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Qualification Requirements of Mediators

Norma Jeanne Hill*

As the use of Alternative Dispute Resolution spreads, the question of who is qualified to provide mediation services becomes ever more important. In determining which selection methods to use in choosing qualified mediators for a particular court or program, attention should be paid to the effectiveness of each specific method, the cost to use it, and whether the method unduly discriminates against individuals of different cultural groups or with varying mediation styles. Just like any other selection procedure in the world of employment, a mediator qualification requirement ought to be analyzed in terms of effectiveness, cost, and discriminatory effects before it is used to say who is and who isn’t a qualified mediator.

I. INTRODUCTION

One of the most complex and hotly debated issues in the academics of Alternative Dispute Resolution (ADR) is the question of what kind of qualifications should be required of mediators, both in the context of the certification of mediators and of mediators in court-affiliated programs. There is, to date, no universal set of qualifications for mediators, as each program or organization that offers mediation services establishes its own, or the qualifications are established by statute or court rule for the program. Yet, courts often feel the need to have some form of entry qualifications for their mediators, even if the courts must concoct these qualification requirements on their own, simply as a means of establishing the credibility of their mediators. Particularly where a court orders mandatory mediation of some cases, the responsibility on the court to provide credible mediators shown to be competent is heightened.

Courts and their state legislatures that have sought specific qualifications of mediators have based these various qualifications on the idea that they contribute to the competency necessary for being a successful mediator. Training, advance educational degrees, and experience are all seen as desirable qualifications in a

* J.D., The Ohio State University College of Law, 1997; B.A., Bowling Green State University, 1994. Special thanks is extended to Professor Nancy H. Rogers of Ohio State for all of her assistance and input on this endeavor. An excerpt of this article was previously published in the World Arbitration and Mediation Report, Vol. 5, No. 10, October 1997 p. 226.


3. 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, 97 (Fall 1994 - Fall 1995) (“as more courts order mandatory mediation, the courts should assume a responsibility to ensure the mediators are competent.”).
mediator. When a court refers parties to a particular mediator, the parties are not in a free market to choose their mediator and so the “marketplace” cannot decide who would be a suitable and competent mediator. The role of caveat emptor in assuring quality in the market is nonexistent when the court has created a form of monopoly on mediation services. Thus, to assure parties that the mediator the court has referred them to is fully competent to mediate their dispute, the mediator must often first satisfy entry qualification requirements established either by court rule or legislative enactment.

Such qualification requirements are largely only imposed on those who are money-making mediators, and not those who volunteer in community-based mediation programs. "A substantial proportion of local mediation services are dispensed by volunteers, usually under the umbrella of a local community organization." These community mediators would be greatly dismayed by an entry requirement of qualifications, making their volunteer work professionalized and as difficult to enter into as fields such as law already are. These mediators are also concerned that professionalization of their work would take away the successful informal character of it that uses non-legal approaches to solve problems.

4. Rogers & Sander, supra note 2, at 5.
5. Competency of mediators is an issue not only when the parties to a case are referred to a particular mediator by the presiding court and, thus, the free market is not at work for the best mediators to surface. Competency of mediators is also an issue when the free market is in operation and the parties have the prerogative of choosing their mediator. The problem of mediator competency arises when the parties are not sophisticated enough to choose a qualified mediator. Newton R. Russell, Mediation: The Need and a Plan for Voluntary Certification, 30 U.S.F. L. REV. 613, 613 (1996). In such circumstances, the risk is great that an unqualified mediator will be selected with the possibility that the mediation could end up with negative, perhaps long-ranging, results. Id.

A possible remedy for this situation would be a certification system for mediators. Similar to a state licensing system, in a certification system a mediator would have to meet specified qualifications in order to hold himself or herself out as a certified mediator. Unlike a licensing system, however, where a mediator would have to meet the qualifications in order to get a license to be a mediator in a state, a certification system would be voluntary so that a mediator could still practice in the state without obtaining a certificate. Id. at 614-15.

Yet, the benefits of being a certified mediator would be the assurances to the free market that the mediator has in fact met certain minimum qualifications. Id. at 614. Thus, the mediator has an incentive to seek certification in order to assure potential clients that he or she is qualified. California Senate Bill 1428 of 1996 ("SB 1428") was a state-wide initiative designed to give the mediator-selecting public such assurances by establishing a statewide system of mediator certification. Id. Although a state certification system for mediators is not itself an improbable idea, SB 1428 failed to make it out of committee in April 1996. Id. at 614 n.5.

