2004

Assuring Excellence, or Merely Reassuring - Policy and Practice in Promoting Mediator Quality

Charles Pou Jr.

JOURNAL OF
DISPUTE RESOLUTION

ARTICLES

Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality

Charles Pou, Jr.[*]

I. OVERVIEW: CAN WE ASSURE QUALITY?

Mediation practice in the United States has grown substantially over the last two decades, as has the number of people offering to serve as mediators. This growth has led some to argue that competency standards are needed to protect consumers and promote the integrity of mediation processes. While professionals and researchers have tried over the past fifteen years or so to define "what media-

---

* Charles Pou is a dispute resolution consultant and public policy mediator in Washington, D.C. A graduate of Rice University and Harvard Law School, he has acted as a design consultant in establishing numerous new conflict resolution programs and rosters. From 1985 to 1995, he directed the Dispute Resolution Program at the Administrative Conference of the United States and was responsible for drafting and implementing the federal Administrative Dispute Resolution Act. Portions of this article appeared previously as a consultant's report by the author to the members of the Maryland Mediator Quality Assurance Committee and Maryland's Mediation and Conflict Resolution Office (MACRO). Special thanks to MACRO for its exceptional support and its permission to use those materials. Thanks also to Christine Carlson and the Policy Consensus Initiative for allowing use of written work previously prepared for the PCI web site's quality assurance pages. Appreciation as well to Michele Sullivan, formerly of the University of Maryland School of Law, for her substantial research assistance with Section VII.

tors do" and better understand "how to do it well," alternative dispute resolution (ADR) programs, roster administrators, and parties seeking neutrals have had to make day-to-day choices.

A. *Background: The Relationship Between Credentialing and Quality*

Typically, most professions think about quality assurance (QA) in terms of credentialing, which tends to involve licensing, certification, or "substitute" credentials (like degrees or professional background). Interviews and program reviews suggest that, for better or worse, activities addressing mediation quality have not moved as far toward credentialing as most professions. Moreover, while mediation programs and organizations have engaged in a variety of activities to promote quality, discussion and writing have tended to focus rather narrowly on certification standards.

Credentialing—especially "certification"—has proven to be controversial in the dispute resolution field. This was inevitable, since discussions of quality and standards address mediators' goals, ideals, pocketbooks, and sense of "who we are." Perspectives vary dramatically; for instance:

- Some raise concerns that credentialing as currently practiced seldom assures skillful mediation, or even advances quality practice very much. In their view, it has created a situation in which consumers of mediation services value, and seek, the wrong skills.

- A range of observers see credentialing as vital to protecting consumers and promoting quality within the field. Many express fear that the field's failure to develop performance-based, or other methods of credentialing mediators, will lead to arbitrary, improvident systems of qualification imposed by the courts or other authorities.

- Numerous knowledgeable people still prefer *laissez faire* approaches instead of credentialing. They contend that credentialing usually does little to "assure" real quality, and they balk at the idea that the field yet knows enough to measure or predict quality performance, or they fear that imposing standards will harm innovation and creativity.[1]

- A few even deride certification—at least as currently practiced—as "consumer fraud"; they maintain that it permits many incompetent people with a certificate to trumpet their at-best marginal "qualifications" to unsuspecting consumers.[2]

---

1. As Maryland mediator Stanley Rodbell has pointed out, "If Rembrandt had set the standard, Picasso would not have met it." Remarks at Future Search Conference, Building a Resolutionary Future: Mediator Excellence in Maryland (July 2003) (transcript *available at* http://www.futuresearch.net/network/activities/archives/cfm?nid=46).

2. Chris Honeyman has advanced this contention in somewhat more elegant terms:

But while other fields are quite firm in their criteria—and in defining qualifications to practice— we in mediation actively market courses in our field to increasing numbers of essentially randomly-selected people. Using the absurdly arbitrary baseline of 40 hours of training, we hand out certificates at the end of that training time. These attractive certificates, nicely framed, promptly show up on office walls.

Christopher Honeyman, *On the Importance of Criteria for Mediator Performance*, *available at* http://www.mediate.com/articles/honeyman.cfm (originally published in the Jan. 1999 issue of *Consensus*) [hereinafter Honeyman, *Criteria for Mediator Performance*].

- Some mediators who have had market success deride credentialing as a means by which "have nots" believe they can gain unmerited credibility with consumers who, until now, have not seen fit to employ their services.
- Conversely, many community mediators and other "lay mediators" (to draw on an unfortunate term coined by an attorney) fear that credentialing may become a wedge by which the "attorney-mediator" relegates them to second-class status or even monopolizes access to many desirable cases.

Whatever the merits of these viewpoints, recent developments indicate that credentialing[3] mediators is a growth industry.[4] Numerous quality assurance, or related roster development, efforts in scores of jurisdictions have been completed or are underway.[5]

B. This Article

Drawing on program and literature reviews, and interviews with experienced administrators, practitioners, and academics, this article tries to map the ways in which the dispute resolution field has sought to define and assure mediator competence.[6] This article suggests, among other things, that the historical focus on credentialing efforts has been largely misguided—putting excessive attention on certification measures and "evidence of competence" (such as law degrees or substantive knowledge) that have less to do with real mediation ability than with ease of administration, and courts' and other programs' desire to "reassure" clients.

Describing several of the more innovative or high-profile QA efforts over the past decade, this article categorizes mediator quality assurance systems by employing a two-dimensional grid: one dimension reflects the nature and height of "hurdles" a mediator must meet at the outset to engage in practice, and the other corresponds to the amount of "maintenance," or continuing educational activities and other support, expected by program administrators.[7] Based on this grid, the

---

3. In the dispute resolution field, "credentialing" is a nebulous term that means different things to different people. Also, it appears the term "credentialing" may be taking on a somewhat broadened definition. Increasingly, it is employed to include actions beyond setting a standard, or "hurdle," for applicants wishing to obtain listing or approval. These additional actions may include mentoring, targeted training, continuing education, user feedback, and grievance processes. Thus, it is not always clear just where "credentialing" stops and other forms of quality assurance start.

4. James McGuire, *Joint Certification: An Idea Whose Time Has Come*, 10 DISP. RESOL. MAG. 22 (2004). On the other hand, some observers, including mediator performance testing pioneer Chris Honeyman, are beginning to ask whether mediator selection decisions involve not only "skill and substantive knowledge, but . . . culture, appropriateness, and what we might call 'saleability.'" Honeyman et al., *Skill Is Not Enough: Seeking Connectedness and Authority in Mediation*, 20 NEGOTIATION J. 489 (2004). These do not always play out in ways consistent with our expectations as to the value of "quality" or the usual image of a "profession." *Id.*

5. *See infra* Part IV.

6. Portions of this article draw upon approximately ninety interviews, nearly all conducted under promise of confidentiality. Rather than cite to numerous anonymous statements, the article seeks to acknowledge interview subjects' invaluable contributions by listing them in the final footnote, without attributing statements to individuals.

7. *See infra* Part V-VI.

article describes and assesses five prototypical approaches to mediator QA—High hurdle/Low maintenance, High hurdle/High maintenance, Low hurdle/Low maintenance, Low hurdle/High maintenance, and No hurdle/No maintenance. It offers examples of each, discusses potential implications of employing any given one, and offers policy and implementation advice.

Based on this inquiry, the article suggests that whatever the psychological or other benefits of approaches that certify some as "competent" mediators and exclude others, the risks inherent in such methods—including exclusivity, overvaluation of marginal skills, and reduced innovation, diversity, and collegiality—can well outweigh the advantages. It advocates a system that—either instead of or in addition to—provides encouragement, incentives, and a support structure that allows mediators (using performance-based approaches and user feedback, among other things) to target developmental needs, work collaboratively on continually improving process skills, give systematic attention to "reflective practice," and deal with shortcomings. Such an approach, the piece concludes, will do far more than an approach placing primary emphasis on credentialing to advance the field's overall competence and enhance its credibility over the long haul.

II. DEFINING MEDIATOR COMPETENCE

Nearly all agree that mediators' skills and other attributes can be crucial to a quality outcome when they seek to help parties resolve their differences. Mediators are asked to play complicated, diverse roles that may involve—depending on the program, the parties, or the specific case—efforts to "transform," to "facilitate," to "evaluate," or to perform a combination of these (and perhaps other) activities. In some controversies, agency or company employees with some training and mentoring may serve as mediators. In other disputes, parties may demand a highly skilled professional with years of experience or even a subject matter expert.[8]

The nature and diversity of roles that mediators are asked to play present complications. Many of the characteristics that make mediation useful—its privacy, flexibility, and an atmosphere that encourages openness—complicate skills assessment and can give rise to abuse by mediocre or unethical neutrals, especially where vulnerable parties are involved. Moreover, strong differences of opinion exist within the dispute resolution community itself as to what constitutes quality results, how to define quality practice by neutrals, and how best to assess whether practitioners have the required skills.

Competence is the term often used to describe the ability to use dispute resolution skills and knowledge effectively to assist parties in prevention, management or resolution of their disputes in a particular setting or context. Research is beginning to reveal the kinds of knowledge, skills, abilities, and other attributes

---

8. Indeed, some contend that initially defining "mediation" is critical to discussing quality intelligently, and that efforts to define and measure quality mediation must recognize and address these variations, especially in light of the extraordinary diversity of disputes in which "mediative" activity occurs. *See* Nancy A. Welsh, *All in the Family: Darwin and the Evolution of Mediation*, 7 DISP. RESOL. MAG. 20 (2001) (describing the extraordinary diversity of mediator practices in varied settings and programs by analyzing similarities and differences between practices in five mediation contexts: community, special education, dependency, labor-management, and civil (non-family)).

(KSAOs) that are important to effective performance as a neutral, and how those aptitudes are best acquired.[9] Studies suggest that these qualities are derived from a mix of sources: innate personal characteristics, education and training, and experience.[10]

While there is no single, clear consensus on the KSAOs needed to perform as a mediator, one of the most generally accepted descriptions of a mediator's tasks comes from the Test Design Project (TDP),[11] an independent group directed by Chris Honeyman and supported by the Hewlett Foundation. The TDP summarizes the descriptions of a mediator's tasks as follows:

- Gathering background information
- Facilitating communication
- Communicating information to others
- Analyzing information
- Facilitating agreement
- Managing cases
- [Helping document any agreement by the parties][12]

The difficulty comes in determining the best way to assess a neutral's ability to perform these tasks competently.

The TDP sought, with some success, to provide ADR programs with reliable and economical tools for selecting mediators.[13] The result of this project—

---

9. *See* Society of Professionals in Dispute Resolution Commission on Qualifications (SPIDR Commission), Qualifying Neutrals: The Basic Principles (1989), *available at* https://bridge.acrnet. org/?t=store.php [hereinafter SPIDR Commission, *Qualifying*].

10. For further insightful readings on issues in seeking to ensure quality mediation see Sarah R. Cole et al., *Regulating for Quality, Fairness, Effectiveness, and Access: Mediator Qualifications, Certification, Liability and Immunity, Procedural Requirements and Other Measures, in* MEDIATION: LAW, POLICY, PRACTICE §§ 11:2-11:5 (2d ed. Supp. 2003); W. Lee Dobbins, *The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL'Y 95 (1995) (providing an overview of some approaches to quality and their potential consequences); National Alternative Dispute Resolution Advisory Council of Australia, The Development of Standards for ADR (Mar. 2000), *available at* http://www.nadrac. gov.au/agd/www/disputeresolutionhome.nsf/page/publications. *See also* Margaret Shaw, *Selection, Training, and Qualification of Neutrals, in* NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 155, 157 (Susan Keilitz ed., 1994) (giving a valuable, if slightly dated, exploration of much of this research and summary of lessons learned on critical skills for effective neutrals and how they are best acquired); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. Rev. 723 (1996) (providing a thoughtful critique of specific legislative proposals in California, advocating credentialing and training methods that accept and embrace the diverse approaches to mediation now in use) [hereinafter Waldman, *Preserving Diversity*]; Glenn Sigurdsen, Quality of Practice and Oversight, ACR Environment/Public Policy Section (Sept. 2002)(giving a helpful look at a number of practical questions).

11. The Test Design Project (TDP) (1990-95) brought together a group of internationally prominent scholars in the dispute resolution field. *See* Convenor Conflict Resolution web site, *available at* http:// www.convenor.com/madison/tdesign.htm (describing the TDP as "a formative effort to design better selection, training and evaluation tools for the emerging mediation 'industry'"). The project not only involved experts in many varieties of dispute resolution, it also included representatives of most of the national membership organizations in the field and several representatives of the courts. *Id.*

12. Test Design Project, Performance-Based Assessment Methodology for Use in Selecting, Training and Evaluating Mediators 1, 16-17 (1995), *available at* http://www.convenor.com/madison/perfor ma.htm.

13. This project reflected an effort to follow up on the earlier 1995 SPIDR Commission's report titled *Ensuring Competence and Quality in Dispute Resolution Practice* (April 1995) (discussed *infra* Part III), *available at* https://bridge.acrnet.org/?t=store.php [hereinafter SPIDR Commission, *Ensuring*

Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators[14]—contains a very useful general set of measures of competence, or KSAOs, for mediators.[15] The initial TDP draft guidelines (Interim Guidelines for Selecting Mediators) was criticized for reflecting a "labor" model that assumes an active, deal-seeking mediator and failing to acknowledge adequately that the relevant KSAOs will vary depending on a particular program or party goals. Following extended discussion with many of its critics, the TDP incorporated multiple sets of evaluation scales in an effort to recognize other models of mediator roles.[16] It also offers a methodology for making performance-based assessments of mediators' likelihood of future success.[17] The TDP set forth the following qualities as those "likely to be needed most to perform the most common and essential tasks of a mediator":

- Investigation: Effectiveness in identifying and seeking out pertinent information.[18]
- Empathy: Conspicuous awareness and consideration of the needs of others.[19]
- Impartiality: Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias.[20]
- Generating options: Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties.[21]
- Generating agreements: Effectiveness in moving parties toward finality and in "closing" the agreements.[22]
- Managing the interaction: Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives.[23]
- Substantive knowledge: Adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information.[24]

Many mediators and other interview subjects have offered general endorsement of this list and the assessment scales that accompany it, while others (especially some who espouse a transformative theory) have asserted some shortcomings.

Some researchers, like Margaret Herrman of the University of Georgia's Mediator Skills Project, believe that programs need to go further than did TDP, espe-

---

Competence]. *See also* Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23 (1990).

14. Test Design Project, *supra* note 12. As described, this consensus-based report sets forth general goals for mediators and offers a conceptual framework and methodology for using performance-based methods for assessing candidate mediators' likely success. *Id.*

15. *Id.* at 18.
16. *Id.* at 5-6.
17. *Id.* at 11-12.
18. *Id.* at 21.
19. *Id.*
20. *Id.* at 22.
21. *Id.*
22. *Id.* at 23.
23. *Id.*
24. *Id.* at 21-24.

cially those contemplating establishment of credentialing systems that could exclude some applicants and thus give rise to litigation in which they might need to justify their methodology.[25] Herrman's effort has sought, among other things, to analyze the jobs mediators perform in various settings and establish a more specific set of skills and substantive knowledge requirements, in part as a basis for developing a certification test for family mediators.[26] Herrman and her colleagues hope to reach a more sophisticated understanding of the roles mediators perform, how good mediators undertake them, and how to test for ability.[27] To date, that project has produced a useful list of substantive knowledge items for family mediators,[28] and thoughts on using these data in credentialing. Additional written products are expected.

A number of programs have employed the TDP KSAOs in selecting trainees for new mediator cadres.[29] Some of them have adapted these KSAOs while seeking to do more to accommodate transformative or other models, to reflect more closely their own practices, or to improve assessment methods.[30] "For instance, the Minnesota Mediation Center developed scales that drew on the TDP list and discussions with family mediators; rather than using them as hurdles, the Center then employed these scales in giving feedback to junior mediators who wanted eventually to 'graduate' to the roster of paid family mediators."[31] In addition, the credentialing activities of Family Mediation Canada and the Maryland Commission on Dispute Resolution have led them to develop and extend the TDP framework for their own needs.

