels of innovation in how we get things done, from both the new processes we will design and the more creative solutions we will develop, with more heads and hearts at the table.

The Debate over National Mediator Certification

By: Debra Berman
*Founder & President,
WCL ADR Society*

The mediation profession has grown dramatically over the last several decades. The growing use of alternative dispute resolution has led some to agree that standards for mediator competence are needed to protect consumers and the integrity of the mediation profession. The number of individuals who call themselves mediators is growing substantially every year and the number of programs that provide mediation services is estimated by the American Bar Association (ABA) Dispute Resolution Task Force to be in the thousands.¹ As Judy Filner states, "Ways to qualify mediators are being developed in literally thousands of different programs."² These range from professional organizations creating membership categories to judges, court administrators, and agencies establishing rosters or other means of "vouching for" their mediators.³

Consumers of mediation services and mediators see some value in establishing standards for mediators because most other professions have governing bodies that grant certifications. Consumers typically look at certification as a signal that the professional has achieved competence according to recognized standards. If mediation is a profession, why isn't there any similar certification for mediators? How does a mediation consumer know how to choose a qualified mediator? Practitioners have strong opinions about the subject, and there is little organizational consensus about what should be done about it.⁴ However, most recognize that there is a need for some type of standard mediator certification program. In addition, before any proposal is established, it first must be determined what qualities are essential in a mediator and which methods for achieving these qualities are appropriate. Further, various state programs should be examined to determine what has proven successful.

Defining a Quality Mediator

Defining mediation is at the heart of developing a mediator certification program. Until there is a consensus on which mediator attributes should be included, it is difficult to establish a certification

program for assessing those attributes. The mediation community is still working to define what constitutes a qualified mediator and what it takes to become one. How does one certify or validate who is or is not a good mediator?² Many practitioners hoped that the Uniform Mediation Act, which was recommended for use in all states in 2001 by the National Conference of Commissioners on Uniform State Laws, would provide a concise list of necessary mediator qualities.⁵ However, the Act contains no such list. Instead, the drafters of the Act determined that individual states or the parties involved in the mediation are best able to decide what qualifications and training the mediator should possess.⁶

The topic over mediator certification has also been controversial for years because the skills a mediator needs varies from one context to another. Therefore, definitions of mediator quality will vary depending on a particular program's needs. In addition, mediators come from a variety of backgrounds, and many mediators have learned skills in forums other than mediation trainings. The necessary attributes of a quality mediator are often described in subjective terms that may not lend themselves to specific certification programs.⁷ For example, some practitioners have suggested that quality mediators must listen actively, identify issues, frame issues so that mediation parties understand them, use clear and neutral language, deal with complex factual scenarios, show respect for parties, earn the trust of parties, and separate their own values from the issues in the mediation.⁸ Practitioners have offered additional characteristics including: integrity, honesty, sensitivity, energy, positive spirit, and commitment to procedural fairness.⁹

Efforts by Organizations and States

Association for Conflict Resolution (ACR)

In 2003, the ABA and the ACR joined forces to study the feasibility of a national mediator certification program and at that time, ACR proposed a voluntary mediator certification program.¹⁰ To obtain ACR's proposed certification, applicants submit a portfolio of experience, training, and education. ACR evaluates the portfolio and requires that the applicant take a written test. There is no provision in the proposed program for observing an actual demonstration of

mediation skills. A successful applicant must have 100 hours of training, 80 of which must be training in mediation skills.¹¹ Applicants must also demonstrate that they have 100 total hours of mediation or co-mediation within the last five years.¹² A candidate with an acceptable portfolio would then take a written examination to test mediation principles, approaches, and techniques.¹³ The Task Force has identified the basic subject areas that would be included in the written exam. It recommends testing eleven knowledge areas including: communication, conflict theory, content management and resources, cultural diversity, ethics, history of mediation, models, strategies and styles, negotiation, role of third parties, systems, and group dynamics.¹⁴

Maryland

The Maryland Mediation and Conflict Resolution Office (MACRO), an office within the state's judiciary, recently sponsored a three-year project leading to a "quality assistance" system for mediators in Maryland.¹⁵ To help develop this plan, various Maryland groups (MACRO; the Maryland Association of Community Mediation Centers; Maryland Council for Dispute Resolution; and the Maryland Chapter of ACR) created a representative Oversight Committee that worked with stakeholders around the state.¹⁶ The Committee's paper outlined the Maryland Program for Mediator Excellence (MPME), which would be a voluntary strategy to promote quality mediators around the state.¹⁷ Mediators would be able to join the program with several basic prerequisites, but would then be required to choose from several options, such as mentorship, observation, and case discussions.¹⁸

San Diego's Performance Based Evaluation Program

In 1992, San Diego's Mediation Center created a performance-based mediation credentialing program that offers on-going training seminars, co-mediations, and post-mediation feedback.¹⁹ One element of the program involves a test instrument used during a simulated mediation, which is designed to identify and rate basic behaviors necessary for mediator competency. The test instrument identifies approaches, techniques, and skills that are appropriate and useful in the mediation process, but not unique to any one mediation style.²⁰ The instrument measures eighteen behaviors that experienced mediators agree

should be present in almost all mediations. These behaviors are: personal interaction, tone of proceedings, process flow, opening statement, facilitation of position statements, coordination of the exchange, management of the negotiation, generation of options, closure, ethical behavior, empowerment of the parties, communication, creation of empathy, clarification, organization of issues, active listening, neutral language, and strategic development.²¹ The behaviors identified are observable and the evaluator notes whether the mediator engages in them or not.