8. There are, of course, exceptions. Many volunteer mediation programs will require their mediators to receive at least some level of training. For example, the Franklin County, Ohio Municipal Court Dispute Resolution Program requires its mediators to receive some specialized training before being permitted to mediate cases. FRANKLIN COUNTY MUNICIPAL COURT DISPUTE RESOLUTION PROGRAM, MEDIATION PAMPHLET (1997).
11. Id.
volunteers in community programs are often regarded as the "soul" of the original mediation movement.\textsuperscript{12} If these volunteers were suddenly required to meet entry requirements, at the level of other professions, for work they are not even being compensated for, many would be precluded from their volunteer mediation work as not being able to meet those requirements.\textsuperscript{13} Further, any incentive to obtain such professional-type qualifications in order to engage in volunteer mediation would be far outweighed by the difficulty (if not impossibility in some instances) of obtaining those qualifications. Therefore, due to the chilling effect qualification requirements of the kind spoken of here would have on volunteer community mediation, it is assumed that this discussion of qualifications is not applicable to such volunteers.

The discussion of this paper is about the qualification requirements currently in place for money-making mediators, proposed future requirements for mediation programs, and the various advantages and disadvantages of each of those requirements. In Part II, I survey current qualification requirements in place by state statute, court rule, and program standards in different parts of the United States. In Part III, I discuss other qualification requirements that have yet to be utilized by any mediator selection programs or that have only been used in isolated programs. The potential of these "new" qualification requirements, as well as the performance of the "older" requirements currently in use, will be discussed in Part IV as I analyze the advantages and disadvantages of each particular kind of requirement along the three dimensions of effectiveness, cost, and discriminatory impact. Part V will summarize whatever conclusions can be drawn from the insights gained by this analysis of the various qualification requirements.

II. CURRENT QUALIFICATION REQUIREMENTS

Numerous states have already enacted statutes, courts have enacted rules, and programs have enacted standards that require of court-affiliated mediators a certain set of minimum qualifications before they can mediate in cases referred by the court. These qualifications often come in the form of requirements of training, experience, educational degrees, and/or successful performance in skills testing.\textsuperscript{14} For example, California Family Code §3164 (1994) since 1980, when it was first enacted,\textsuperscript{15} requires of its "conciliation counselors" (mediators) in child custody cases:

1) a masters degree in psychology, social work, or "other behavioral science substantially related to marriage and family interpersonal relationships";

2) two years experience in counseling in related areas; and

3) knowledge of pertinent subject matters, including California court procedures, community resources, family psychology, and child development.\textsuperscript{16}


\textsuperscript{13} Id.

\textsuperscript{14} \textsc{1 Nancy H. Rogers & Craig A. Mcewen, Mediation: Law, Policy & Practice} § 11.02 (1994).

\textsuperscript{15} California Family Code § 3164 (1994) continues former California § 4607 without substantive change.

\textsuperscript{16} Devine, \textit{supra} note 1, at 206.
Similarly, Missouri’s Supreme Court Rule 88.05 (1994) requires for child custody mediators:
1) a law degree or a graduate degree in the field of behavioral science;
2) a minimum of twenty hours child custody mediation training; and
3) knowledge of basically the same pertinent subject matters as California requires.17

The San Diego Mediation Center, a community program originally established through the joint efforts of the University of San Diego Law School and the San Diego County Bar Association,18 has established its qualification requirements as a combination of considering applicants’ backgrounds in training and experience, and their performance on a test instrument administered to the applicants in a simulated mediation.19 Thus, the typical approach for selecting mediators will generally require at least two or more of the qualifications of training, experience, educational degrees, and, sometimes, a passing score on a skills-based test.

Training is understandably a somewhat universal requirement before one can mediate. It is usually a structured program designed to impart knowledge, skills, and abilities so that a trainee will become competent in mediation. Commentators believe there is a definite link between training and quality of mediation20 and believe the more role-play and simulation training21 or experience-based apprenticeship training22 there is, the greater success23 the mediator will have.24 The

17. Id. at 204-05.
21. Id. at 119.
22. Shaw, supra note 12, at 133.
23. At this point, a short discussion of what constitutes “success” as a mediator may be helpful. Just like mediator qualification requirements, what constitutes mediator success, or the indicia of mediator quality, is also “hotly debated.”
SPIDR (Society of Professionals in Dispute Resolution) Commission on Qualifications has stated that such training programs are of "critical importance" to ensuring the competence of mediators. 25

Experience is also widely considered to be a qualification that ensures some level of competence in mediators, although there are differences among scholars as to whether it is the quality rather than the quantity of experience that matters; 26 and some doubt the importance of experience at all. 27 However, the SPIDR Commission has regarded the use of experience as an appropriate qualification requirement when other requirements are not practicable 28 and empirical research has shown experience mediating to actually affect the success of mediation program results. 29 Given the widespread acceptance of training and experience as qualification requirements (see the earlier discussion of the California statute, Missouri court rule, and San Diego Mediation Centers standards), these two requirements as a means of measuring competence are not hotly debated issues in the ADR community.