III. APPROACHES TO PROMOTING COMPETENCE

The growing use of ADR processes has led some to argue that standards related to competence and the selection of mediators are needed to protect consumers and the integrity of dispute resolution processes. The topic has been controversial for years, in part because the competence a mediator needs may vary from one context to another. Moreover, nearly all agree, measuring competence cannot be done based on paper credentials alone. Several professional membership or-

---

25. Interview with Dr. Margaret Herrman, Director, Mediators Skills Project, University of Georgia's Carl Vinson Institute of Government (April 2000). See the Institute's web site, *available at* http://www.cviog.uga.edu/about/fs/bio.php?id=herrmanm, for further information on Dr. Herrman.

26. The Mediator Skills Project seeks to assess what constitutes skillful mediation. *Id.* It creates materials in support of quality assurance for courts or government agencies, including validated tests for mediators and continuing education materials for mediation program staff, mediators, and trainers. *Id.*

27. *See infra* Part III.

28. The findings of this research were published in an article. *See* Margaret Herrman et al., *Defining Mediator Knowledge and Skills*, 17 NEGOTIATION J. 139 (2001). *See also* Margaret Herrman et al., *Supporting Accountability in the Field of Mediation*, 18 NEGOTIATION J. 29 (2002).

29. Several Massachusetts courts have followed this method. *See* ABA Section of Dispute Resolution, Task Force on Credentialing, Report on Mediator Credentialing and Quality Assurance (Oct. 2002) (discussion draft), *available at* http://www.abanet.org/dispute/taksforce_report_2003.pdf [hereinafter ABA, Task Force on Credentialing].

30. *Id.*

31. *Id.*

ganizations and others have developed policies, principles, or qualification stan-
dards regarding who can serve in various settings.[32]

In 1989, the Society of Professionals in Dispute Resolution (SPIDR) Com-
mission on Qualifications was formed to investigate and report on basic principles
that could be used to influence policy for setting qualifications for mediators,
arbitrators and other dispute resolution professionals. In its 1989 report, *Qualify-
ing Neutrals: The Basic Principles*,[33] the Commission put forth three fundamental
recommendations:

- That no single entity (but rather a variety of organizations) should estab-
  lish qualifications for neutrals.[34]
- That the greater the degree of choice the parties have over the dispute
  resolution process, program or neutral, the less mandatory the qualifica-
  tion requirements should be.[35]
- The qualifications criteria should be based on performance, rather than
  paper credentials.[36]

In 1995, a second SPIDR Commission on Qualifications developed a report
that made recommendations to policy makers, practitioners, program administra-
tors, trainers, ADR associations, and consumers about their roles and responsibili-
ties in ensuring competence and quality in dispute resolution practice.[37] It pro-
vides a framework for determining which approaches to use, and is a useful re-
source for thinking about how to address quality assurance issues.

The 1995 SPIDR qualifications report, *Ensuring Competence and Quality in
Dispute Resolution Practice*, states that assuring competence is a key to quality
and is a shared responsibility of programs, practitioners, parties, and dispute reso-
lution organizations.[38] It offers helpful advice and a framework for policymakers,
organizations, and others to use in determining the approach to take in the context
within which they work.[39] The report recommends that all stakeholders be con-
sulted in formulating standards of competence and qualifications.[40] It sets forth
this framework for analyzing how to achieve quality, using the following ques-
tions to help organize deliberation:

- *What is the context?* The context of the dispute resolution service needs
  to be examined and understood, because that determines what should be
  considered competent practice in a specific situation.[41]
- *Who is responsible for ensuring competence?* Stakeholders—including
  practitioners, consumers, program administrators and others—have roles
  and responsibilities in assuring quality. Practitioners can gain skills and
  knowledge and work within their area of competence. Consumers can
  familiarize themselves with the basics they will need to make an in-

---

32. *See* SPIDR Commission, *Qualifying*, *supra* note 9.
33. *Id.*
34. Policy Consensus Initiative, Assuring Quality in ADR Practice & Programs (1989), *at* http:
//www.policyconsensus.org/pci/policiestools/qualityassurance_3.html.
35. *Id.*
36. *Id.*
37. *See* SPIDR Commission, *Ensuring Competence*, *supra* note 13.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

formed choice and participate in the evaluation of the services rendered. Programs and associations can solicit views in developing guidelines on competent practice.[42]

■ *What do practitioners and programs do?* It is important to examine the core tasks performed in any dispute resolution practice or program.[43]

■ *What does it mean to be competent?* The core skills that have been identified through studies and research, apply here, but may merit adapting for context.[44]

■ *How do practitioners and programs become competent?* The multiple paths to becoming a competent practitioner need to be recognized. Practice involves some combination of natural aptitude, skills, knowledge, and other attributes developed through education, training, and experience.[45]

■ *How is competence assessed?* No one method of assessment should be relied on because it may lead to emphasis of one measure of competence at the expense of other valuable measures; assessing competence should be a shared responsibility among the various stakeholders.[46]

■ *How should assessment tools be used to assure quality?* Quality assurance tools should be used to support the goals of the dispute resolution program and be consistent with the practice context where they are to be applied. Formal and informal credentialing promote competence of practitioners. The more formal the certification process, the greater the number of considerations that should accompany its implementation, including operating costs and how to handle decertification. Programs can also assure competence through training, supervision, monitoring, and the use of informal assessment tools.[47]

While the framework is expressed in a linear way, it has been adapted to different situations and contexts. Several members of the second SPIDR Commission developed a draft *Guide for Implementing the Seven Steps to Understanding and Ensuring Competent Dispute Resolution Practice* (never published),[48] setting forth issues to consider in undertaking such a process. Sidebars in this paper describe briefly how several entities used the "seven-step framework" to organize their review and development of qualifications policies.[49]

Some entities have made other efforts to link measures of competence to context. For example, a document prepared by a committee of SPIDR's Environmental/Public Disputes Sector[50] sets forth several different tasks and skills in-

---

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Second SPIDR Commission on Qualifications, A Guide for Implementing the Seven Steps to Understanding and Ensuring Competent Dispute Resolution Practice (1997) (unpublished draft).

49. *Id.*

50. Society of Professionals in Dispute Resolution Environmental/Public Disputes Sector Committee, Environmental/Public Policy Sector (SPIDR Environmental Committee), Competencies for Mediators of Complex Public Disputes (1992), *at* https://bridge.acrnet.org/?t=store.php [hereinafter SPIDR Environmental Committee, *Competencies*].

volved in organizing and mediating environmental and other complex, multi-party conflicts.[51] Another effort—*Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs,* a joint project of SPIDR and the National Center for State Courts—took the second SPIDR Commission's report and thought through the issues in the court arena.[52]

IV. WHAT'S HAPPENING? SOME QUALITY ASSURANCE INITIATIVES

A. Overview

While professionals and researchers have tried over the past fifteen years or so to define "what mediators do" and better understand "how to do it well," ADR programs, roster administrators, and parties seeking neutrals have had to deal with day-to-day choices. Moreover, mediators and "wannabes" often use their training, continuing education, roster listings, court "certifications," or credentials to practice another profession as indicators of claimed competence to mediate.

As Judy Filner states in her recent article, "[W]ays to qualify mediators are being developed in literally thousands of different programs."[53] These range from professional organizations creating membership categories to judges, court administrators, and agencies establishing rosters or other means of "vouching for" their mediators. This section describes some of the more interesting, innovative, or timely of these activities.

B. National Organizations

1. Association for Conflict Resolution

The newly-created Association for Conflict Resolution (ACR)—formed by joining SPIDR, Academy of Family Mediators (AFM), and other organizations—is involved in several quality assurance initiatives. These include participation on the Joint Committee on Model Standards of Conduct for Mediators, now considering revisions in these ethical standards; its Ethics Initiative, described below;[54] and the Advanced Practitioner Workgroup.[55]

---

51. *Id.*

52. *See* Center for Dispute Settlement & Institute for Judicial Administration, Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs (1997), *available at* http://www. acrnet.org/library/catalogue.htm. (includes model standards for court-connected mediation programs to guide and inform courts interested in initiating, expanding or improving mediation programs to which they refer cases), republished by Center for Analysis of Alternative Dispute Resolution Systems as National Standards for Court-Connected Mediation Programs, *available at* http://www.caadrs.org/stud ies/nationstd.htm.

53. ABA Section of Dispute Resolution, *Focus: Credentialing Mediators,* 8 DISP. RESOL. MAG. 3 (2001) (special edition). *See also* Judy Filner, *New Trends: Will Mediator Credentialing Assure Quality and Competency?* 8 DISP. RESOL. MAG. 3 (2001); ABA, Task Force on Credentialing, *supra* note 29; Judy Filner, An Introduction to Mediator Credentialing (2000) (contains basic data on mediator credentialing, its background, and issues involved), *available at* http://www.keybridge.org/med_in fo/credentialing.htm.

54. *See infra* Section IV.

55. *See* Letter from Nancy Peace, President, Association for Conflict Resolution 2002-2003, to members (Feb. 25, 2004), *at* http://www.acrnet.org/about/initiatives/QualityAssurance/index.htm.

The most significant of ACR's recent QA initiative is its Mediator Certification Task Force, which has developed recommendations regarding a certification process.[56] The Task Force concluded that the field has developed to the point of needing certification that documents and acknowledges that a mediator has completed a minimum level of training and experience.[57] Among its stated goals is a process that is accessible to a broad range of practitioners and allows for diversity of practice and people.[58]

After considering a variety of options, the Task Force recommended that ACR establish a certification program with the following elements:

- Presentation of a "portfolio" of experience and training.
- Successful completion of a written knowledge assessment.
- Periodic re-certification.
- A process for requesting a waiver of some of the requirements in exceptional or extraordinary circumstances.
- Potential de-certification for violation of ethical and professional standards.
- Appeals of decisions at various stages in the certifying process.[59]

The intent of the Mediator Certification Program is that the program to be "purely voluntary and open to both members and non-members of ACR."[60]

The ACR Mediator Certification Task Force's final Report and Recommendations to the ACR Board of Directors have drawn considerable attention and widely varying responses.[61] One recent development is that ACR and the ABA Section of Dispute Resolution are beginning to work together to create an independent entity that will provide a voluntary certification process.[62]

2. ABA Section of Dispute Resolution

The Section established the Task Force on Credentialing in 2001, under the leadership of Judy Filner of Washington, D.C.[63] The goals of the Task Force were:

> [T]o inform the Section about past and current dispute resolution professional credentialing practices and policies; to consider the direction the field is moving related to credentialing and to make recommendations to the Section for policy and action; and to assure networking with profes-

---

Advanced Practitioner status would inform potential clients that a mediator with this designation has extensive training and experience, has undergone peer evaluation, and is committed to continuing education. This designation currently it is available only to Family Section members. The ACR Board hopes to make it available for other practice areas in 2004. *Id.*

56. *Id.*
57. *Id.*
58. *See* ACR Mediator Certification Task Force, Report and Recommendations to the ACR Board of Directors (2004), *available at* http://www.acrnet.org/about/taskforces/certification.htm.
59. *Id.*
60. *Id.*
61. *Id. See also* Academy of Family Mediators, Outline of Credentialing Basics and Application for "AFM-Approved Mediation Training Program" (2000) (extensive summary of literature and initiatives in credentialing ADR neutrals), *available at* http://www.mediate.com/afm/afmtrainapp.html.
62. *See* McGuire, *supra* note 4.
63. ABA, Task Force on Credentialing, *supra* note 29.

sional membership organizations and others engaged in credentialing policy and program development.[64]

The ABA Task Force's 2003 *Report on Mediator Credentialing and Quality Assurance* discusses past and current mediator credentialing practices, analyzes the relation of credentialing to quality practice, and puts forth some recommendations on policy actions.[65] The recommendations were approved by the Section's Council in early 2003—these included a statement favoring mediator credentialing, a policy to support mediator competency and growth (quality assurance) over paper credentials, and development of model standards for mediator preparation programs.[66]

The group, now co-chaired by Howard Bellman of Madison, Wisconsin and Professor Andrea Schneider of the Marquette University Law School, is seeking to make its consultations with other organizations that have considered credentialing issues more formal.[67] Since approval of the ABA Task Force's report, members of the group have begun informal consultation with representatives of ACR and other national and state mediation organizations and is joining ACR in commissioning a feasibility-marketing survey by an independent expert. The Section of Dispute Resolution's Council does not envision the ABA or the Section serving as a credentialing body, but rather to support the field in the development of quality practice and credentialing.[68] The Task Force will also develop model standards for mediator preparation programs and outline one or more model systems of mediator credentialing to recommend to states or to the field, focusing initially on the accreditation of mediator preparation programs.[69]

3. Academy of Family Mediators

A pre-merger credentialing effort by Academy of Family Mediators (AFM) yielded primarily a description of the substantive knowledge desirable for family mediators.[70]

4. National Association for Community Mediation

The National Association for Community Mediation's (NAFCM) Quality Assurance Committee recently completed an initiative that has produced a *Community Mediation Center Self Assessment Manual*, a non-prescriptive assessment tool that will help community mediation centers focus on improving general manage-

---

64. *Id.*

65. *Id.* This report draws substantially upon an earlier version of the current article prepared for the Maryland Mediator QA Committee, as well as on extensive research performed by Ms. Filner. *See id.*

66. Interview with Judy Filner, Chair, ABA Section of Dispute Resolution, Task Force on Credentialing (Apr. 2003).

67. Interview with Howard Bellman, Member, ABA Section of Dispute Resolution, Task Force on Credentialing (Nov. 2004).

68. *Id.*

69. *Id.*

70. Academy of Family Mediators, Volunteer Mediator Certification Project: Report to the William and Flora Hewlett Foundation (2000); Margaret S. Herrman et al., *Defining Mediator Knowledge and Skills, Negotiation Journal*, 17 NEGOTIATION J. 139 (2001).

ment for non-profits, case administration, and training, development, nurturing, and handling of volunteers.[71] For each of these areas, the NAFCM document addresses practical service delivery considerations for centers and sets forth some potentially useful approaches to dealing with them.[72] Consonant with most community programs' emphasis on some regimen of basic and advanced training, mentoring, co-mediation, observation, and continuing education—as opposed to credentialing individual mediators, which NAFCM officials describe as inherently exclusive—the initiative describes aspirational standards, poses questions to consider regarding how to reach these goals, and offers examples of how some centers have dealt with these issues.[73] A recent article on NAFCM's web site by Melissa Broderick, Ben Carroll, and Barbara Hurt, entitled *Quality Assurance and Qualifications*,[74] discusses community mediation programs' QA activities, and includes a "quality assurance statement" that briefly addresses screening and recruitment, basic training, evaluation of training participants, apprenticeship, co-mediation, continuing education, and trainer responsibilities.[75]

5. Family Mediation Canada

Family Mediation Canada (FMC) went through a lengthy collaborative process that resulted in a rigorous set of credentialing standards for family mediators.[76] FMC's standards require completion of an initial 13 page application that documents completion of at least 80 hours of basic training and an added 100 hours of related education and training, as well as letters of reference and insurance.[77] Applicants then receive a Candidate's Manual to guide them through an assessment process, including preparation of a videotaped skills demonstration, a self-evaluation, and a four-hour "invigilated" written exam on substantive issues.[78] Preparation workshops are offered to potential candidates.[79]

C. State-Level Entities

1. Texas

Two recent, and considerably different, quality assurance initiatives are worth noting. An advisory committee to the supreme court submitted a proposal in 2001 for creating a registry of state court mediators (attorneys and non-

---

71. National Association for Community Mediation, Community Mediation Center Self Assessment Manual (2003).

72. *Id.*

73. *Id.*

74. Melissa Broderick et al., Quality Assurance and Qualifications (2001) (explicates NAFCM's quality assurance standards, current activities, and policy views), *available at* http://www.nafcm.org/pg9.cfm#practice%20standards.

75. *See id.*

76. *See* Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience*, MEDIATION Q., Spring 2001, at 221.

77. *Id.* at 229-230.

78. *Id.* at 230, 232.