A minimum score must be achieved and candidates are given two opportunities to be re-evaluated. After the evaluation, candidates receive the evaluators' comments, including areas for further work. Members concluded that, "with two experienced mediator observers providing an assessment of each behavior along a scale, it is possible to be fair about the admittedly subjective criteria."²² To date, the program's use of the performance-based testing to evaluate mediators has been successful.²³

Recommendations

While certification could provide benefits to the field by protecting the public, promoting mediation, and reducing court congestion, providing certification through point systems and written testing alone is problematic.²⁴ In 1989, the Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications was formed to investigate and report on basic principles that could be used for establishing qualifications for mediators, arbitrators and other dispute resolution professionals.²⁵ In the report, *Qualifying Neutrals: The Basic Principles*, the Commission set forth several recommendations.²⁶ The report recommends that there be no standard certification of mediators, as there is for dentists, lawyers, etc. This is because, "the knowledge and techniques required to practice competently may vary by program."²⁷

Therefore, certification programs should rely on a combination of criteria such as amount of training, mentorships, amount of experience, and/or academic degrees. The report indicated that the combination of a variety of criteria compensates for the uncertainty connected with any one criterion's ability to predict competence.²⁸ Few individuals are ready to mediate competently following a basic mediation training.

Mediator competency comes from experience, which includes mediating real disputes. Therefore, in an effort to preserve diversity within the mediation field and to avoid precluding qualified mediators from obtaining certification, a certification effort should add a “holistic review” to the certification process for mediator applicants.²⁹ One way of ensuring that quality mediators are capable of obtaining certification would be to maintain existing hour or point requirements, but to allow an additional holistic review of an applicant's portfolio.³⁰ Such a program should incorporate degrees/education, training requirements, mentoring or supervision, continuing education or training, amount of experience, performance tests or live or taped demonstrations. This type of holistic review, where a reviewing committee could deviate from the rigid standards, might be more successful in protecting a diverse mediator pool and ensuring that mediators who have considerable training but lack experience, may nevertheless receive certification.³¹

Just as passing a bar examination does not mean that a new attorney is competent and qualified to practice law, certification may not ensure competent and ethical mediators.³² However, if there is to be a national mediator certification, it is important that those who know the field come together to identify appropriate standards before it is done by people who do not necessarily know mediation. It seems almost certain that certification of the mediation profession will one day be standardized. However, is a national certification really necessary when people have been mediating for decades without certification? The field has unquestionably flourished without it thus far.

1. ABA Section of Dispute Resolution Task Force on Credentialing, “Discussion Draft: Report on Mediator Credentialing and Quality Assurance.” Pg. 4, October, 2002.

2. Charles Pou, *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*. 2004 Disp. Resol. 303, 313 (2005).

3. Id.

4. Judith Filner, “An Introduction to Mediator Credentialing,” www.keybridge.org/med_info/credentialing

5. Kylie Polson, Ensuring Competent and Effective Mediators in Illinois: Uniform Qualifications and Consumer Education. 29 S. Ill. U. L. J. 129, 133 (2005).

6. Id.

7. Sarah Cole, *Mediator Certification: Has the Time Come?* 11 No. 3 Disp. Resol. Mag. 7 (2005)

8. Id.

9. Id.

10. Sarah Cole, *Mediator Certification: Has the Time Come?* 11 No. 3 Disp. Resol. Mag. 7, 9 (2005).

11. Id.

12. Id.

13. James McGuire, *Joint Certification*. 10 No. 4 Disp. Resol. Mag. 22, 23 (2004).

14. ACR Mediator Certification Task Force: Report and Recommendations

15. Charles Pou, *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*. 2004 Disp. Resol. 303, 317 (2005).

16. Id.

17. Id.

18. Id.

19. Michael Jenkins, *Performance Based Evaluation of Mediators: The San Diego Mediation Center Experience*. 30 U.S.F.L. Rev. 647, 657-658(1996).

20. Id. at 658

21. Id. at 659

22. Id. at 658

23. Id.

24. Charles Pou, *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*. 2004 Disp. Resol. 303, 310 (2005).

25. Id.

26. Suzanne Ghais, *The Measure of a Mediator: On the Road to Defining Mediator Qualifications and Standards*. BBB Solutions, Volume 5, Issue 4, page 15.

27. Id. at 16.

28. Id. at 19.

29. Sarah Cole, *Mediator Certification: Has the Time Come?* 11 No. 3 Disp. Resol. Mag. 7, 9 (2005).

30. Id.

31. Id. at 9-10.

32. Paul Garrity, *Certification: What's the Point?* 40-APR B. B.J. 8 (1996).

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