More controversial, however, are qualification minimums that require a specific educational degree before an individual can become a court affiliated mediator. The California statute and the Missouri court rule are examples of this kind of requirement. Some commentators debate the kind of degree that should be required of mediators, whether a law degree or a degree in some area of the mental health field should be required. 30 Others argue that at least some form of higher education should be required of mediators. 31 But the more commonly held view among ADR scholars is that a degree should not be required as it has no bearing on performance and will only serve to unduly restrict entrance into the mediation field. Non-degreed individuals who are actually highly competent to mediate would be precluded from mediating when the reason for imposing a degree requirement is dubious. 32 Indeed, when the California State Senate in 1996 considered SB 1428, a statute that provided for a means to certify mediators, its sponsor, Newton R. Russell, specifically stated his belief that "a license, educational degree, or a particular profession [should] not be a prerequisite to practice mediation, and that provision was in SB 1428." 33 Yet,


27. Dobbins, supra note 3, at 105-06.
29. ROGERS & MCEWEN, supra note 14, § 11.02.
31. Hartfield, supra note 20, at 114 (arguing that an undergraduate degree, preferably in a liberal arts, wide-ranging area, helps prepare mediators to deal with a wide variety of people).
32. Shaw, supra note 12, at 134 ("The existence of a degree does not affect performance."). SPIDR perhaps stated the reasoning against degree requirement best:
Knowledge acquired in obtaining various degrees can be useful in the practice of dispute resolution. At this time and for the foreseeable future, however, no such degree in itself ensures competence as a neutral. Furthermore, requiring a degree would foreclose alternative avenues of demonstrating dispute resolution competence. Consequently, no degree should be considered a prerequisite for service as a neutral.

1989 Report, supra note 25, at 9. See also, Spiegelman, supra note 10, at 679 n.10, 689-90, 690 n.64; Dobbins, supra note 3, at 101-02.
33. Russell, supra note 5, at 615.
these prerequisites still exist in the context of many state mediation statutes and court rules. 34

A common requirement for mediators is to successfully pass a program’s skill- based test and/or performance evaluation. The San Diego Mediation Center performs such a test on its applicants, where the applicants are evaluated by trained evaluators in a seventy-five minute mock mediation with two trained actors. The mediator candidate is assessed based on mediation process criteria, such as facilitating position statements, managing the process, generating options, etc., 35 and is later given feedback on their performance in the evaluation. 36 Such performance evaluations are highly regarded as an accurate method of assessing mediator competence 37 and are recommended as a selection method whenever feasible. 38 Although training, experience, and educational degrees are the typical requirements established by statute and court rule, performance evaluations are currently utilized in mediation programs as qualification requirements and may soon be making inroads into the requirements of statutes and court rules. 39

As mediation programs become more popular in various state courts, the court- connected mediation programs try to ensure the quality of their service by imposing

34. See, e.g., CAL FAM CODE § 3164 (West 1994) and MO SUP. CT. R. 88.05 (West 1994), discussed supra.

35. The San Diego Mediation Center developed its evaluation instrument with significant reliance on Christopher Honeyman, On Evaluation Mediators, 6 NEGOTIATION J. 23, (1990), in which Honeyman listed seven “parameters of effectiveness” of mediators. These parameters include:
   1) Investigation - of the relevant information of the case;
   2) Empathy - for the needs of the parties;
   3) Persuasion - to get the parties into concession-making;
   4) Invention - of non-obvious solutions to the problem;
   5) Distraction - from the tension of the issues by some form of entertainment;
   6) Managing the interaction -- by some strategy in dealing with the conflicts in the process; and
   7) Substantive knowledge - of the issues and type of dispute.
See also Filner & Jenkins, supra note 19, at 656.

   However, the thoroughness of this list of “parameters of effectiveness” is open to considerable debate. When the National Institute for Dispute Resolution (NIDR) loosely adopted Honeyman’s parameters in its Interim Guidelines for Selecting Mediators (see NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, INTERIM GUIDELINES FOR SELECTING MEDIATORS 7-10 (1993) [hereinafter NIDR Report]), several commentators expressed concern that the list of effective mediator skills was underinclusive. See generally, Carrie Menkel-Meadow, Measuring Both the Art and Science of Mediation, 9 NEGOTIATION J. 321 (1993); Deborah M. Kolb and Jonathan E. Kolb, All the Mediators in the Garden, 9 NEGOTIATION J. 335 (1993); Robert A. Baruch Bush, Mixed Messages in the Interim Guidelines, 9 NEGOTIATION J. 341 (1993).