79. *Id.* at 231.

attorneys).[80] Advisory committee members gathered extensive data on other ju-
risdictions' approaches during their deliberations, drawing especially from Ten-
nessee and Georgia.[81] The Texas Supreme Court did not act on the report, which
contained recommendations concerning minimum qualifications for mediators, a
recommendation for a Commission on Training, and Rules of Ethics for Media-
tors. [82]

The advisory committee did not make a recommendation on "credentialing"
for a variety of reasons, but it did recommend minimum qualifications for court
mediators.[83] In addition to the required training courses, the committee proposed
requiring continuing education for court mediators.[84] The committee also recom-
mended having judges select from the list of mediators possessing minimum
qualifications, while allowing a judge to go outside the list if she provides a writ-
ten explanation for doing so.[85]

In addition, the advisory committee would have required that mediators ad-
here to the Texas Rules of Ethics for Mediations and Mediators as promulgated by
the Texas Supreme Court.[86] As to enforcement, the committee recommended that
the court in which the action is pending, or the local administrative judge of the
county, district or region, enforce the ethics rules in any manner provided by law,
or by submitting the matter to mediation.[87]

While the supreme court advisory committee's efforts have not produced
concrete results, a second Texas initiative, the Texas Mediator Credentialing As-
sociation (TMCA), has recently been incorporated as a not-for-profit entity to
serve as a voluntary credentialer for mediators and mediation trainers in all
fields.[88] The Association's ten-member board includes representatives from
Texas' major mediator and trainer groups, the bar, consumers, education institu-
tions, and the judiciary.[89] The Board set credentialing and training standards, and
set up an administration system and a grievance process, and has begun to accept
applications.[90] TMCA's model entails a four-tiered approach, in essence a senior-
ity system with basic certification and advanced levels of credentialing based on
training and experience.[91]

TMCA's collaborative effort to promote quality in a judge and lawyer-centric
system has built a broader understanding and acceptance among diverse groups of

---

80. Supreme Court of Texas Advisory Committee on Court-Annexed Mediation, Executive Over-
view of Advisory Committee Recommendations 2-3 (2001).

81. Interview with Bruce Stratton, Co-Chair ADR Advisory Committee, Texas Supreme Court
(Aug. 2001).

82. Interview with Suzanne Duvall, Texas Mediator Credentialing Association (July 2002).

83. Supreme Court of Texas Advisory Committee on Court-Annexed Mediation, *supra* note 80. The
committee stated that the minimum `qualifications for mediators are not "credentialing" or "certifica-
tion," but rather an effort to focus attention on continuing education and training. Likewise, it said,
there should be a Commission on Training focusing on the quality of training. *Id.* at 5.

84. *Id.*

85. *Id.* (Attachment B to Executive Overview at 4).

86. *Id.* at 2.

87. *Id.* at 4.

88. Texas Mediator Credentialing Association, Promoting Quality Mediation Throughout Texas
(brochure); Texas Mediator Credentialing Association, Frequently Asked Questions, *at* http://www.tx
mca.org/faq.htm (last visited Dec. 2, 2004).

89. *Id.*

90. *Id.*

91. *Id.*

mediators in the state. In April 2003, its Board joined to oppose unanimously several entities that wanted the supreme court to revive its activities leading to credentialing of court mediators.[92]

2. Maryland

The Maryland Mediation and Conflict Resolution Office (MACRO)—an office within that state's judiciary—and three Maryland practitioner groups recently sponsored a three-year project leading to consensus on an innovative "quality assistance" system for mediators in Maryland.[93] To help develop this plan, these 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 collaboratively with stakeholders around the state.[94] As part of their collaborative process, they developed options for Maryland, and sponsored extensive outreach and consensus-building activities over a three-year period that led to complete agreement among the Oversight Committee members.[95]

The Committee's concept paper outlining the Maryland Program for Mediator Excellence (MPME)[96] proposes a voluntary, multi-faceted strategy to promote quality mediators and mediation.[97] Mediators would be able to join the MPME program with a few basic prerequisites—similar to those in most other jurisdictions—but would then be expected to choose from a variety of options, such as mentorship, observation, case discussions, and the like, for continuing personal growth.[98] Prerequisites for membership include an agreement to follow the MPME mediator ethics program and to participate in a statewide grievance/ombuds process.[99] The resulting program deemphasizes "seals of approval," pass-fail barriers, and substitute credentials. Instead, it seeks to promote and reward mediators wishing to develop their skills and self-awareness. Maryland's mediation and court communities appear likely to accept MPME.

3. New York

The New York Court's Alternative Dispute Resolution Office (Court ADR Office) does not certify mediators, but for several years has had standards and

---

92. Letter from Board Members, Texas Mediator Credentialing Association, to Hon. Priscilla Owen, Judge, Supreme Court of Texas (Apr. 27, 2003).

93. *See* MACRO, Meeting the Challenge of Mediator Excellence: Final Report of the Maryland Mediator Quality Assurance Committee (2004) (describing the Maryland process, its results, and members' reasons for their decisions).

94. *Id.*

95. *See* MACRO, *supra* note 93. *See also Maryland Eyes Voluntary Mediation Quality Assurance Program*, ADR WORLD, Sept. 20, 2002, *available at* ADRWorld.com.

96. *See* MACRO, *supra* note 93, at 15-19.

97. Several work groups are now carrying out focused action plans, as follows: Coordinating/Oversight Entity, Funding, Definitions, Ethics Standards and Support, Grievance Process, Training, Mentoring, Certification, Consumers/Consumer Education, Self-Reflective Practice and Discussion, Web Activities, and Mediator Evaluation. *Id.* at 21-27.

98. *Id.*

99. *Id.*

requirements for mediators and mediation trainers, mostly in connection with community mediation centers that receive courts funds. These centers provide extensive mediation services to many courts in the state. Court ADR Office personnel say that they are giving thought to reassessing their mediator training program requirements, since many community programs now offer training that goes considerably beyond the existing requirements. As part of its training oversight process, the office reviews training agendas, manuals, and materials from those seeking accreditation, offers informal feedback, and observes trainings. Court ADR Office personnel also say they are considering hiring two employees to offer "train-the-trainers" sessions periodically.

A subcommittee of a court advisory committee, led by Lela Love, has been working to prepare recommendations for another set of standards that courts could use in developing rosters or selecting individual mediators not affiliated with a community mediation center. These will likely be fairly undemanding (e.g., forty hours of training), but will differentiate between various styles and processes. Court ADR administrators will seek first to work informally with local courts to obtain their understanding and acceptance.

Finally, the New York State Dispute Resolution Association's (NYSDRA) Certification Committee is developing a broad mediator certification process; it began by holding several interviews and focus groups on the issue with hundreds of stakeholders. Some materials related to the focus groups and their results (including a history of mediation certification, a focus group participant letter, and focus group results regarding education, training, experience, and evaluation criteria) are set forth on NYSDRA's web site.[100] Committee members were impressed with the Idaho and Washington mediator associations' work (see below).

NYSDRA posted the completed draft certification document and survey on its web site to be accessed by NYSDRA members, focus group members, committee members, New York State dispute resolution organizations, the Dispute Resolution Section of the Bar, and other interested parties. The committee chairpersons and staff will tabulate, collate and review the responses received and plan the next steps depending on the results of the comments. NYSDRA officials are uncertain whether the new system will be administered locally or centrally.

4. Massachusetts

Massachusetts has had criteria for court mediators for several years, but a court advisory committee studying credentialing has produced some controversy, and recently, consensus proposals for significant change. The longstanding guidelines have included standards for approval of training organizations; guidance for evaluation and mentoring; a statement of qualities and responsibilities for trainers, evaluators, and mentors; and a mediator skills checklist. The recent advisory committee proposal established, among other things, general requirements for training including: orientation to the judicial system, observation (generally, one role-play observed by a qualified evaluator, plus observation and discussion of one case), experience, and performance assessment of mediators wanting to do

---

100. For more information on the New York State Dispute Resolution Association, visit the web site at http://www.nysdra.org.html.

court work. Some controversy over grandparenting those with no training has arisen. During the advisory committee's discussions, a group of Massachusetts attorneys retained a legislative lobbyist to put forward their concerns. The court is scheduled to consider the advisory committee report.

5. Colorado

Five major entities involved with mediation in Colorado formed a steering committee in the mid-1990s to develop a consensus on credentialing mediators.[101] Several years of work, with lengthy discussions of the definition of mediation and principles for handling qualifications, produced a product that would have had a newly-formed oversight group administer a certification program. Two constituencies, including the bar, then declined to endorse this product.[102]

6. Idaho/Washington

The mediation associations in Idaho and Washington have recently adopted "low hurdle/low maintenance" credentialing processes for members wishing to achieve something greater than "general member" status. Washington's approach employs a slightly "higher" set of hurdles (e.g., more training hours), but both involve a fairly simple examination of paper submissions describing or substantiating skills training, case practice (including memoranda of agreement), additional experience or study, and letters of recommendation.[103] Applicants who are found to fall short can receive a statement of deficiencies and usually negotiate a plan to obtain mentoring or demonstrate additional needed competencies.[104]

At present, the Washington credentials system has not been recognized or adopted by court entities there, though obtaining such recognition is a goal of the Washington Mediation Association. In Idaho, the state court system has accepted the Idaho Mediation Association's system.[105] The Washington Mediation Association is developing a brochure that it hopes to put into every superior court in the state, and adding public education components to its web site. A contentious issue on which these two states have diverged is requiring professional liability insurance for mediators; Washington requires it, Idaho does not.

---

101. *See* Sally K. Ortner & Merrill Shields, *A Report on the Development of Qualifications and Standards of Conduct for ADR Professionals*, THE COLORADO LAWYER (October 1997) (for a description of the early stages of this history). *See also* interview with Cynthia Savage, ADR Coordinator, Colorado Judicial Branch (July 2001).

102. Interview with Cynthia Savage, ADR Coordinator, Colorado Judicial Branch (July 2001).

103. For more information on Idaho and Washington mediation standards visit the web site for each group; the Idaho site is *available at* http://www.idahomediation.org/, and the Washington site is *available at* http://www.washingtonmediation.org/.

104. Washington's certification information may be obtained *at* http://www.washingtonmediation.org/certification.pdf.

105. Recently, IMA adopted a new standard for inclusion on the roster for civil mediators, who must now sign a notarized statement attesting to civil mediation training and/or supervised case practice in a program setting. The change was based on the notion that civil court mediation should be practiced by mediators with background and experience in that specialty. Taylor Cox, IMA Adopts New Directory and Court Roster Listing Requirements, IDAHO MEDIATION ASS'N J. (Feb. 2004), *at* http://www.idaho mediation.org/imanewsletter0204.pdf.

7. *Florida*

Florida was among the first states to credential court mediators, and probably has the largest such program. In order to receive referrals directly from the courts, a mediator must be certified by the Florida Supreme Court.[106] The qualifications are established in the Florida Rules for Certified and Court-Appointed Mediators.[107] In addition, parties to mediation are free to select a certified or non-certified mediator who is otherwise qualified by training or experience to mediate all or some of the issues in the particular case. The selection of a non-certified mediator is subject to review by the presiding judge.[108]

"County Court Mediators" in Florida must be certified as a circuit court or family mediator or complete a minimum of twenty hours in a training program certified by the supreme court; observe a minimum of four county court mediation conferences conducted by a court-certified mediator and conduct four county court mediation conferences under the supervision and observation of a court-certified mediator; and be of good moral character.[109] "Family Mediators" must complete a minimum of forty hours in a family mediation training program certified by the supreme court; have a master's degree or doctorate in social work, mental health, or behavioral or social sciences; be a physician certified to practice adult or child psychiatry; or be an attorney or a certified public accountant licensed to practice in any United States jurisdiction; and have at least four years practical experience in one of the aforementioned fields or have eight years family mediation experience with a minimum of ten mediations per year; observe two family mediations conducted by a certified family mediator and conduct two family mediations under the supervision and observation of a certified family mediator; and be of good moral character.[110] "Circuit Court Mediators" must complete a minimum of forty hours in a circuit court mediation training program certified by the supreme court; be a member in good standing of the Florida Bar with at least five years of Florida practice and be an active member of the Florida Bar within one year of application for certification; or be a retired trial judge from any United States jurisdiction who was a member in good standing of the bar in the state in which the judge presided for at least five years immediately preceding the year certification is sought; observe two circuit court mediations conducted by a certified circuit mediator and conduct two circuit mediations under the supervision and observation of a certified circuit court mediator; and be of good moral character.[111] Mediators duly certified as circuit court or family mediators before July 1990 are deemed qualified.[112]

---

106. FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.100 (2000), *available at* http://www.flcourts.org/osca/divisions/adr/certrules.http.
107. *Id.*
108. FLA. R. CIV. P. 1.720(f)(1)(B) (2004).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

8. *Tennessee/Georgia*

Georgia's approach is a fairly typical court-administered one, and slightly less elaborately developed than those in Florida or Virginia. The Georgia Supreme Court has issued rules, with quality being managed largely by individual courts.[113] Neutrals wishing to work on court cases must register with the court's Office of ADR, and are then monitored by that Office and the Georgia Commission on Dispute Resolution (the court's ADR policy-making arm).[114] Requirements for registration include training, education, and references—as well as being "of good moral character."[115] Registered neutrals are deemed qualified to serve in any court in the state, though individual courts may add more stringent requirements and select the neutrals who will serve their programs. A Commission on Ethics hears complaints of neutrals' violations; only one formal complaint has received treatment so far, and only one formal opinion has been issued.

9. *Virginia*

The Virginia Mediation Network (VMN) sponsored a day-long seminar on mediator quality assurance in March 2003, which produced recommendations for fostering detailed discussions, promoting ideas, sharing information, and encouraging wider "grass roots" involvement in VMN and other mediation-related activities.[116] Four study groups are being organized to hold regional colloquia; study issues, gather information, and develop papers; develop pilot projects; develop sessions for training conferences; develop draft recommendations for consideration by VMN or state agencies; help develop positions on legislation or issues of the day; and partner with other organizations to work cooperatively on specific matters.

The four study groups proposed are Mediator Development and Quality Enhancement, Training, Basic and Advanced Credentialing, and Academic-Practitioner Interaction. Among the possible activities under consideration for these groups are:

- Peer development and support: Fostering opportunities for peer consultation and feedback, such as a series of analytical discussions of difficult mediation situations.
- Mentoring, evaluation and testing: A voluntary program of peer evaluation in mock mediations or videotape sessions, review of literature and best practices related to mediator evaluation and testing, and development of benchmarks for good practice.
- Peer development discussions among trainers: "Train-the-trainers" presentations; best training practices from elsewhere; presentations from nationally known trainers; recommendations for improvement to basic

---

113. GA. ALT. DISP. RESOL. R. (1999) (as amended by the Georgia Supreme Court, May 1999), *at* http://www2.state.ga.us/courts/adr/adrrules.html.
114. *Id.*
115. *Id.*
116. For more information on the Virginia Mediation Network, visit the web site at http://vamediation .org/ colloquium.html.

training programs; suggested training models and standards; protocols for trainer evaluations.

- Examine range of options for "credentialing" mediators to see whether changes to court certification or additional credentialing approaches might be developed and recommended.

- Establish a relationship with representatives of Virginia colleges and universities to promote dialogue and help practicing mediators learn about the research and academic thought.

One result of these efforts was that, early in 2004, three major mediation organizations in Virginia began promoting Mediator Peer Consultation, a project that gets mediators together in structured small groups to reflect on critical moments in their cases.

D. Federal Agencies

1. United States Postal Service

The United States Postal Service (USPS) trained a number of trainers to offer several thousand experienced mediators a two-day session on using a transformative approach to postal workplace mediation.[117] Rather than evaluating trainees at that point, USPS then required those wishing to obtain paid referrals to submit to observation in an initial pro bono case.[118] USPS also sought to train its mediation program administrators to assess neutrals on an ongoing basis, and provided listed mediators an opportunity to participate in periodic "mini-conferences" to discuss real-world problems and research findings. This approach has resulted in USPS paring its mediator list considerably, based largely on observations. Program managers expressed the view that QA is a continuing process, rather than a one-time assessment, and emphasized the importance of defining quality in connection with a program's goals rather than generically.

2. Department of the Navy

The Navy's workplace mediation program relies almost entirely on several dozen employee-mediators who, after being nominated by their "commands," have received training and mentoring before being certified to mediate Navy workplace cases part-time. The Navy's four-step process seeks to assure competence, and involves a basic twenty hour mediation course, a supplemental twenty hour course emphasizing role-plays, a screening based on observation of how the trainee handles a one and one half hour role-play, advanced training on ethics and other issues, and three co-mediations and extended debriefs with experienced contractor-mediators or internal mentors. After completing these steps, a Navy mediator can apply for certification. The Department of the Navy has developed several instruments to aid this program (e.g., observer's checklist, co-mediator evaluation form), and provide occasional refresher sessions. The program's direc-

---

117. Indiana Conflict Resolution Institute, Indiana University, Mediation at Work: The Report of the National REDRESS Evaluation Project of the United States Postal Service (2001).
118. *Id.*

tor expressed intent to develop a recertification process, based on the notion that approval is not "for life."

3. Federal Deposit Insurance Corporation

In the early 1990s, the Federal Deposit Insurance Corporation (FDIC) sought the advice of a "Blue Ribbon Panel" of experts to develop a set of criteria for private mediators wishing to be listed on the agency's nationwide roster of neutrals who could be used to resolve agency cases.[119] In brief, these experience-based criteria were total hours spent as a neutral, number of cases, diversity of substance and process, dollar amount involved, multi-party experience, and complexity of cases.[120] The panel considered and rejected several factors, including education, training, prior certifications, and professional association memberships.[121] An initial decision to award points for women or minority status was later reversed in light of recent federal court decisions.[122]

4. Federal Mediation and Conciliation Service

The Federal Mediation and Conciliation Service (FMCS) decided in 1999 to establish a roster of private sector neutrals to augment its full time staff occasionally in the delivery of employment mediation services. FMCS commenced a comprehensive credentialing effort by having a team headed by Dr. Angela Laird Brenton, Dean of the College of Professional Studies at the University of Arkansas at Little Rock, issue a report to FMCS in late 2002.[123] FMCS then published a Federal Register notice proposing a new regulation to establish an Access to Neutrals Initiative.[124] The main function of the Access to Neutrals Initiative was to be the provision of a Registry of Neutrals—a list of individual dispute resolution providers who have documented their qualifications according to criteria outlined in the regulation in the categories of ADR experience, ADR education and training, substantive education in the content area, and experience in the content area. The proposed Access to Neutrals Initiative also included informational, ethical and continuing education requirements for individuals on the Registry of Neutrals as well as a consumer complaint process. FMCS subsequently withdrew its proposal and announced in August 2004 that it was postponing implementation of its registry plans.[125] No further activity has occurred.

---

119. *See* FDIC/RTC Roster Qualifications Review Panel, *Report of the FDIC/RTC Roster Qualifications Review Panel*, 5 WORLD ARB. & MEDIATION REP. 1, 17 (1994).

120. *Id.* at 19.

121. *Id.* at 20-21.

122. *Id.* at 20.

123. Institute of Government, College of Professional Studies, University of Arkansas at Little Rock, State Mediator Rosters and Qualifications (draft report to FMCS) (March 25, 2002), *at* http://www.ualr.edu/iog/mediator.html.

124. Federal Mediation and Conciliation Service, Access to Neutrals Initiative, 68 Fed. Reg. 23, 624 (proposed May 5, 2003).

125. Federal Mediation and Conciliation Service, FMCS "Access to Neutrals" Initiative Terminated for Budgetary Reasons (Aug. 23, 2004), *at* http://222.fmcs.gov/internet/itemDetail.asp?categoryID=39&itemID=18554.

V. PROTOTYPE QA MODELS: THE QUALITY ASSURANCE GRID

ADR programs take a variety of approaches in seeking to promote or assure neutrals' quality. A few are quite selective. Others place relatively low, or even no, formal hurdles before would-be listees, but may provide extensive advice to parties on the theory of New York clothier Sy Syms that, "An educated consumer is our best customer."[126] Quality may also be addressed by offering mentoring to new recruits, additional focused training, or telephone advice for volunteer neutrals. Other approaches include requiring adherence to codes of ethics, removing from rosters those who are never selected, meeting periodically with neutrals on trends and problems, or simply not selecting neutrals found inadequate. A few solicit questionnaires from parties, make party evaluations available to prospective users, get case reports from neutrals, or follow up when parties' assessments indicated patterns of behavior needing improvement. An occasional program has developed formal complaint or advice-giving procedures for assuring that listed neutrals perform adequately and ethically.

There are several possible ways to think about "prototypes" of QA approaches and the potential and actual strengths and weaknesses of each. One possible way to categorize these approaches might look to the following generic credentialing activities:

- Private voluntary paper standards for individuals (e.g., TMCA, WA, ID, NYSDRA)
- Public mandatory paper standards for individuals (e.g., TX Sup. Ct., FL courts, VA courts, USIECR roster)
- Mediator mentoring and development approaches (e.g., SD Comm. Mediation Ctr.)
- Performance-based approaches
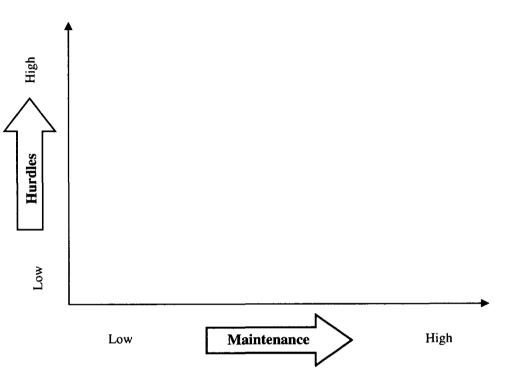- Hybrids (e.g., Family Mediation Canada)

Several other ways exist to think systematically about QA "systems." For instance, some suggest "sorting" by location of case managers, standards setters, or source of cases; they say that this approach allows one to focus on "real world" developments in the field. They would use categories like:

- Court program credentialing and rosters
- Agency programs credentialing and rosters
- Community programs QA
- Private practitioner groups or private provider organizations credentialing
- Individual private practitioners self-credentialing

A possibly useful mode of categorizing QA systems employs a grid displaying the height of "hurdles" that mediators must meet at the outset to engage in practice and the amount of "maintenance" or development aid provided them later on (see grid set forth below).

---

126. This is a reference to a series of advertisements offered by the New York clothier Sy Syms.

MEDIATOR QUALITY ASSURANCE GRID

Such a grid yields five "prototypical" approaches to mediator QA:
- No hurdle/No maintenance
- High hurdle/Low maintenance
- High hurdle/High maintenance
- Low hurdle/Low maintenance
- Low hurdle/High maintenance

A program with a "high hurdle"[127] would require many hours of training, experience, and/or observation to obtain a "credential." Many "low hurdle" programs (twenty to forty hours of training, and, perhaps, a few mediations or co-mediations) are structured so as to allow people with minimal training and experi-

---

127. Family Mediation Canada employs such a program and requires several hundred hours of training. For more information on the program, see the Family Mediation of Canada web site *at* http://www.fmc.ca./?p=Professionals. The United States Institute for Environmental Conflict Resolution's roster uses a similar program and calls for 200 hours of environmental experience. For more information on the program, see the Institute's web site *at* http://www.ecr.gov/.

ence to mediate; this approach is often criticized as indicating that "mediation is easy."

A program that takes a "high maintenance" approach—as do many community mediation programs—recognizes that initial training or substantive knowledge is not generally determinative of a mediator's abilities or long-term potential. Such a program may require little to become a mediator but would typically mandate that mediators either receive considerable "nurturing" or handle a large number of cases annually so as to broaden their awareness and enhance skills over time. This nurturing could include co-mediation, follow-on training, in-services, and coaching. A "low maintenance" program would impose a few mandates on a mediator once she has been credentialed—in the case of many court programs, as little as six to eight hours of continuing education each year.

The great bulk of credentialing and QA efforts to date have set relatively undemanding "hurdles" that typically require minimal training and a small amount of actual mediation experience, often involving co-mediation or supervised mediation. Apart from community programs, required "maintenance" has tended toward some commitment to take some periodic continuing education and adhere to basic ethical standards, with little or no active oversight.

QA systems will include some combination of "hurdles" and "maintenance." Any given combination would well produce differing impacts on key outcomes, including:

- The credibility and professionalism of the dispute resolution field.
- The dispute resolution field's diversity.
- Effective enforcement of ethics, consumer protection, and quality standards.
- Mediators' knowledge, self-awareness and skills in facilitating communication and promoting appropriate resolutions.
- Mediators' responsiveness to the goals of various ADR programs and individual clients' needs.
- Mediators' substantive expertise about the cases they handle.
- The perceived fairness, acceptability, and workability of the quality assurance process.

Each dimension of the grid is a continuum, and different combinations of "hurdles" and "maintenance" will have significantly different impacts on how mediation practice ultimately develops in a program or jurisdiction. These may include:

- The extent to which the QA system is administered in a flexible manner—e.g., following a single set of requirements or, instead, a generalized standard that is particularized for various areas of practice or even program-by-program.
- Whether a QA system is administered in a centralized or decentralized manner—e.g., is there a central QA decision maker or, instead, a delegation of authority?
- What entity (or entities) makes and enforces decisions regarding mediator quality, including credentialing—e.g., state agency, mediator groups, the bar, courts.
- The methodological basis for any QA system—for instance, the quality of nurturing activities, or what criteria are used in setting hurdles and as-

sessing abilities (observation, performance assessment, paper credentials, written tests, degrees, or other approaches).

- The extent to which provider organizations or potential users of mediation services employ, or pay heed to, the standard or approach that is established.
- Regional or other variations in access to training and other assistance.
- The scope and nature of education to help consumers understand mediation, mediator styles and aptitudes, what to look for in typical settings, and how to select.
- Other economic incentives and professional factors affecting parties, mediators, courts, other ADR provider organizations, and quality assurors— e.g., practical availability of mentoring services, limited revenue or personnel resources, relative costs and benefits to mediators of obtaining credentials.

Notwithstanding these factors, selecting any one of the various combinations of "hurdles" and "maintenance" is likely to have some predictable implications. Briefly described, they are:

- *No hurdle/No maintenance programs* (free market). A market-based system could be seen as very close to "no hurdle/no maintenance," with any interested practitioner empowered to hang out a shingle with marginal, or even no, training, mentoring, continuing development, or oversight. This no-barriers approach could afford maximum diversity, a large mediator population, and minimum bureaucracy, but minimal consumer protection, ethics enforcement, and credibility. It could also allow undue emphasis on substantive expertise or professional background,[128] and does not assure that the best mediators continue to practice. Skills would depend entirely upon individual mediators' inherent abilities and willingness to seek to improve them. Educating consumers and providing them accurate, useful information would assume critical importance in promoting informed selection and responsible, quality mediation.
- *High hurdle/High maintenance programs* (e.g., Family Mediation Canada). This highly professionalized system could yield great credibility, high mediator skill levels, and effective enforcement, but would likely require a significant bureaucracy. It could lead to substantial contention, with its high hurdles, and, unless some grandfathering provisions were adopted, could run afoul of geographic variations, professional rivalries, and uncertain political acceptability. It probably would reduce diversity within the mediation field, unless specific outreach efforts were undertaken. While this system might enhance mediators' substantive knowl-

---

128. Chris Honeyman notes:
   Caveat emptor is disheartening enough when applied to a toaster or plumber; so when we mediators offer our services, it should not be surprising that parties look for some externally validated evidence of competence. They do look, and they take whatever "evidence" they can find. This, I think, is the real reason why parties tend to give so much - often too much - weight to prospective mediators' credentials in law or substantive knowledge of the particular field which seems closest to the dispute (engineering, labor-management relations, family dynamics). Such credentials are prized because they are relatively standardized, and thus easy for the parties to recognize.

Honeyman, *Criteria for Mediation Performance, supra* note 2.

edge (if acceptance criteria were written to include such knowledge), it could also reduce responsiveness to individual clients' or programs' needs by promoting particular styles or leading to a bureaucratized approach to QA.

- *High hurdle/Low maintenance programs* (e.g., USIECR). With a somewhat smaller bureaucracy than the prior system, this approach could yield substantial credibility, good mediator skill levels (depending on the criteria selected), and effective enforcement. However, it would also reduce attention to the value of mediators' continuing improvement of process skills and systematic attention to "reflective practice." And, by emphasizing high initial barriers to entry, it could produce disagreements over credentialing decisions, give rise to antitrust or other litigation, and negatively affect collegiality among mediators.

- *Low hurdle/Low maintenance programs* (e.g., most state court mediation programs, Washington and Idaho Mediation Association credentialing). This approach would likely yield considerable diversity, a sizeable number of mediators, and greatly variable mediator skills levels, with little in the way of bureaucracy or support structures for mediators. It would establish a QA and ethics enforcement system that could be easily administered and would likely produce few disagreements over credentialing, but that could also allow undue emphasis on "contacts" and substantive expertise. This approach would reduce attention to the value of mediators' continuing improvement of process skills and systematic attention to "reflective practice" and could lead to overemphasis on "qualifications" not related to process skills. It would afford users limited quality assurance and the dispute resolution field fairly marginal credibility, unless combined with considerable attention to providing users with accurate information on mediators and educating them as to the value of being an informed consumer and the limits of this approach for securing quality practice.

- *Low hurdle/High maintenance programs* (e.g., most community programs, United States Navy workplace program). This approach could yield high mediator skills levels and effective enforcement, but would likely require some bureaucracy or structure for providing a support system for mediators. It would require some long-term commitment to, and by, each mediator and thus could raise practicality concerns (especially for solo practitioners) if embodied in a statewide system. It would likely produce fewer disagreements over credentialing than a high hurdle system, and could produce a somewhat greater sense of collegiality among mediators in a jurisdiction. If a truly effective support structure were established that targeted and addressed individual mediators' developmental needs, this approach could provide substantial credibility for the dispute resolution field, especially if combined with consumer education explicating the limits of "hurdles" as quality indicators.

VI. THE GRID'S VERTICAL AXIS: CREDENTIALING ISSUES

A. *What Is Credentialing?*

Credentialing is one method for attempting to assure competence.[129] Most certification approaches involve some combination of requirements for training and experience—occasionally with some academic degree or apprenticeship or mentoring.[130] A number of professional groups have developed standards for "credentialing" mediators or other neutrals—i.e., vouching for the individual's competency to perform.[131] The primary options for credentialing are certification, rosters and directories, and licensing, discussed below.

1. *Certification*

Recognition through certification, usually by professional organizations, courts, or other bodies, indicates that an individual has met certain specified qualifications standards. While some programs have adopted approaches that rely less on entry standards than on targeting needed improvements in mediator skills or developing "informed consumers," many courts, legislatures, and agencies now employ some method of "certifying" mediators.[132]

2. *Rosters and Directories*

There are now hundreds of rolls, or directories, of neutrals who are listed because they meet criteria established by a program or agency for interested parties or administrators to use in identifying a service provider.[133] These criteria may be highly restrictive, or may require very little to be listed. The Federal Deposit Insurance Corporation (FDIC) made an early effort at creating a roster and developed moderately restrictive selection criteria for mediators.[134]

The United States Institute for Environmental Conflict Resolution now maintains a National Roster of Environmental Dispute Resolution and Consensus Building Professionals.[135] The article, *Issues in Establishing an EPA-Sponsored Roster for Neutrals' Services in Environmental Cases*, formed a basis for the development of this roster, and explores issues that arise frequently in creating and running an effective roster of neutrals, including qualifications for listing neutrals,

---

129. *See, e.g.*, MICHAEL S. HAMM, THE FUNDAMENTALS OF ACCREDITATION (1997); JUDY FILNER, CERTIFICATION ISSUES OUTLINE FOR AFM'S VOLUNTARY MEDIATOR CERTIFICATION PROJECT (May 2000).
130. *See, e.g.*, FILNER, *supra* note 129.
131. *Id.*
132. For a useful resource that includes information on certification and credentialing, see Maria Mone, *Legislation and Court Rules re Mediator Qualifications*, developed by Maria Mone, Director of the Ohio Commission on Dispute Resolution and Conflict Management (offering an extensive summary of state rules regarding standards, liability, ethics, and other rules relating to mediators).
133. Judith M. Filner, *Will Mediator Credentialing Assure Quality and Competency?*, 8 DISP. RESOL. MAG. 3 (2001).
134. FDIC/RTC Roster Qualifications Review Panel, *supra* note 119.
135. The Institute's web site, *at* http://www.ecr.gov/roster.htm, offers further information.

assessing their performance, making panel assignments, and handling com-
plaints.[136]

3. Licensing

Licensing is a government process by which a person is designated as mini-
mally qualified to engage in the defined practice. While many professions are
licensed by the state, no state has used this method to certify ADR professionals.
This may be because current knowledge about the qualifications needed to ensure
effective ADR practices are still being developed. The second (1995) SPIDR
Commission on Qualifications thought licensure inappropriate because it risks
establishing arbitrary standards in a field that is rapidly changing.[137] Licenses
typically confer certain due process protections. They also are accompanied by the
power to impose sanctions for malpractice.