36. Spiegelman, supra note 10, at 704-06 (“Any requirements concerning who can practice as a neutral should be based on performance.”).

38. Id.; see also NIDR Report, supra note 35, at 11-17 (describing performance evaluations by the Wisconsin Employment Relations Committee, the Massachusetts Office of Dispute Resolution, and a Hawaii family mediation program).
39. California SB 1428 contained a provision requiring the passing of qualification tests in order to be a certified mediator. Carey, supra note 9, at 639, 642-43. However, SB 1428 did not make it out of committee in April, 1996. Id. at 635 n.1.
these entry-level requirements on potential mediators. Training, experience, educational degrees, and successful performance on evaluation tests are all designed to make sure the mediators are qualified and have the skills necessary to mediate a case.

III. FUTURE QUALIFICATION REQUIREMENTS

Many possible selection methods exist that are yet to be explored in setting future entry requirements for mediators. The Suffolk County, Massachusetts Superior Court and the Wisconsin Employment Relations board have each used written examinations to test the applicants' knowledge of mediation skills. In particular, Suffolk County has used such an exam as a means of conducting a preliminary "weeding out" of candidates who do not possess basic mediation skills before proceeding further with the requirement of successful performance on an evaluation test. The use of written examinations in combination with other

40. The SPIDR Commission on Qualifications has recently issued a follow-up to its 1989 Report. SPIDR COMMISSION ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (Draft Report) (October, 1994). This report suggests a seven step framework for courts to consider when developing qualification requirements for their mediation programs. The framework, in the form of questions the court is supposed to ask itself when establishing requirements, is as follows:

1) Who is responsible for ensuring practitioner competence?
2) What is the context in which the program is to take place?
3) What do practitioners and programs do (what are their tasks)?
4) What does it mean to be competent?
5) How do practitioners and programs become competent?
6) How is competence assessed?
7) How should assessment tools, such as certification, be used to assure quality?

Id. at 4-5. Within this framework, the court or program is to consider whether the various requirements of training, experience, educational degrees, or skills-based testing or some combination of these requirements would best further the goals of their mediation program.

41. Dobbins, supra note 3, at 102.

42. Id. at 109-10. Dobbins described the combination of a written questionnaire with the administering of a performance test as a hybrid approach by Suffolk County. In 1988, the Suffolk County, Massachusetts Superior Court used a hybrid approach to meet its specific needs. It wanted to use a performance test to select its mediators, but the performance test proved time-consuming given the large number of applicants. Ultimately, the program administrators solved the problem by implementing a written questionnaire to weed out nearly half of the applicants. The reduced pool of applicants was small enough that each applicant could undergo a performance test judged by a pair of experienced mediators. The hybrid approach used by the Suffolk County, Massachusetts Superior Court is one that many other mediation programs could follow. It allows mediators to be selected using a performance test since by narrowing the initial pool of applicants, fewer judges are needed for evaluating the performance tests. This type of hybrid approach can help make a performance test feasible even for a mediation program that can only get a small number of qualified judges.

Id. (footnotes omitted). I have quoted this passage from Dobbins at length as it best describes the manner in which this hybrid approach came about and the sheer uniqueness of it. The use of a low-cost selection method in order to limit the number of applicants the high-cost selection method was administered to appears to be an effective yet cost-efficient means of qualifying mediators.
selection methods, as was done in Suffolk County, is a qualification requirement whose potential should be explored more.

Other selection methods not realized yet are those which can focus in on the personal characteristics of the mediator. Some ADR scholars have recognized that personal characteristics "may be more important than all of" the other qualifications required of mediators.\footnote{Hartfield, supra note 20, at 122.} Persistence, understanding, integrity, honesty, intelligence, listening, flexibility, sensitivity, and tolerance have all been deemed as qualities that help a mediator to be effective.\footnote{Shaw, supra note 12, at 130.} A recent National Institute for Dispute Resolution (NIDR) report suggests the possibility in the future of developing standardized tests that ADR programs can buy off the shelf that consist of Job Analysis questionnaires and rating scales.\footnote{NIDR Report, supra note 35, at 20-21.} These standardized tests could gauge for aptitudes and attitudes in candidates that are seen as desirable in a mediator.\footnote{The development of standardized tests, both in written form and in performance evaluations, is a possibility. However, whether the specific skills and/or aptitudes tested for will be accepted by courts as sufficiently job-related to uphold these forms of evaluation instruments is questionable, particularly when considering the highly subjective nature of such evaluations. (See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), where subjective evaluations by supervisors of employee skills were not sufficiently validated. See also Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (similar)). Circumstances vary from program to program and from case to case such that any specific evaluation scale may not adequately relate to the needs of a given program. See NIDR Report, supra note 35, at 20. For further discussion regarding the subjectivity and variability of skills and aptitude testing, see infra text accompanying notes 54-55, 89-96.} Such tests are already in use in many employment settings so that the possibility exists that they can be developed for use in employing mediators.