4. Criteria for Credentialing?

The criteria and means of assessing performance that are used for credential-
ing and rosters typically incorporate some or all of the following methods:
- Training requirements
- Mentoring or supervision
- Continuing education or training
- Amount of experience, i.e., number of cases
- Performance tests using live demonstrations
- Taped demonstrations
- User evaluations
- References
- Interviews

Most of these systems tend to be at the "minimalist" end of the spectrum,
most often requiring little more than some training (typically twenty to forty
hours), some experience and/or supervised practice (three to ten cases), and mod-
est continuing education.[138] Occasional programs, such as the Family Mediation
Canada and the United States Institute for Environmental Conflict Resolution,
have raised the bar considerably beyond these typical requirements.[139]

---

136. Charles Pou, Issues in Establishing an EPA-Sponsored Roster for Neutrals' Services in Envi-
ronmental Cases (1997) (report to the U.S. Environmental Protection Agency). *See also* Charles Pou,
Jr., *"Wheel of Fortune" or "Singled Out"?: How Rosters "Matchmake" Mediators*, 3 DISP. RESOL.
MAG. 10 (1997); Christopher Honeyman & Charles Pou, Finding and Hiring Quality Neutrals: What
Every Government Official Needs to Know (1996) (Administrative Conference of the United States)
(monograph based on workshops addressing issues like sources of neutrals for agency cases, conflict
of interest, budgetary, and contracting issues), *available at* http://www.convenor.com/madison/fh1.
htm.
137. ABA, Task Force on Credentialing, *supra* note 29, at 18-19.
138. "Using the absurdly arbitrary baseline of forty hours of training, we hand out certificates at the
end of that training time. These attractive certificates, nicely framed, promptly show up on office
walls." Honeyman, *Criteria for Mediator Performance, supra* note 2.
139. *See* MACRO, *supra* note 93.

5. *Who Sets Credentialing Standards for Whom, and Who Decides?*

The site of quality assurance programs and decision making vary; they include individual judges, central or local court administrators, state supreme courts, advisory groups authorized by courts, executive agency roster administrators, other official entities, and private mediator associations. These activities may be centralized, with a single entity setting standards and accepting applications. In other settings, they may be decentralized, by either (1) having a central entity set policy guidance with local courts or administrators filling in the gaps or (2) fixing separate standards for different programs or kinds of mediation activity.

Within any entity, the individual gatekeepers may also vary, ranging from "blue ribbon panels" to groups of mediators to administrative or clerical personnel. In some of these, a tendency toward routinization of these decisions has driven them down to lower-level personnel than was initially envisioned. A recent trend appears to place greater focus on accrediting mediator training programs, occasionally combined with putting some duties on trainers to advise trainees of their strengths and weaknesses, or provide mentoring or other continuing feedback.

A significant consideration may be that of "economies of scale." There may be efficiencies gained by having a single entity certify. Florida began its certification process by requiring the chief judge of each circuit to certify mediators. This was changed soon after because few liked the system. Since the criteria were set by the state in a court rule, the circuit judges had no discretion on certification and thought it should therefore be a state function; many mediators wanted the state to take over because they did not like having to apply in different places if they wanted to mediate statewide.

Some state mediator organizations serve as gatekeepers to credentials, whether designated a membership or special status in an association or a credential to be cited.[140] Several non-governmental groups have thought it highly beneficial to obtain some imprimatur from the state legislature or supreme court to give their decisions added luster and credibility. While most credentialing appears to occur at a central location, some observers have suggested that a more localized approach (e.g., at the regional or judicial district level) may have advantages, while acknowledging that the latter can introduce issues involving reviewer/assessor consistency and fairness.[141]

State supreme courts, or affiliated entities, have served as the credentialing body in several states (e.g., Florida, Virginia, Georgia). Occasionally this notion has caused worries among non-lawyers (especially in certain states, like Texas) and among those with concerns about having competitors judge their potential competitors' qualifications. On the other hand, in Florida non-attorneys apparently *like* the fact that the program is with the supreme court, rather than the Florida Bar or the state agency handling business and professional regulation; when

---

140. *See, e.g.*, discussion on Idaho and Washington, *infra* Part IV(C)(6).

141. Waldman, *Preserving Diversity*, *supra* note 10, at 754-756 (raising concerns that, even with multiple credentialing organizations, potential problems may still arise involving credentialing and training methods that fail to accept and embrace the diverse approaches to mediation now in use).

the court considered moving the program elsewhere, mediators overwhelmingly supported leaving it where it was previously located.

Some people have expressed doubt over locating credentialers within a state bureaucracy, which may prefer to focus on paper credentials to ease their task. Similarly, some jurisdictions have tended to avoid governmental credentialing, in part from concern over possibly heightened openness, judicial review, and procedural requirements.[142]

6. What Role Should Paper, Performance, or Other Methods Play in Credentialing?

Most experienced mediators and program administrators express a strong belief that paper credentials and written testing are unlikely to measure mediator competence or potential. Many of these express views that observation of performance is the only valid means and should be expanded substantially. They believe mediation requires skills that can only be demonstrated in actual practice or effective simulations, and fear trainers would "teach to" any written test. Proponents of paper credentials counter that other approaches would prove burdensome. Most would limit written testing to the substantive knowledge needed to handle specified types of cases; a few, such as Peggy Herrman, see somewhat greater potential for written tests.

7. Amount of Experience

Numerous programs and rosters permit any neutral to practice provided he or she has "logged" a certain minimum number of cases or hours in mediation in combination with required training.[143] A small number of programs require considerable experience or reward it in other ways. USIECR requires over 200 hours in environmental or public policy settings, a requirement that is considerably higher than most.[144] TMCA's four-tier credentialing system allows mediators to move "up the ladder" as their experience grows.[145] Some applaud this; others decry it. Those who criticize it as exclusivist fear that experience requirements can make it harder for new mediators to acquire experience, set such high requirements that persons who are excellent part-time mediators will be discouraged from continuing, and present a high wall retarding entry of a cadre of newer and qualified mediators.

---

142. Colorado contemplated using a state agency, though this proved some hindrance to implementation when a "sunrise" process, required to justify the need for new regulation, turned up scant evidence of substantial problems stemming from incompetent neutrals. Interview with Cynthia Savage, ADR Coordinator, Colorado Judicial Branch (July 2001).

143. *See* FDIC/RTC Roster Qualifications Review Panel, *supra* note 119.

144. *See* MACRO, *supra* note 93.

145. *See generally* Texas Mediator Credentialing Association, Criteria for Credentials, *at* http://www.txmca.org/criteria.htm (last visited Dec. 2, 2004).

8. How Long Should Credentials Last?

A few programs take note of the fact that mediators' capacity to perform can change over time, often through no fault of their own. So far, none seem to have called for "re-credentialing," but some—especially in community contexts—emphasize the value of continuing education, maintaining a caseload over time, getting periodic observation and feedback, or other informal approaches to assuring continued competence.

9. Grandparenting Mediators

Some jurisdictions have sought to accommodate the fact that mediators have taken many routes into the field, with some effective mediators having had little training, mentoring, or observation. A few have employed "grandparenting" (formerly "grandfathering"), or other credentialing approaches that recognize that there may be several paths to competence and acknowledge the value of actual experience, in assessing applicants who might otherwise lack specified training or other attributes.

10. Processes for Developing Credentialing Systems

QA and credentialing processes are not established or operated in a vacuum. Efforts to address credentialing are often highly contentious. Indeed, to take two examples, the NYSDRA and Maryland QA Committee's initial time estimate—one to two years—proved highly optimistic.[146] The nature and success of such activities will depend on numerous factors.

It can be critical to reach out to decision makers and users of mediation services, educate them about what to look for in an ADR process and in a mediator, and explore the potential benefits of various styles of mediation.[147] In many jurisdictions, the higher one goes in bureaucratic or political systems, the harder it gets for mediators' or similar professionals' views to affect policy decisions; there, a more concerted effort could be helpful. Also, it may be valuable (while difficult) to try to bridge gaps that often exist, as between attorney-mediators, who sometimes are seen as more "evaluative" or prone to value legal expertise, and other mediators who espouse more facilitative or transformative approaches.

Mediator associations, courts, agencies, and other authorities have employed a variety of processes for considering that information, examining technical and policy issues involved, obtaining input or agreement from affected interests, and developing principles and a final decision.

A few have used collaborative decision making processes, ranging from one-time hearings and brief information-sharing activities to full-fledged consensus procedures. Apart from expert-driven, closed-door approaches, among the potential process options for a QA effort are:

---

146. *See generally* Neilson & English, *supra* note 76, at 221-48 (for a discussion based in large part on Family Mediation Canada's multi-year efforts).
147. *See* SPIDR Commission, *Qualifying, supra* note 9.

- A structured data gathering and information exchange process that provides interested persons one or more chances to offer views to the oversight committee (and perhaps react to interim proposals).
- An advisory process in which selected representatives seek to reach a general agreement on recommendations to the oversight committee and no one is formally "bound" by the decision.
- A consensus decision making process in which representatives of affected interests negotiate in an effort to reach a specific agreement and each interest is expected to abide by it.

Opinion appears split as to the appropriate process. A few efforts have sought to be "collaborative" ones committed to maximum feasible involvement or even reach actual "consensus" among stakeholders.[148] Experience suggests that undertaking a full consensus process (third option)—similar to the one now being employed by NYSDRA—can be challenging, resource-intensive, and time-consuming.[149] While a consensus process would offer greater incentive for the participants to educate each other, "think outside the box," and find creative solutions, many are dubious about achieving prompt, full agreement among so many affected entities.

A facilitated, broad-based decision making process (second option) that would seek to produce actual agreement on policy recommendations advising, but not binding, the oversight committee can (1) increase some parties' comfort level in mutual sharing of information and perspectives, and (2) permit more focused, intensive dialogue on "real world" concerns that should be addressed in crafting realistic guidance. The Maryland QA Committee, for instance, undertook a multi-year process to:

- Sponsor a structured data gathering and information exchange process that provides interested persons one or more chances to offer their views.
- Develop background papers, statements of options and principles, and/or interim proposals that interested persons could react to.
- Seek consensus within the Committee on an ultimate QA plan that takes into account as many views and reactions as possible.[150]

Of course, this approach requires representatives on a decision making committee to ensure that they speak effectively for their constituents, and keep them apprised of developments, as the process moves forward.

A few initiatives have made a concerted effort to include mediation consumers' views in the process of developing a QA system. As noted elsewhere, lawyers, judges, and parties often define mediator quality differently than do most

---

148. *See* the Maryland MPME process described *infra* Part IV(B)(5)(c)(2).

149. Efforts at true consensus appear to have floundered, including an Oregon Mediator Competency Work Group that met over a dozen times with limited results and the aforementioned Colorado efforts that produced an initial consensus that two constituencies then declined to endorse. According to some reports, both groups spent inordinate time seeking to address the scope of their efforts and define "mediation." One Colorado participant suggested that a lesson from that process is to assure that representatives continually keep their constituents briefed as options are explored and tentative decisions reached. The New York State Dispute Resolution Association's current credentialing effort has sought to achieve wide awareness, input, and buy-in through a consensus-based process that has involved extensive outreach, numerous focus groups, and group drafting exercises; it took considerable time to develop actual proposals.

150. *See* discussion *infra* Part VI.

mediators. For example, research by Roselle Wissler indicated that more parties viewed the mediation process as fair (and thought the mediator understood their views) when the mediator expressed some views on the merits of the case (though not necessarily the appropriate outcome).[151] A few have established a broad-based advisory committee to reach out to customers (much as has been done with the Texas Mediator Credentialing Association) and enhance long-term credibility and implementation of a quality assurance system.

11. Market Approaches

Some programs take a "free market" approach to credentials. Supporters of this method fear that licensing or certification may be restrictive and rob ADR of valuable perspectives and approaches. They believe a market approach will ensure that only the best mediators continue to practice. This philosophy recognizes that a "market" solution requires consumers to be well-informed, so that they are better able to assess the kind of assistance they need and to evaluate the performance of the practitioner and program. Several state entities have devised consumer guides on selecting a neutral.[152]

12. Conclusion on Credentialing

While "hurdles" have some utility, and may offer some psychological assurance to certain parties, they often prove exclusionary and focus on criteria that are measurable but often relatively irrelevant to actual quality performance. They also fail to further many important goals that can be promoted by advanced mediation training, ethics education, apprenticeship, co-mediation, continuing education, feedback, self-assessment, and grievance processes.[153] A QA system should embody recognition that a mediator's commitment to long-term improvement and education ("quality assistance," "life-long learning") is at least as important to promoting quality as most credentialing. A system that provides encouragement, incentives, and a support structure for mediators to work collaboratively, target developmental needs, and enhance their skills level and credibility over time, may prove considerably more effective. The following section offers an overview of these approaches.

---

151. *See* Roselle Wissler, Washington D.C. State Justice Institute, Trapping the Data: An Assessment of Domestic Relation Mediation in Maine and Ohio Courts (1999).

152. *See, e.g.,* Alaska Judicial Council, A Consumer Guide to Selecting a Mediator (July 1995), *available at* http://www.adsa.ws/Library/AConsumerGuide.htm; Ohio Commission on Dispute Resolution and Conflict Management, Consumer Guide: What You Need to Know When Selecting a Mediator (Feb. 2000), *at* http://www.state.oh.us/cdr/brochures/cgmediator.htm.

153. Charles Pou, *'Embracing Limbo': Thinking about Rethinking Dispute Resolution Ethics,* 108 PENN. ST. L. REV. 199, 208 (2003) [hereinafter Pou, *Embracing Limbo*]. "One concern lies with those solo mediators in 'low maintenance' programs—and they exist—who deem that forty hours of training, a little CLE, and perhaps a law degree are about all they will ever need." *Id.*

VII. The Horizontal Axis: Nurturing and Protecting Quality

Besides, credentialing or certification, many methods of assessing and nurturing quality practice are available to be used in complementary combinations. Most people interviewed suggest that exclusive reliance on any one method—for example training, interviews, references, or observation—is likely to measure or promote certain elements of competence while neglecting other significant ones.

These less formal approaches to promoting mediator competence generally involve a combination of several of the following:

- Standards for training programs
- Mentoring, supervision, or other support
- Amount of experience (e.g., number of cases and/or hours)
- Performance tests or live or taped demonstrations
- Monitoring and user evaluations
- Continuing education and training
- Ethics education
- Complaint procedures/panels
- References
- Interviews
- Market approaches

A. Standards for Training Programs

Some standards-setters choose to certify or accredit trainers, address the content of the training program that should be offered to mediators, or discuss trainers' broader (or longer-term) responsibilities. As one knowledgeable person has written, "Training standards should be reviewed with the goal of making trainers more accountable for 'graduating' or recommending incompetent students."[154] This viewpoint appears to represent a growing trend, reflecting observers' belief that quality training—especially combined with effective mentoring—can make a substantial difference and that trainers should bear an obligation to mentor their students (or at least offer feedback that discourages substandard trainees from moving forward).

Joseph Stulberg and Ruth Montgomery's *Design Requirements for Mediator Development Programs* offers some structural suggestions.[155] Training programs typically involve behavioral components that employ substantial roleplays and demonstration of appropriate behavior.[156] These exercises are often linked to examples with theory-based knowledge.[157] Mediators are generally seen as benefiting from self-evaluation. In some cases, videotaping the mediation allows trainees to see their verbal and non-verbal activities at different stages and affords an opportunity for more rigorous feedback.

---

154. Ansley Barton, *Who Goes There? New Questions at the Gate*, 1 Conflict Resol. Practitioner 43 (2001).
155. Joseph Stulberg & B. Ruth Montgomery, *Design Requirements for Mediator Development Programs*, 15 Hofstra L. Rev. 499 (1987).
156. *Id.*
157. *See id.* at 529.