But just like selection methods already in use, although these potential methods may have some desirable aspects to them, they may also have some serious drawbacks that argue against their widespread utilization. Consideration of the effectiveness, cost, and possible discriminatory impact of each tool can be useful in determining whether or not to employ them as a program's mediator qualification requirements. These three criteria may not coincide very well (as, for example, a highly effective method of choosing mediators may be prohibitively costly so as to preclude its use); however, they are important considerations when designing selection procedures for a mediation program since, ultimately, a program would prefer to have the most effective selection procedures for the money while refraining from encountering legal problems arising from a discriminatory impact due to such procedures.

IV. ADVANTAGES AND DISADVANTAGES OF THE VARIOUS SELECTION METHODS

The various possible selection methods for programs to use in selecting qualified mediators each rate differently when considering their respective
effectiveness, cost, and possible discriminatory effects.\footnote{Also to be considered, and to be discussed below, is whether, despite such discriminatory effects, the selection methods can still be upheld as valid.} Although a method may rate high on one scale, a negative rating on another may argue completely against its use, particularly if the negative rating comes on the illegal discriminatory impact scale.

Training and experience are excluded from the following discussion for the reason that they are widely accepted as valid criteria for selecting mediators. Requiring mediation training is a common selection qualification,\footnote{See, e.g., MO. SUP. CT. R. 88.05 (West 1994); Filner & Jenkins, supra note 19, at 657 ("Most practitioners have accepted the value of training as one criterion for credentialing mediators."); Dobbins, supra note 3, at 99 ("Most mediators agree that training is very important to becoming a skilled mediator.").} often regarded as indispensable to the success of any mediation program.\footnote{Menkel-Meadow, supra note 35, at 322.} Experience, similarly, is highly regarded as a selection qualification.\footnote{See, e.g., Shaw, supra note 12, at 131 (mediation experience as a "valuable asset, and an important factor in the mediation selection process."); 1989 Report, supra note 26, at 9 ("experience can be a useful screening tool to identify those who can mediate or arbitrate.").} Little controversy exists over the use of training and experience as effective selection methods. Therefore, only the problematic selection criteria of educational degrees, performance in skills-based testing, and screening applicants with aptitude/attitude questionnaires will be analyzed due to their variances along the three dimensions of effectiveness, cost, and discriminatory impact.

Effectively predicting performance in mediation is what each of the selection methods ideally should do. But, not all qualification requirements are effective in making that prediction. For instance, the widely used qualification requirement of an educational degree is probably the least effective predictor. SPIDR has reported that it can see no evidence that an educational degree is necessary for being a competent mediator.\footnote{1989 Report, supra note 25, at 8.} In contrast, successful performance in an evaluation test does appear to predict good mediation results, as the specific skills being tested for in the evaluation are the same skills necessary for a good mediator.\footnote{Mennel-Meadow, supra note 35, at 322.} Testing for personal qualities may or may not be effective as personality characteristics are very difficult to quantify.\footnote{Devine, supra note 1, at 200.} If the desirable personal qualities can be somehow translated into an objective written aptitude test that accurately gauges for successful mediator skills,\footnote{Shaw, supra note 12, at 130.} then such questionnaires should be used as an effective selection method.

Yet the cost of each selection method may cause effectiveness to take a back seat when selection methods are being chosen. Although an educational degree requirement may not effectively predict mediator performance, it does not cost anything for a court or a program to require it of their mediator candidates.\footnote{However, as discussed below, there are likely to be costs associated with the narrowed pool of mediators due to the educational degree requirement, specifically if the narrowed pool is also a less diverse pool.} Conversely, skills-based testing of mediator candidates is probably the most pricey selection method there is, as it requires of the court or program an expensive
bureaucracy to administer it, is time-consuming, and requires the use of trained actors and evaluators to conduct it. Thus, small mediation programs may not be able to afford such skills-based testing. Written examinations, on the other hand, are relatively cheap and easy to administer, and the purchase of them “off the shelf,” if they ever become available in that form, will also be low cost. If, however, the court or program has to develop such questionnaires on its own, the costs of development may be prohibitively high. Again, as with their effectiveness, the cost of such future aptitude/attitude questionnaires is as yet unknown.

However, despite the cost and degrees of effectiveness of particular selection methods, if the method has a discriminatory effect in its operation, that alone could argue against it. As NIDR has stated, “there could be serious legal consequences if unvalidated assessment procedures are used and members of legally protected groups do not succeed in passing the assessment procedures in proportions similar to members of the majority group in society.” Not only must the qualification requirements not have a disparate impact on society’s minority class members when mediators are being selected, but also the various styles of mediation should be accounted for when making mediator selections.

Discriminatory effects can result when the selection method results in mediators that have only one particular style of mediation, probably the style of the individual who is doing the selecting. Mediator styles vary and commentators have come up with different schemes for classifying the styles. One scheme classifies mediators as either “process-oriented,” where the mediator merely facilitates the process for the parties themselves to arrive at their own solution, or “substance-oriented,” where the mediator makes his or her own evaluation of the case and then offers substantive recommendations of how the case could be resolved. Another scheme, similar to the last scheme, bases classifications on how much the mediator inputs outside standards into the mediation process, and classifies mediators as either norm-generating, norm-educating, or norm-advocating. Whatever the classification system used, the fact remains that different styles of mediation exist.

The selection method used by a court or program in picking mediators may unduly limit those with a different style from the court’s or program’s administrators. An educational degree requirement will not have that effect generally, as what degree an individual has is not determinative of the mediation style of the individual. However, a skills-based performance test runs the danger of excluding mediators trained in different styles from those of the evaluator who

56. Rogers & Sander, supra note 2, at 6.
57. Dobbins, supra note 3, at 104.
58. Id.
59. Id. at 102.
60. NIDR Report, supra note 35, at 20.
61. Id.
62. Id. at 19.
65. Arguably, however, lawyers are more likely to bring outside standards into the mediation than those with behavioral science degrees. See Foster & Kelly, supra note 30, at 670-71.
may not appreciate the diversity in mediation styles. Similarly, in administering aptitude/attitude questionnaires, the selectors may only choose candidates with personality types like their own, thereby limiting "... the field of mediation to clones of those conducting the testing or implementing the program." Therefore, whatever selection method is utilized, those administering it must be conscious of the different possible styles of mediators they may encounter and the fact that there may be many manners in which to conduct a successful mediation.

The more worrisome discriminatory effects of a selection method arise when the method operates to exclude disproportionate numbers of individuals of different races, sexes, national origins and/or religions. These groups are protected by Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. (1989), which applies to employment relationships. Thus, mediators who receive compensation for their services will often be covered by Title VII's provisions. Among Title VII's protections are to prohibit employment practices that have a disparate impact on groups of different races, sexes, national origins, or religions. Such employment practices include employee selection procedures that disproportionately exclude Title VII-protected groups. Similarly, mediation selection procedures that disproportionately exclude Title VII-protected groups would also be deemed to have a disparate impact and, therefore, be prohibited by Title VII.

Yet, if these mediator selection procedures can be validated by showing that the skills or attributes they gauge for are related to the actual job duties of being a mediator, they will be upheld under Title VII despite a disparate impact on

66. Spiegelman, supra note 10, at 684-85 ("community programs will have to be sensitive to issues of diversity and be willing to accept and evaluate mediators trained in different models.").

67. Devine, supra note 1, at 200.


69. Specifically, Title VII states: §2000e-2 (a) Employer Practices. It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

(emphasis added). Selection methods that limit entrance into mediation positions thus would be subject to Title VII's provisions.


72. See Dothard v. Rawlinson, 433 U.S. 321 (1977), where height and weight requirements that kept women out of prison guard jobs ten times as often as men were held to have a disparate impact on women and struck down as violative of Title VII.

73. Griggs, 401 U.S. at 431.
Professionally developed tests are specifically protected in §703(h) of Title VII if they are shown to be job-related. The Uniform Guidelines on Employee Selection Procedures of 1978 (UGESP) specify how an employer can validate its selection procedures and the recordkeeping, scoring and standardization that must accompany the use of any particular selection method. If a selection method can meet the rigorous standards required for validation to show that it is job-related, then a disparate impact that procedure may have upon minority groups would not be in violation of Title VII.