Several entities have adopted standards for approving mediator training pro-grams, such as the Academy of Family Mediators.[158] The Florida and Georgia state courts actually require all mediators registered for court and domestic rela-tions cases to be trained by programs they have approved; in a very few states, training by in-state trainers is mandated. The Florida Supreme Court Committee on ADR Policy provides the court with recommendations relating to all aspects of mediation training including the development of mediation training program stan-dards, mentorship requirements, continuing education requirements, and certifica-tion of mediation and arbitration programs.[159] Michigan has model basic training materials, including instructor's manuals, and has offered programs for trainers on using them.[160]

In 1993, a group of Texas mediation trainers conducted a series of discussions to examine possible standards for the basic forty hour mediation training in Texas, leading to a document describing standards agreed upon by the trainers, the areas in which trainers agreed that standards would not be appropriate, and areas in which the trainers have not reached consensus.[161] As part of its training oversight process, according to interviews, the New York Court's ADR Office takes a "sup-portive" approach—it reviews training agendas, manuals, and materials from those seeking accreditation, offers informal feedback, and observes trainings; it is considering undertaking to offer "train-the-trainers" sessions periodically.

B. *Mentoring, Supervision, or Other Peer Support*

Craig Coletta, a community mediation expert, has suggested that mediation is neither art nor science, but rather a "craft."[162] As with most crafts, he maintains, some of the most effective learning for mediators comes in the "guildhall" with other craftsmen—which can be something of a challenge for solo mediators in "low maintenance" programs.[163] This notion aptly emphasizes the value of a framework that encourages, or even requires, regular exposure to other mediators, models, and experiences.[164] It could also help us to see that there probably will be multiple responses worth weighing in any mediation dilemma, and possibly pro-mote what has come to be thought of as "reflective practice" or "mindfulness" in mediation.

---

158. Association for Conflict Resolution, Criteria for Training Programs (describing fifteen identified training outcomes, approved by the ACR Family Section), *at* http://www.mediate.com/acrfamily/pg11 .cfm (last visited Dec. 2, 2004). *See also* Stulberg & Montgomery, *supra* note 155 (Offering structural suggestions for putting training programs together).

159. *See generally* Policy Consensus Initiative, Assuring Quality in ADR Programs (citing Florida's 2000 Training Standards and Georgia's Training Approval Guidelines), *at* http://www.policyconsen-sus.org/pci/policiestools/qualityassurance_5.html (last visited Dec. 7, 2004).

160. Interview with Joseph Stulberg, Associate Dean, Ohio State University School of Law (July 2002).

161. *See* Texas Mediation Trainer Roundtable Standards (Feb. 1994), *available at* http:www.texasadr .org/standards.cfm (last visited Dec. 7, 2004). *See also* Ohio Commission on Dispute Resolution & Conflict Management, Consumer Guide for Selecting a Trainer, *at* http://disputeresolution.ohio.gov/ Brochures/cgmediator.htm (last visited Dec. 7, 2004).

162. *E.g.*, Craig Coletta & Anne DiDomenico, *Thoughts on Mediators as Craftspeople*, 4 ADR REP. 17 (2000).

163. *Id.* at 21-22.

164. *Id.*

A recurrent theme among experienced mediators and administrators was the importance of training, mentoring, and continuing education. In contrast with the extensive attention to credentialing standards, the literature on these QA-related issues is sparse. Actual practice, though, is rich, especially among community mediation programs, and may offer the oversight committee useful lessons. A recent article on NAFCM's web site entitled *Quality Assurance and Qualifications*,[165] discusses community mediation programs' activities in this area, and includes a "quality assurance statement" that briefly addresses screening and recruitment, basic training, evaluation of training participants, apprenticeship, co-mediation, continuing education, and trainer responsibilities.[166]

One way that some have suggested to promote peer support could be regional or other smaller meetings to provide mediators with an opportunity to discuss some particularly difficult cases and see what others would do. Colleagues would be able to share the same challenges, solicit advice, and share in their successes. This would offer important peer support that may prove more valuable than more formal training.

Many programs employ co-mediation and/or peer consultation components with assessment of the mediator built in.[167] In Virginia, Massachusetts, and a few other jurisdictions, mentors co-mediate with, or observe, and evaluate prospective mediators before they can be certified.

Given the importance often assigned to mentoring and structured feedback in improving mediators' skills, it is surprising that many have doubts as to most such activities' effectiveness. Also, relatively little seems to have been written on the theory and practice of effectively mentoring mediators, although doubtless one or more solid sets of materials might be compiled from individual trainers' notes, presentation materials from professional conferences,[168] and less formal writings.

Maryland's new MPME is implementing a plan for creating a new statewide mentoring program to provide a variety of learning experiences for both mentors and mentees.[169] The group has researched mentoring activities in Maryland and some other states, determined the basic outline of the mentoring program, prepared several detailed forms and agreements to get the program going, and begun carrying out an implementation timeline.[170] A second MPME task force is seeking to use volunteers, practitioner groups, and other resources to schedule periodic

---

165. Broderick et al., *supra* note 74.

166. *See also* Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain that "Two Heads Are Better Than One,"* MEDIATION Q., Apr. 1996, at 179.

167. *See* MICHAEL P. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE (2000); Sue Bronson, *Improving Mediator Competence Through Self-Assessment*, MEDIATION Q., Winter 2000, at 171.

168. *See, e.g.*, Julie Bowen & Lee Salmon, Beyond Mediation - Coaching and Mentoring for Leadership Development, Materials for Federal Dispute Resolution XV Conference (Aug. 2000).

169. *See* FDIC/RTC Roster Qualifications Review Panel, *supra* note 119, at 23-24.

170. It has identified three locations in Maryland to serve as pilots for the new mentoring program (Maryland Human Relations Commission; a District Court; and the Montgomery County Community Mediation Center). It will identify a part-time Mentoring Coordinator who will oversee and serve as central contact person for the mentoring program; find and orient initial mentors and mentees; and complete and evaluate the pilot program within one year. For more information, see the Maryland Mediation & Conflict Resolution Office web site *at* http://www.courts.state.md.us/macro.index.html.

discussions in regional forums around the state to help mediators grow profes-
sionally through self-reflection and the use of discussion groups.[171]

Many community mediation programs and some others, like the Massachu-
setts Office of Dispute Resolution's Environmental Mediation Program, carefully
assess a neutral's performance and provide appropriate follow-up to assure qual-
ity. Programs may use this method in connection with a credentialing process, or
they may employ mentoring alone because it allows them to avoid developing a
credentialing process and possible attendant controversies and uncertainties over
its effectiveness. Their approach generally involves co-mediation or some form of
apprenticeship, with experienced neutrals observing or leading new or problematic
ones in actual sessions. They also may provide targeted follow-on training or
mentoring, and occasionally offer telephone advice for neutrals with specific con-
cerns.

C. Performance Tests or Demonstrations

Many neutrals and experts believe qualifications are best measured through
performance tests, such as participating in mock mediation sessions in which can-
didates have a chance to demonstrate their ability. The SPIDR Commission on
Qualifications, for example, recommended that "where standards are set they
should be performance-based."[172] While efforts have been made to develop these
kinds of competency tests,[173] few large-scale programs have had the time and
resources for wide performance-based testing.[174] Moreover, while direct observa-
tion may be an excellent measure for evaluating what occurs during a mediation,
inter-rater reliability and a variety of other practical concerns must be considered.
MCDR and FMC appear to have done the best job with these issues.

A few programs have undertaken this approach in selecting candidates for
training. Ellen Waldman's recent article in the ABA Dispute Resolution Section's
Dispute Resolution Magazine examines how some state court and other pro-
grams—in particular the Maryland Council for Dispute Resolution—have begun
to make greater use of performance-based approaches.[175] For example, the Mas-

---

171. The task force drafted an e-mail to be sent to leaders of Maryland mediator groups asking them
to encourage formation of committees to organize practitioner discussion groups and materials. A
number of possible facilities around Maryland for holding these discussions were identified. A diverse
committee drawn from representatives of each practitioner group, region, and approach to practice,
would develop an information packet on self-reflective practice, develop flyers and other methods to
announce discussion group activities, and identify effective discussion leaders. *Id.*

172. *See* SPIDR Commission, *Qualifying, supra* note 9.

173. *See* Test Design Project, *supra* note 12.

174. Honeyman, *Criteria for Mediation Performance, supra* note 2. "Beyond a few programs which
insist on high standards and are willing to pay the costs for themselves, we have failed, so far, to pro-
vide the performance-based mechanisms by which skilled mediators can demonstrate to all comers that
they have the key elements of effective performance. We have thus discouraged consumers and the
public from valuing those elements highly." *Id.*

175. Ellen Waldman, *Credentialing Approaches: The Slow Movement Toward Skills-Based Testing
Continues*, 8 DISP. RESOL. MAG. 13 (2001) (thoughtfully examining approaches to credentialing,
relation between training requirements and mediator skills, and efforts to employ performance-based
testing). The ABA Section of Dispute Resolution Magazine focused a special edition on credentialing
mediators; it contains several articles of interest, including looks at the new trends (Judy Filner), use of
skills-based testing (Waldman), and rosters and mediator quality (Peter Maida) (Fall 2001).

sachusetts Office of Dispute Resolution has a panel of more than sixty-five pri-
vate-sector neutrals who were chosen based on a performance-based selection and
training process.[176]

A few programs have made efforts to employ performance-based assessment
to identify individual mediators' strengths and weaknesses, in an effort to develop
individualized improvement strategies. These efforts are discussed in greater
detail in the sections above.

D. Monitoring and User Evaluations

Many people believe that a key element of a QA system will involve user
feedback and a complaint handling procedure, but relatively little attention ap-
pears to have been paid to specifics. In particular, these processes may raise con-
fidentiality challenges. ADR programs may also wish to systematically monitor
neutrals' performance to identify situations involving quality concerns. Some
programs, like MODR's and the CPR roster, rely extensively on feedback from
users as a tool to assess their neutrals. A related approach used by some programs
involves removing those neutrals who are never selected by parties.

Another common method is using post-mediation questionnaires or evalua-
tions from the attorneys and/or parties in each case to ascertain whether they
found mediation helpful, whether they would use the mediator again and whether
the mediator maintained neutrality, understood the issues, stimulated creative
solutions, and helped them reach agreement. Obtaining, handling, and using such
feedback presents a number of definitional and logistical questions;[177] partly due
to this, some programs report that they receive, and rely, less on user feedback
than they initially planned.

E. Continuing Education or Training

Continuing education or training is a common requirement. Continuing edu-
cation was cited by many as critical for helping mediators understand underlying
racial, social, educational, and other issues potentially affecting their effective-
ness. This might include helping some mediators learn about themselves and their
attitudes and better understand how and why they influence the process. Since
different mediators have different views of why they are in the room, and may
benefit from understanding different mediating styles and their impact, many see
continuing education as an important component. Continuing education is an
especially vital component of the Virginia and Maryland programs, with Virginia
offering an especially extensive course selection.

The amount of continuing education required varies, often based on the types
of claims the mediators handle. For mediators handling smaller claims, for exam-

---

176. *Id.*
177. These questions include: Would feedback seek to gather data on the field of mediation, or also
to promote mediator self-improvement? Depending on the answer, what processes should be used for
completion, collection, storage, safeguarding, and usage of feedback forms? Should data on these
forms be shared with or discussed with a mediator? If so, when, how, and by whom?

ple, eight hours of training may be required, with others (e.g., divorce, civil, arbitration) needing up to fifteen hours of training. For example:

- Florida's continuing mediator education requirements demand that, every two years, mediators take sixteen hours applicable to each area of certification, including a minimum of four hours of mediator ethics. In addition, family and dependency mediators must do at least four of their sixteen hours in domestic violence education.[178]
- FMC appears to demand the most such education from its mediators.[179]
- The Texas advisory committee proposals, not atypically, would have required that court mediators get a minimum of ten hours of approved continuing education annually on mediation or mediation-related issues, with at least two hours on mediation ethics and four hours on mediation practice skills enhancement.[180]

Many community and agency-based programs do considerably more than typical court programs, holding periodic seminars, in-services, "mediator master classes," conferences, or other training sessions with their neutrals (or, in some cases, those with special needs) concerning skills enhancement, new developments in the field, or handling ethics or other commonly experienced problems. A few programs employ these "advanced" sessions to identify mediator needs, or even to see which ones "really get" the basic concepts (e.g., principled negotiation, confidentiality, neutrality) and identify and address individual needs. Occasional programs (e.g., Idaho and Washington) have required neutrals to provide references or lists of clients from prior cases. A few programs—such as the D.C. Superior Court's Multi-Door Courthouse and some agencies' collateral duty mediator programs—employ interviews as part of their mediator selection process, or get reports from the neutrals themselves and use them as a tool in assessing their understanding and performance.

F. Mediator Ethics: Standards, Education and Support[181]

Setting and enforcing ethics standards for mediators relates closely to QA. Approaches vary. Some experts prefer to focus on establishing more, and more detailed, context-specific, standards and enhancing grievance procedures. Others advocate having the field concentrate more intensely on (1) developing mediators' individual ethical and professional capacities, (2) creating effective educational and support systems, and (3) enhancing and improving ethics-related resources. In any case, a recent trend has begun to think in a more focused way about ethics and ethics education, the relation between ethics and quality mediation practice, and ways to build ethical awareness into the way we "think like mediators." The

---

178. Interview with Sharon Press, Director, Florida Dispute Resolution Center (July 2000).

179. Family Mediation Canada, Family Mediator Certification Program, Application Form, *at* http://www.fmc.ca/pdf/CertApplicformJan2004.pdf (last visited Dec. 7, 2004); Family Mediation Canada, Practice and Certification and Training Standards, *at* http://www.fmc.ca/?p=Professionals/Certification-QandA.htm (last visited Dec. 7, 2004); Family Mediation Canada, Steps in the Certification Process, *available at* http://www.fmc.ca/ (last visited Dec. 7, 2004).

180. Supreme Court of Texas Advisory Committee on Court-Annexed Mediation, Executive Overview of Advisory Committee Recommendations (2001).

181. Portions of this section, and the next, are drawn from Pou, *Embracing Limbo, supra* note 153.

Ethics Task Force assisting to implement Maryland's QA program (MPME) has recommended that MPME's Oversight Committee:

- Require all MPME mediators to take (1) a basic mediator ethics course during their initial two years of membership (four hours), and (2) continuing ethics education every two years thereafter (six hours).
- Offer the basic mediator ethics course at no cost to all MPME members during its first year of operation, and to all new members thereafter.
- Approve proposed MPME Standards for Mediator Ethics Education addressing goals, methods, and content; these draw on standards adopted in 2003 by the Texas Mediation Trainers Roundtable.[182]

Standards for mediator behavior are usually fairly short and offer limited help in specific situations. Most address general categories of issues or aspirations,[183] usually in summary fashion and perhaps with some added commentary. In most practice situations, codes offer only a starting point: competing "priorities" or "requirements" that necessitate an analytical process to balance, or even accommodate conflicting, standards.[184]

While it may be beneficial in some contexts—court and family programs are cited by some, while different "styles" of mediation are cited by others—to place some specific "overlay" or interpretation on selected standards sections, focus on "top down" rule rewriting risks being un-inclusive, as well as navel-gazing and promoting inaction. By contrast, a "thought process/education" approach recognizes the close relation between ethical requirements and "good practice," since much (but not all) of what one mediator might do to assure a durable, informed outcome may in fact enhance ethical behavior and "ethicizing" many tactical and strategic decisions inhibits mediators' flexibility and creativity.

Whatever the relative priority of developing more detailed codes, observers have pointed out a number of steps that could also be taken to move toward an "optimally ethical ADR world." In brief, they involve (1) establishing systems that allow neutrals to know their obligations, (2) supporting mediators in the field (e.g., possible discussions of difficult cases "before the deal is done"), and (3)

---

182. Memorandum from Roger Wolf & Arlene Grant to MPME Oversight Committee on Ethics Education Proposal (April 14, 2004).

183. *See, e.g.,* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications,* 1994 J. DISP. RESOL. 1, 9-10.