As stated earlier, mediators who are employed by courts or community programs often receive the protection of anti-discrimination statutes such as Title VII. When establishing qualification requirements for their employed mediators, courts and community programs should anticipate the legal ramifications of a

74. If, on the other hand, no disparate impact results from the use of a particular selection procedure, validation of that procedure need not be conducted. Uniform Guidelines on Employee Selection Procedures of 1978, 29 C.F.R. §1607.1(B) (1995). However, it is recommended that validation be conducted of selection procedures regardless of whether or not there is a disparate impact. Id.

75. 42 U.S.C. §2000e-2(h) (1989) (§703(h)) states:

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

76. See generally, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

77. 29 C.F.R. §1607.5B sets forth three means of validation:

Criterion Related selection procedures means that they test for abstract traits needed for the job. Construct Validity of selection procedures means that they test for abstract traits needed for the job. Content Validity means that the selection procedure tests based on an actual sample of the work to be done.

78. 29 C.F.R. §1607.5B sets forth three means of validation:


80. Although the Uniform Guidelines on Employee Selection Procedures (UGESP) are comprehensive in providing standards by which to validate a selection method, they are not formal regulations that have gone through regular rule-making procedures by the Equal Employment Opportunity Commission (EEOC) and thus are not binding as law. Rather, the stated purpose of the Guidelines is "to assist employers . . . to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures." 29 C.F.R. § 1607.1B (1995).

As a result, courts differ as to how much deference to give the UGESP. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court stated that although the Guidelines were not formally promulgated agency rules, they were entitled to "great deference" as the official interpretation of Title VII by the agency charged with its enforcement. Id. at 431. However, even though the employer in Albemarle seemingly made efforts at complying with the UGESP in administering the selection methods at issue, the Court held that the manner of validation of these methods was so poorly conducted that the validation could not be upheld as the selection methods were not sufficiently job-related. Id. at 433. Therefore, validation of a selection procedure as job-related, despite a disparate impact, is not done conclusively simply by complying with all of the requirements of the UGESP.

81. The scope of coverage of Title VII and the UGESP includes "employers, labor organizations, employment agencies, and licensing and certification boards." Uniform Guidelines on Employee Selection Procedures of 1978, 29 C.F.R. §1607.1B (1995) (emphasis added). Thus, even when contemplating a certification scheme for mediators, as California SB 1428 recently did (See generally Russell, supra note 5.), the prohibitions of the antidiscrimination statutes should be considered.
possible disparate impact of a requirement and whether that requirement can be
validated as related to necessary mediator skills. 82

Even despite the legal requirements of the antidiscrimination statutes, just as there exist benefits in having mediators with a variety of mediation styles in a particular program (as discussed earlier), there are also benefits in having mediators from a variety of different backgrounds based on race, sex, national origin, religion, and age. Rather than have a group of mediators all with similar characteristics, 83 a diverse group of mediators is viewed by many as an important goal 84 and advantageous. 85 Such advantages from a diverse mediator pool can spring from the acceptability of particular mediators to the diverse community which they serve, and the varying insights and backgrounds different mediators can bring to the table. 86 Thus, although being in compliance with the law is certainly quite important, selection procedures for mediators should ensure diversity in the resulting mediator pool for practical reasons stemming from the process of mediation itself.

When considering each of the selection methods of educational degrees, performance evaluations, and aptitude/attitude questionnaires and whether each method can survive scrutiny under Title VII and validation procedures, the results are similar to those from when the effectiveness of each selection method was considered. Educational degree requirements are likely to be found in violation of Title VII as they may easily operate to exclude disproportionate numbers of women and minorities. Furthermore, an educational degree requirement could probably not be validated as there is no indication that having a particular degree is at all related to performing the job of a mediator. 87

On the other hand, the subjective aspects of the evaluations in both skills-based testing and in assessing responses to aptitude/attitude questionnaires can also potentially operate to exclude Title VII-protected groups if differences in race, sex, national origin, or religion caused the evaluator or questionnaire assessor to make their selections in an exclusionary manner. 88 However, this has not been the experience with skills-based evaluations and written examinations administered by the Wisconsin Employment Relations Board, 89 the Suffolk County, Massachusetts

82. NIDR Report, supra note 35, at 19; Carey, supra note 9, at 643.
83. Filner & Jenkins, supra note 19, at 654.
84. Id. at 655. A recent study from the University of New Mexico, titled The Metrocourt Project, analyzed both the monetary results and the satisfaction of mediation participants in terms of differences based on gender and ethnicity. Although refraining from making any specific recommendations regarding gender and ethnicity in mediation, the Final Report of the Project did highlight that "differential outcomes in mediation relate to ethnic [and gender] differences," discussing possible explanations for such outcomes and suggesting that further research in the area is needed. THE METROCOURT PROJECT FINAL REPORT 137-48 (1993). The Report also stated that the study showed more positive results in some cases, where a minority mediator was used in a mediation with a minority participant. Id. at 139, 142. Thus, having diverse mediators in a mediator pool may help to produce better results for the diverse clientele that pool services.
85. Shaw, supra note 12, at 134-35.
86. Spiegelman, supra note 10, at 690.
87. Dobbins, supra note 3, at 101-02.
89. Id. at 14; Dobbins, supra note 3, at 104.
Superior Court,90 or the San Diego Mediation Center.91 Thus, as disparate impact has not been the case so far, the need for validation of these selection methods is somewhat dubious.92 Furthermore, although the mediator skills and attributes gauged for by these performance evaluations and written questionnaires are difficult to quantify and to even specifically test for,93 if standardized evaluations and/or tests can be developed, they have a high likelihood of being validated, despite any disparate impact, as the specific skills and attributes necessary to successfully mediate are being gauged.94 Therefore, considering the earlier discussion on selection method effectiveness,95 it appears that the more effective a selection method is in identifying competent mediators, the more likely that selection method is to be upheld as valid under the antidiscrimination statutes.

V. CONCLUSION

In conclusion, just as in any other form of employee selection procedure, qualification requirements for mediators must be considered in terms of their effectiveness, cost, and discriminatory effects. Although a particular selection requirement may appear attractive as a low cost means of identifying competent mediators, its effectiveness in determining mediator competency may be so poor as to argue conclusively against its use. Conversely, effective mediator screening methods may be prohibitively costly as to make their use out of the question. And yet, the biggest concern in choosing mediator selection requirements, cost and effectiveness aside, may very well be the exclusionary effects of those requirements on individuals with different mediation styles or on individuals from legally protected minority groups. Perhaps no specific selection method could ever be completely satisfactory in terms of being highly effective, low cost, and void of any discriminatory effects whatsoever.

However, the Suffolk County, Massachusetts, Wisconsin, and San Diego experiences do show some promise as models to imitate when adopting qualification requirements. Suffolk County’s hybrid approach to qualification requirements by first administering written questionnaires to pare down the field of applicants, who would then be evaluated in skills-based mock mediations (the second step in the qualifying of mediators) is an example of using a low-cost selection method (the questionnaire) to limit the number of applicants the high cost yet more effective

90. Dobbins, supra note 3, at 104.
91. Spiegelman, supra note 10, at 703.
92. See supra note 74.
93. Carey, supra note 9, at 641, 642; see also NIDR Report, supra note 36, at 16, 20, (cautioning those who would administer such skills-based tests and/or written questionnaires regarding the need for professional development and validation of such evaluation instruments).
94. See Spiegelman, supra note 10, at 703 ("The performance evaluation instrument developed by the [San Diego] Mediation Center uses a simulation of the actual job performance (a mock mediation), measures behaviors that are recognized as representative and important for mediators, and is not locked into the model of mediation followed by the Mediation Center."); Dobbins, supra note 3, at 103-04 ("mediation programs using performance testing have had good results.").
95. See supra text accompanying notes 51-54.
selection method (the mock mediation) is administered to.\textsuperscript{96} Furthermore, although the Wisconsin Employment Relations Board\textsuperscript{97} and the San Diego Mediation Center\textsuperscript{98} utilized the costly method of performance evaluations in mock mediations, these evaluations proved to be highly effective in identifying competent mediator applicants.\textsuperscript{99} Maybe most significant, however, is that each of these programs was successful in selecting a diverse pool of mediators,\textsuperscript{100} and is thus apparently free from any disparate impact difficulties.

Certainly more research and studies need to be conducted in order to come up with a valid method of establishing qualification requirements that are effective and low cost without unduly limiting the selection of individuals with varying characteristics to become mediators. However, the experiences of some courts and programs have given indications of what may be fruitful avenues to pursue in establishing qualification requirements.

\textsuperscript{96} Dobbins, \textit{supra} note 3, at 109-10.
\textsuperscript{97} NIDR Report, \textit{supra} note 35, at 11.
\textsuperscript{98} Spiegelman, \textit{supra} note 10, at 709-09.
\textsuperscript{99} \textit{Id}.
\textsuperscript{100} Dobbins, \textit{supra} note 3, at 104; NIDR Report, \textit{supra} note 35, at 14; Spiegelman, \textit{supra} note 10, at 703.