184. Some observers criticize these codes for being stale, and not capturing the richness and diversity of actual practice. Many believe that context matters considerably in thinking about how to handle ethical dilemmas, and advocate moving to create more detailed, or context-specific, standards—e.g., for different practice areas or styles of practice—to produce neutrals who will be more attentive to their ethical obligations. Florida, for instance, recently revised its ethical standards for court-connected mediators to make them somewhat more detailed. Others prefer to devote attention to interactive education that promotes ethical behavior by enhancing mediators' awareness of existing codes and helping them identify and effectuate evenhanded, defensible responses in tough cases. They suggest this approach improves mediators' abilities to avoid problems and lets them respond creatively and constructively. Rather than seeking detailed black letter principles, they believe handling many ethics issues facing mediators will never be simple and requires a thought process, rather than "looking up the answer." *See, e.g.,* Albie M. Davis, *How to Ensure High Quality Mediation Services: The Issue of Credentialing, in* COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS, 203 (Karen Grover Duffy et al., eds. 1991). *See also* Charles Pou, Jr., *Enough Rules Already: Making Ethical Dispute Resolution a Reality,* 10 DISP. RESOL. MAG. 19 (2004).

improving how we train mediators to think about and handle ethics issues.[185] Such efforts appear to be isolated so far.

Among the activities that several have cited as worthwhile, and occasionally initiated, are:

1. Greater Focus on the Relation Between Ethics and Good Practice in Training Programs

A key, if obvious, first step is helping neutrals, especially newer ones, to *recognize* ethics problems.[186] Ethics web sites are common in many professions.[187] Such a site may not need to be sophisticated or costly, especially if it sought mainly to compile, or help inquiring minds link to, relevant sources already available. ACR's Training Section has commenced a project to compile and make available online ethics training materials.[188]

2. Hotline or Other Feedback for Mediators

Ideas for hotlines range from an e-mail address to which a mediator facing an ethical dilemma could write for reactions or referrals—or, as one described it, an "Ann Landers column"—to more elaborate opportunities for structured feedback. Practical issues involved timeliness concerns and possible lack of opportunity for true dialogue.

One possibility is that the hotline could essentially serve as an entry point that could identify a peer counselor, "duty officer," or other local or regional feedback source—since "human interaction in talking through the problem in its context" would be ideal. At the least, it could assist by helping neutrals with conundrums to eliminate obviously bad choices.

3. Case Studies

Other professional groups' ethics programs rely considerably on case studies of ethical conundrums, with or without commentary. Some see a need for doing more—e.g., to develop a book or other compendia presenting a series of common situations and to compile and perhaps annotate them for trainers and mediators. A number of individuals have developed some case studies for ethics teaching purposes, and have offered to share them and upload them to an ethics web site.

---

185. *E.g.*, Symposium, *Dispute Resolution and Capitulation to the Routine: Is There a Way Out?*, 108 PENN. ST. L. REV. 1 (2003).

186. A draft of proposed standards for approved ethics training courses has been submitted by the Texas Mediation Trainers Roundtable's Ethics Standards Committee.

187. Other ethics web sites cited as worth closer exploration were those of the Center for Study of Ethics in the Professions. It includes a variety of codes, an index of them, an introduction covering the debate about the function and value of codes of ethics, a context for using a code by considering a sample case, resources on writing codes, links to other sites, and a bibliography. *See* Illinois Institute of Technology, Center for the Study of Ethics in the Professions, *at* http://www.iit.edu/departments/c sep/ (last visited Dec. 7, 2004).

188. Interview with Mary Thompson, Corder/Thompson and Associates (Oct. 2004).

4. *Local or Regional Support Systems*

Several people have advocated beginning to develop local or regional networks conversant with ethics standards and mediation practice to interact—as one put it, counselors, expert advisors, or peer discussion groups to allow mediators to have the right kind of conversations about ethics problems. Some well-designed, well-run court and community programs now present brown-bag in-services, peer supervision, or similar models that many thought to be worth closer attention and possible emulation. A related idea, recently initiated in Virginia, is establishing small groups of mediators who commit to coming together periodically to discuss ethical aspects of their cases with other group members.[189]

5. *Training: Making Ethics Skills Routine*

Far too often, ethics has been treated as an afterthought in "practical" skills building training, or as something separate from good practice. Many believed that basic and advanced mediation training should place the systematic exploration of applicable codes much closer to the center of their curricula. These standards seek to express the field's goals and ideals; in so doing, they inform new and experienced mediators about "who we are." Conversely, they also build internal inconsistencies into our outlooks and tensions into day-to-day practice that should be dealt with as part and parcel of that practice. The better able a mediator is to perceive, analyze, and avert or deal with ethical dilemmas, the better a mediator she will be.[190]

6. *What Should Ethics Education Look Like?*

Whether offered separately, as a core part of broader training, or as professional "in-service" exchanges, a case-specific method offers more engaging exchanges than theoretical discussions of principles.

Mary Thompson, an experienced Texas dispute resolution trainer, has counseled that handling ethical dilemmas requires mediator competency in at least four very different areas: self-awareness, knowledge of professional standards, analysis

---

189. Pou, *Embracing Limbo, supra* note 153, at 213. "Social workers, some experts observed, build similar peer discussions into their routine activities as part of their career development." *Id.* at 213 n.71.

190. The Ethics Task Force assisting to implement Maryland's QA program (MPME) has recommended that MPME's Oversight Committee:

- Require all MPME mediators to take (1) a basic mediator ethics course during their initial two years of membership (four hours), and (2) continuing ethics education every two years thereafter (six hours).
- Offer the basic mediator ethics course at no cost to all MPME members during its first year of operation, and to all new members thereafter.
- Approve proposed MPME Standards for Mediator Ethics Education addressing goals, methods, and content; these draw on standards adopted in 2003 by the Texas Mediation Trainers Roundtable.

Memorandum from Roger Wolf & Arlene Grant to MPME Oversight Committee on Ethics Education Proposal (April 14, 2004).

and decision making, and performing in the moment.[191] The last of these competencies involves sharpening skills in applying the results of the first three in a manner that is appropriate to the situation, the neutral's style, and her individual strengths and limitations.[192] Each competency has its own unique aspects, and Thompson describes the practice implications of each in an article describing effective ethics education.[193]

She suggests the following components, and offers illustrative training exercises for developing each skill:

- Self-awareness: Ethical decision making involves more than knowing a code of ethics, but also understanding those personal factors (e.g., morals, biases, religious and cultural values) that affect a mediator's ability to remain impartial and ethical.[194]

- Knowledge of professional standards: Individuals work within, and must understand, the applicable laws, organizational policies, certification requirements, and ethical rules or guidelines.[195]

- The extent to which provider organizations or potential users of mediation services employ, or pay heed to, the standard or approach that is established.

- Analysis and decision making: Armed with knowledge of personal values and professional standards, a mediator must then be able to analyze an ethical dilemma and decide on a course of action, often during the fast pace of a session.[196]

- Performing in the moment: Mediators must not only arrive at an ethical decision, but also select and implement a course of action in a way that minimizes damage to the parties, to the process, and to the role of the mediator.[197]

7. *Some Possible Modes of Ethics Instruction*

Thompson notes that enhancing each of these competencies is best done via differing modes of instruction.[198] For self awareness, she suggests personal bias exercises; standard negotiation exercises like "Prisoner's Dilemma," and "Stand by Your Values."[199] To instill knowledge of applicable standards, she would em-

---

191. Mary Thompson, *Teaching Mediation Ethics: Activities for Teaching Ethical Competence*, 10 DISP. RESOL. MAG. 23 (2004)

192. *Id.*

193. *Id. See also* Mary Alton, At the Table: A System for Mediator Evaluation and Training (1995) (a trainer guide and accompanying videotape with professional actors, presenting trainees a chance to observe generic situations, stop the action, discuss issues raised, and assess options for responding. It presents one model, and some useful trainer materials, that could be worth drawing on or emulating in the ethics skills context), available through the University of Minnesota Extension Service *at* http:// www.extension.umn.edu/abstracts/nonweb/abstract.html?item=06531 (last visited Dec. 7, 2004).

194. Thompson, *supra* note 191, at 23.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* In these exercises, the trainer posts flip charts in different areas of the room, with each area representing a choice relating to a question posed by the trainer. For example: In a "barking dog" mediation, which of the following solutions would be hardest for you to live with as a mediator?

ploy (1) "Code Comparison,"[200] and (2) "Ethics Jeopardy," which adapts a quiz show format to test trainees' knowledge of codes of ethics.[201]

Analysis and decision making skills would be raised via exercises like (1) "Decision Tree," where trainees arrive at an ethical solution after being presented with a decision making model; (2) "Where Do You Draw the Line?" in which a situation is raised (e.g., the parties ask the mediator for advice), trainees discuss five to seven possible responses arranged on a continuum, and all exchange views of which responses actually cross the line; and (3) "Defend Yourself," a small group exercise with each group set up as a grievance committee considering a disputant's complaint and requiring the mediator to justify her actions.[202]

Performance skills, Thompson says, could be heightened via (1) role plays in which ethical dilemmas arise and mediators receive feedback on how effectively they dealt with them; (2) stop-action demonstrations where trainees watch a simulated role play, stop action at points where they recognize an ethical dilemma has come up, discuss the situation, observe as the mediator implements a strategy to respond, and then discuss the effectiveness of the mediator's response; and (3) "Quick Decisions," in which a "mediator" in a small group responds to an ethical dilemma, the entire group then offers feedback on how effective the response was, and ultimately all have had a chance to play the mediator role.[203]

8. *Ethics Standards and Complaint Procedures*

Meaningful options for handling grievances, and occasionally sanctioning misbehavior, are important to the quality and credibility of a mediation system. Such a system should include continuing ethics education, feedback, and a complaint procedure. For whatever reasons, programs report receiving few significant user complaints and tend to employ informal means to deal with most of these. Still, QA systems should be more proactive in addressing complaints, lest the market or legislatures drive decision making in this area.

A typical court program may afford the program director authority to address complaints. When a complaint is filed, she may seek a response in writing from the mediator, observe the mediator, or otherwise use discretion to determine how to handle the complaint. There may be interim steps such as education or training targeted on a certain point. The final resort would be removal of the mediator from the roster. The mediator generally may appeal any of these actions. The first appeal is the program director's decision; the second appeal may go to an oversight committee or arbitration-type panel.

Some jurisdictions now employ, or are considering, relatively highly structured procedures for assuring that neutrals perform adequately; these "after-the-fact" systems, while implemented in a very professional manner, often focus on relatively formal processes whose effectiveness and "user friendliness" have been

---

Trainees then stand by the sign that represents their choice and are asked to talk with each other about what their choice says about their personal values. *Id. See also* Alton, *supra* note 193.

200. Thompson, *supra* note 191, at 23. Using an ethical dilemma, trainees in small groups compare and contrast what various mediation codes say about the scenario, then debrief in a large group. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

Mediator Quality Assurance

questioned. The Texas Mediator Credentialing Association, now developing a credentialing regime for Texas is reviewing a lengthy, detailed proposal that some have criticized as legalistic and excessively concerned with "what lawyers and judges are comfortable with."[204]

The Florida Supreme Court created an Ethics Advisory Committee to field requests from mediators on ethics questions; it also created a Mediator Qualifications Board to hear grievances against certified and court-appointed mediators.[205] The typical sanction in Florida has tended toward requiring further training or imposing restrictions on certain types of practice (e.g., no more family cases). Very few mediators have been suspended.

In practice, however, programs have seldom found it necessary to employ such formal procedures. For now, outside of Florida at least, it appears that relatively little attention has been focused on the mechanics of grievance and ethics processes. Several observers emphasize that complaint processes should attempt to employ mediative, ombuds, or other interest-based approaches—at least at the first stage—in lieu of formal hearings. Grievance and enforcement processes can raise confidentiality, fairness, and efficiency challenges, and they merit considerable forethought. A few questions:

- Are existing ethical standards or codes adequate for decisions on complaints?
- Who would serve as ethics committee members, peer reviewers, mediators, or ombuds?
- How would the various roles be structured and carried out, in light of resource and burden issues?
- Should a committee, ombuds, or a peer review group have any authority to issue sanctions, or publicly available findings? Would there be any public record of process or results?
- Are there antitrust, fairness, or appearance concerns that ought to be addressed?
- What degree of confidentiality should be afforded to complaints, complaint-handling, grievance proceedings, and decisions of reviewers?
- Would an ombuds make reports periodically (or ever) to an oversight committee, or any other entity?

Establishing graduated, flexible complaint procedures, and possibly a complaint "hotline" for complaining parties, are methods some programs have sought to employ to promote ethical behavior. The Maryland Mediator QA Committee's pending concept paper calls for an ombuds function that "would be operated with independence, impartiality, and confidentiality and would manage initial efforts to check out and deal with issues raised by a complaint." The ombuds function could be the first step in a variety of resolution possibilities, to include concilia-

---

204. *See* Texas Mediator Credentialing Association, Criteria for Credentials, *at* http://www.txmca.org /criteria.htm (last visited Dec. 7, 2004). *See generally* Suzanne M. Duvall & John P. Palmer, ADR Council Authorizes Committee To Meet with Mediator Groups To Establish Credentialing Program Based on the Revised Proposal for a Voluntary Program for Mediators' Designation 'Credential Mediator' (June 12, 1998), *at* http://www.texasadr.org/tmca.cfm#toc (last visited Dec. 7, 2004).

205. *See* FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS § 10.900 (2000).

tion, mediation, or, eventually, a peer review panel, if that seemed appropriate or needed. Clients would retain all other remedies available.[206]

A few programs, such as the Massachusetts Office of Dispute Resolution, follow up with targeted mentoring or training when parties' assessments indicate troublesome patterns of behavior by certain neutrals. Some people expressed a view that complaint processes should be available both to customers of mediation services and to mediators wanting a say concerning negative assessments of their performance.

9. Who Should Be Developing, and Enforcing, Professional Standards? How?

A spectrum of possible "carrot-and-stick" conduct can be undertaken to promote suitable mediator behavior: setting standards, educating practitioners, supporting good practice, offering feedback, cajoling, chiding, humbling, humiliating, and, if all else fails, debarring or expelling. Various organizations at local, state, organizational, and national levels are currently focused on varying segments of this continuum—mostly on developing or reviewing codes of ethics or just offering practice guidance.

In some jurisdictions, statewide regulation was not seen to be the most effective way to regulate mediators. Instead, some said, local mediation centers sometimes can best provide for their own needs in their own ways, and statewide regulations tend to be slower and less responsive.

The Association for Conflict Resolution (ACR) has begun to examine how a new Ethics Committee can play a complaint-handling role.[207] In this setting, and others, decisions as to *who should be developing (and enforcing) ethical standards, for whom, and how* may well be as important as the actual standards. (i.e., Current or revised? Specific requirements, general aspirational goals, or something else?) Standards developers should also carefully consider the implications of decisions about who ought to be doing what along the above continuum. Also, the quality and inclusivity of the processes used to develop any standards will be important for their quality, understandability, and acceptance. To take one example: in New York, ethical standards are adopted at a community program level. This promotes discussion at a local level about the issues that mediators practicing in that area face. While perhaps not the most efficient process, it may enhance mediator buy-in and encourage effective means to address problems.

---

206. *See* MACRO, *supra* note 93.

207. ACR's Board of Directors has recently approved a policy for an Ethics Committee, with the President appointing the Ethics Committee Chair who will in turn appoint the remaining Committee members. *See* ACR Ethics Committee, *at* http://www.acrnet.org/about/committees/ethics.htm (last visited Sept. 26, 2004). "The primary responsibility of the Ethics Committee will be to review and address ethics complaints. In addition the committee is authorized to offer mediation under appropriate circumstances." *Id.* "To ensure an efficient and diverse flow of members through this committee, the first Ethic Committee will develop criteria for selecting Committee members, as well as a training process that new members will be required to undergo prior to joining the Committee." *Id.*

VIII. BEYOND THE GRID: QA FOR PROVIDER ORGANIZATIONS

It is worth noting that the quality of dispute resolution services that users ultimately receive will depend on factors having little to do with the skills or knowledge of the individual neutral involved. In particular, the rising use of consensus, public consultation, and mediation processes has been accompanied by a growing number of administrative offices and rosters to help parties employ ADR and find neutrals. While these entities' operations have stimulated little objective scrutiny or systematic commentary (but considerable speculation and *sub rosa* grumbling), knowledgeable professionals have recently begun to address quality issues relating to the administration of ADR programs: intake, matching, advice-giving, and other tasks in providing parties with ADR services.[208]

Program administrators' intake, assignment, and other actions greatly affect the long term credibility and viability of ADR methods, not to mention disputing parties' satisfaction with the quality of their ADR services. These activities warrant closer examination and more systematic attention and self-examination re-. garding how these programs are established and run—whether cast as standards, practice guidance, or just "things to think about." A few tentative steps have been taken to promote a growing sense that program administrators are professionals, or at least engage in activity that is a worthy endeavor; that they can perform well or poorly; and that converging to discuss how to do these jobs adeptly is valuable.[209]

Observers have found that provider organizations have responsibilities to provide fair, impartial, and quality processes. The aforementioned NAFCM project[210] is one such effort. Earlier, the CPR-Georgetown Commission on Ethics proposed Principles for ADR Provider Organizations.[211] These principles recognize the central role of the ADR provider organization in the delivery of fair, impartial, and quality ADR services. According to the Commission, an ADR Provider Organization includes any entity or individual holding itself out as being able to (1) provide prospective users with conflict management services directly, or (2) provide prospective users with conflict management services indirectly through the management or administration of such services including referral,

---

208. Charles Pou Jr., Mediator Quality Assurance: A Report to the Maryland Mediator Quality Assurance Oversight Committee (2002) [hereinafter *Mediator Quality Assurance*], *available at* http://www.policyconsensus.org/pci/policiestools/QA_MD_Report.pdf (last visited Dec. 7, 2004). These ADR program activities and rosters differ greatly in their contexts and purposes, as well as in their usage, exclusivity, openness, and operating philosophies. Some are well-planned, while little forethought has gone into establishing others. They range from an administrator artfully matching neutrals with disputants all the way to a bureaucratic black box in which cronyism, or biases, may play shrouded roles.

209. *See, e.g.*, Key Bridge Foundation, Clearinghouse for Mediation Program Managers: A Resource for Mediator Rosters, *available at* http://www.crinfo.org/mediation-program-managers (last visited Sept. 26, 2004).

210. *See* Broderick et al., *supra* note 74.

211. *See* CPR Georgetown Commission on Ethics and Standards of Practice in ADR, Principles for ADR Provider Organizations (2002), *at* http://www.cpradr.org/finalprovider.pdf. These principles advise ADR provider organizations on the delivery of fair, impartial, and quality ADR services. *Id.* at 4. The document also includes a taxonomy suggesting the breadth and diversity of ADR provider organizations. *Id.* at 15.

clearinghouse, roster creation, brokering or similar activities.[212] "Conflict management services" include activity as a neutral third party assisting disputants to clarify or resolve their conflicts, as well as provision of consulting, design, training, or other services intended to enable a user to better employ neutrals or enhance the capacity to resolve conflicts more effectively.[213]

Several core principles guided the CPR-Georgetown effort:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR provider organizations and to inform consumers, policy makers, and the public generally.
- The most effective architecture for maximizing the fairness, impartiality, and quality of dispute resolution services is the meaningful disclosure of key information.[214]
- Consumers of dispute resolution services are entitled to sufficient information about ADR provider organizations and their neutrals to make well-informed decisions about their dispute resolution options.[215]
- ADR provider organizations should foster and meet the expectations of consumers, policy makers, and the public generally for fair, impartial, and quality dispute resolution services and processes to ensure that best practices will be highlighted in the development of the field.[216]

The CPR-Georgetown Commission on Ethics recommended several possible approaches to addressing the numerous issues of quality, selection, administration, access, oversight, and design that converge when public and private entities provide ADR services.[217] It recognized that, as dispute resolution activity becomes increasingly institutionalized, the need will grow for those who administer ADR programs to ensure that their efforts are effective and their activities viewed as fair and appropriate.[218] The Commission recognized that provider organizations' efforts should include some self-assessment drawn from the following:

- *Obtaining consumer input/review of complaints.* Some programs, like the D.C. Superior Court's Multi-Door Courthouse, seek parties' or lawyers' feedback as to the manner in which they have administered a case, in addition to their assessment of the neutral's performance.
- *Self-assessment/performance audits.* Occasionally, programs have either retained a consultant, or undertaken themselves, to evaluate their administration efforts.
- *Peer review.* This could include seeking review and input from administrators of other ADR programs or from ADR experts who can provide an unbiased look at the program's operation.

Finally, provider organizations can help themselves by doing more to share information and experiences among themselves, think through matters of effective systems design and evaluation, and focus explicit attention on "best practices" much as mediator groups have begun to do. NAFCM's recent successful effort to

---

212. *Id.* at 5-6.
213. *Id.* at 6.
214. *Id.* at 4.
215. *Id.*
216. *Id.* at 5.
217. *See id.* at 7-13.
218. *Id.* at 4.

develop an assessment tool for community mediation programs, discussed above, is one example of how providers are beginning to work together to address this aspect of ADR quality.

IX. ASSISTANCE INSTEAD OF ASSURANCE: LEARNING TO ACCEPT AMBIGUITY

The growth of ADR has led many courts and mediation programs to develop credentialing and other approaches that seek to assure high quality, ethical practice. Local political and professional factors, persistent, strong divisions as to how to define and promote "good" mediation, and a variety of practical difficulties have led courts and other programs to take very diverse—and sometimes dubious—paths in trying to assure quality. Chris Honeyman has set forth some of these approaches and described their pitfalls:

> More and more, we can expect the heavily-trumpeted legal and "substantive knowledge" skills to be used to fill the gap. The logical result makes mediation an adjunct function within each of several occupations which are really about something else. At the same time, on the professional side of the field, we are in effect helping to promote in the marketplace mediators whose key skills overlap the core skillset of mediation only to a degree, at the expense of those whose balance of skills is closest to mediation itself. Over a period of time, we should logically expect this to lower the public's reasonable expectations of what mediation should be able to accomplish.[219]

Given what we do know about mediators' behavior, clients' needs, and the political realities involved, addressing mediator quality assurance will never be a simple or straightforward matter. As Glenn Sigurdsen has written, "The fact that we have struggled for so long and so hard and continue to do so should be telling us something."[220]

High-quality mediators come from a variety of backgrounds, and many good ones have learned on the job or developed skills in ways other than standard ones. Any approach to quality assurance that is exclusive, as opposed to inclusive, runs a risk of eliminating some potentially excellent mediators.[221] Similarly, those who believe that reliance on a single test, a research-based questionnaire, or credentials based on background or experience will succeed in denoting or predicting good practice are doomed to disappointment.[222]

---

219. Honeyman, *Criteria for Mediator Performance, supra* note 2.

220. Glenn Sigurdson, ACR Environment/Public Policy Section; Critical Issues Papers, Inside the Space Between A & B and C, D, & E: Reflections and Suggestions on Practice and Quality 22-23 (May 2002), *available at* http://www.acrnet.org/pdfs/epp-criticalissues.pdf.

221. ABA, Task Force on Credentialing, *supra* note 29, at 10.

222. In particular, given the field's diversity, no nationwide system established by any single entity is likely to prove practicable. While the ABA Task Force on Credentialing recommendation to develop a model for accrediting mediator preparation programs could be highly worthwhile, it does not call for uniform credentialing standards for individual mediators. *See* Sigurdson, *supra* note 220.

None of the five QA strategies described above[223] is so superior that all should adopt it. On the one hand, a "low hurdle-low maintenance approach," when implemented by an able administrator who works closely with her mediators, can produce superior results. On the other, it may yield processes that rely on "headbanging" and "horsetrading" at the expense of parties' thoughtful exploration of a range of possible solutions. Nevertheless, although the current diversity has many good points, this article's survey suggests several initial conclusions:

- A "community" or "low hurdle-high maintenance" approach may often yield the most consistent beneficial results in promoting the skills that lie at the heart of mediation practice.[224]
- Many "paper-based certification" programs can provide some generalized assurance of minimal skills. In light of the unchallenging hurdles they usually impose, most cannot begin to offer meaningful assurance of consistent quality. Worse, they often are misleading and may engender unwarranted complacency among some who have attained credentials.
- Mediators who understand and embrace the importance of developing their skills and building self-awareness are more likely to deliver quality processes than those who view mediation skills as easily acquired or merely adjunct to other expertise.
- The field should seek to promote and reward mediators wishing to develop their skills and self-awareness, and deemphasize "pass-fail" barriers and substitute credentials that sometimes serve to direct users to look for marginally relevant expertise and skills.
- The "guildhall" concept[225] and performance-based methods (which have considerable intellectual support but little actual use) can be quite valuable. While they raise logistical, resource, incentive, and other challenges meriting close attention, their benefits likely will warrant the added effort.

A strategy that would, among other things, encourage, or even require, regular exposure to other mediators, styles, and experiences to promote "reflective practice" will be both more stringent than laissez faire and less rigid than regulation involving the "certainty" of prescriptive edicts as to "who can mediate." Those implementing a QA strategy should consider these general recommendations:

- The definition of "quality mediation" may not be the same in every context (e.g., differing styles and expectations, mandatory v. voluntary participation, imposed or party-selected mediator, substantive specialization).
- Substantive knowledge can be important in some mediation settings but is not generally determinative of a mediator's abilities or long-term potential.
- Voluntary approaches to promoting quality mediation are preferable to mandatory credentialing or "elitism."

---

223. See *infra* Part V.
224. Pou, *Mediator Quality Assurance, supra* note 208, at 15-17. Maryland's MPME is now creating a statewide framework to implement such a system. *Id.*
225. *See* Coletta & DiDomenico, *supra* note 162.

- Hurdles should be kept modest, and incentives and encouragement to participate in long-term improvement programs (e.g., disclosure via mediator registries, educating users, support frameworks, opportunities for mentoring and targeted discussion) should serve as a middle way between mandatory certification and market-based approaches.
- While we know that some percentage of trainees and experienced mediators will never be able to master necessary skills, a great majority possess either basic skills or the ability to acquire them with some sustained effort.
- All mediators have something to learn about good mediation, and benefit from exposure to a variety of sources and styles.
- As opposed to a "pass-fail" approach, performance-based testing activities should be developed that serve to permit identification of areas where skills could stand improvement and remedial education plans be developed.
- A key for any QA system will be the extent to which mediators choose to participate and provider organizations or users of mediation decide to employ standards that are established; i.e., will judges, attorneys, or roster managers view them as meaningful in (or at least relevant to) their listing and selection decisions? The process used to develop a QA system can be critically important to understanding, acceptance, and success. Utilizing collaborative or even consensus approaches, or at least being as inclusive as possible (e.g., by involving mediators and users as much as possible) are vital for building a broad sense of ownership in the outcome.
- Ongoing outreach, education, and related interactions that involve users and providers of mediation services will be important. They should explore what to look for in an ADR process and in a neutral, as well as the limits of particular credentialing approaches.

QA processes and decisions that emphasize approaches that *assist* mediators to improve—not those that purport to "assure" competence pursuant to readily measurable criteria of questionable significance—are likely to produce clear advantages for courts, provider organizations, and other mediation users. Ideally, these groups will begin to value such a "quality assistance" philosophy, both as a vehicle for mediators' growth and as an indicator of their skill.[226]

---

226. Portions of this article draw upon approximately ninety interviews, nearly all conducted under promise of confidentiality. Rather than cite to numerous anonymous statements, the article generally seeks to acknowledge the following interview subjects' invaluable contributions without directly attributing statements to individuals: Greg Abel – Washington Mediation Association; James Alfini, – South Texas College of Law; Terry Amsler – Conflict Resolution, William and Flora Hewlett Foundation; Linda Baron – National Association for Community Mediation; Howard Bellman – Madison, WI; Nick Beschen – Maryland Association of Community Mediation Centers; Lisa Bingham – University of Indiana School of Public and Environmental Affairs; Scott Bradley – (formerly) Executive Director, North Carolina Community Mediation Centers; Ramona Buck – Maryland Mediation and Conflict Resolution Office; Chip Cameron – Nuclear Regulatory Commission, Office of General Counsel; Christine Carlson – Policy Consensus Initiative; Lorig Charkoudian – Community Mediation Program, Baltimore, MD; Elly Cleaver – NASA, Dispute Resolution; Craig Coletta – National Association for Community Mediation; Mark Collins – ADR Coordinator, New York State Court System; Cris Currie – Washington Mediation Association; Dorothy Della Noce – Institute for the Study of Conflict Transformation, Hofstra University, Hempstead, N.Y.; Geoff Drucker – USPS, Dispute Resolution and

Prevention; Suzanne Duvall – Texas Mediator Credentialing Association, Texas Supreme Court ADR Advisory Committee; Judith Filner – Key Bridge Foundation, Washington, DC; Fetneh Fleishmann – Association for Conflict Resolution, District of Columbia Chapter; John Charles Fleming – Austin, TX; Ken Fox – Hamline University; Donald Gifford – University of Maryland Law School; Aimee Gourlay – Minnesota Center for Dispute Resolution; Cindy Hallberlin – (formerly) USPS; Kenn Handin – New York State Dispute Resolution Association; Merri Hanson – Peninsula Mediation Center, Hampton, VA; Gary Hattal – Federal Mediation & Conciliation Service; Timothy Hedeen – Kennesaw State University; Joseph Herkert – North Carolina State University; Margaret Herrman – University of Georgia; Lisa Hicks – New York State Dispute Resolution Association; Chris Honeyman – Hewlett Theory-to-Practice Project, Hewlett Test Design Project; Carol Izumi – George Washington University Law School; Susan Jeghelian – Massachusetts Office of Dispute Resolution; Marvin Johnson – Silver Spring, MD; Robert Jones – Florida Conflict Resolution Consortium; SPIDR Second Commission on Qualifications; ACR Senior Professionals initiative; Dan Joyce – Cleveland Mediation Center; Susan Kalil – Circuit Court for Montgomery County; Diane Kenty – Maine Courts ADR Program; Kim Kovach – (formerly) University of Texas School of Law; Martin Kranitz – National Institute for Conflict Resolution; Jeremy Kropp – New York State Court System; John Lande – University of Missouri School of Law; Pam Madrieata – Idaho Mediation Association; Steve Marsh – Dallas, TX; Suzanne Marshall – State Office of Administrative Hearings, Austin, TX; Bernie Mayer – CDR, Boulder, CO; Martha McClellan – FDIC; Joseph McDade – U.S. Air Force; Michael McWilliams – Baltimore, MD; Carrie Menkel-Meadow – Georgetown Law School; Christina Merchant – Arlington, VA; Ellery "Rick" Miller – University of Baltimore; Patricia Miller – National Institute for Conflict Resolution; Maria Mone – Ohio Commission on Dispute Resolution; Dana Morris-Jones – Severna Park, MD; Hon. James Murray – Office of Administrative Hearings, Hunt Valley, MD; Michael Niemeyer – Oregon Commission on Dispute Resolution; Pamela Ortiz – Administrative Office of the Courts, Annapolis, MD; Lisa Johnson Peet – (formerly) Community Mediation Program, Baltimore, MD; Sharon Press – Florida Dispute Resolution Center; Eileen Pruett – Ohio Supreme Court ; Geetha Ravindra – Virginia Supreme Court; Richard Reuben – University of Missouri School of Law; Robert Rhudy – Maryland Legal Services Corporation; Julia Roig – (formerly) U.S. Office of Special Counsel, ADR Specialist; Mary Ryan – U.S. Navy; Judy Saul – Ithaca Dispute Resolution Center; Cynthia Savage – ADR Coordinator, Colorado Judicial Branch ADR Program; Carl Schneider – Mediation Matters, Silver Spring, MD; Louise Phipps Senft – Baltimore, MD; Margaret Shaw – New York, NY; Bud Silverberg – Texas Supreme Court ADR Advisory Committee; Anne Skove – National Center for State Courts; Sid Stahl – Texas Mediator Credentialing Association; Donna Stienstra – Federal Judicial Center; Bruce Stratton – Co-Chair, Texas Supreme Court ADR Advisory Committee; Joseph Stulberg – Ohio State University School of Law; Janice Summer – University of Texas Center for Public Policy Dispute Resolution; Leila Taaffee – Georgia Courts ADR Program; Tracy Tarver – University of Texas Center for Public Policy Dispute Resolution; Mary Thompson – Corder/Thompson & Associates, Austin, TX; Michael Thompson – Iowa Mediation Service; Anne Turner – Circuit Court for Worcester County; Jeannette Twomey – Mediation Works, Fairfax, VA; Doug Van Epps – Michigan Courts ADR Program; Hon. Melanie Vaughn – Baltimore, MD; Nancy Welsh – Dickinson College of Law; Rachel Wohl – MACRO; Roger Wolf – University of Maryland School of Law.