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## Survey of Domestic Mediator Qualifications and Suggestions for a Uniform Paradigm, A

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# STUDENT PROJECTS

## A Survey of Domestic Mediator Qualifications and Suggestions for a Uniform Paradigm

### I. INTRODUCTION

Plagued by the burdens of congestion in the family courts system, many jurisdictions have resorted to both court-connected and independent mediation referral as a means to relieve the hurdles of domestic litigation.<sup>1</sup> In efforts to ensure the quality of mediators to whom they refer cases, many states have resorted to statutory provisions which prescribe certain criteria which domestic mediators must meet. What has evolved is a variety of domestic mediator skills, personal qualities, and knowledge standards incorporated by jurisdictions throughout the United States. This note will attempt to identify the predominant themes recurrent in states ordaining statutory domestic mediator qualifications, as well as to suggest an assortment of qualifications which could lead to more uniformity among the states with regard to domestic mediator paradigms.

### II. PREDOMINANT THEMES REPRESENTATIVE OF DOMESTIC MEDIATOR QUALIFICATION LEGISLATION

#### *A. Mediator Qualification Legislation*

At first glance, a nationwide statutory survey reveals some consistency among the fifty states relative to qualifications for mediators of domestic disputes. Though seemingly harmonious, the various statutory qualifications are hardly uniform. A moderate minority of states affords no statutory treatment for domestic mediator qualifications.<sup>2</sup> Conversely, a large majority address domestic mediator qualifications within each state's respective body of statutory laws, with varying degrees of regulation. Additionally, among those states with statutory qualifications, the rather ubiquitous classification of domestic disputes is often further

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1. Margaret Shaw et al, *National Standards for Court-Connected Mediation Programs*, 31(2) FAM. & CONCILIATION CTS. REV., 156, 156, 160 (1993).

2. Alabama, Arizona, Arkansas, Colorado, Connecticut, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, Nevada, Vermont, as well as the District of Columbia have no statutory domestic mediator qualifications, respectively. A small number of these states statutorily regulate general mediator qualifications which will not be discussed in this article.

distinguished, with some states regulating qualifications for mediators in child custody or visitation disputes as well as marital dissolution or divorce. What follows is a summation of the predominant specifications recurrent in those states prescribing statutory domestic mediator qualifications.

### *B. General Knowledge Requirements*

Under this rather broad category, statutory qualifications generally require mediators to possess basic knowledge of court procedures, family law issues, and an awareness of other resources in the community offering assistance for domestic matters.<sup>3</sup> Typical among statutes that follow this rubric is Michigan's statute governing "domestic relations mediation."<sup>4</sup> The statute reads: "A domestic relations mediator who performs mediation under this act shall have all of the following minimum qualifications: ... (b) Knowledge of the court system of this state and the procedures used in domestic relations matters [and] (c) Knowledge of other resources in the community to which the parties to a domestic relations matter can be referred for assistance."<sup>5</sup> California has expanded on these general knowledge qualifications and requires its mediators to have knowledge of "adult psychopathology and the psychology of families, and child custody research sufficient to enable a counselor to assess the mental health needs of children."<sup>6</sup>

### *C. Degree Requirements*

Only six states mandate degree requirements for domestic mediators.<sup>7</sup> All of these states require, at minimum, a bachelors degree,<sup>8</sup> with some states calling for graduate degrees.<sup>9</sup> Missouri, a state with specialized graduate degree requirements, obligates its mediators to have a graduate degree in the fields of "psychiatry, psychology, social work, counseling, or other behavioral science "substantially

3. See KAN. STAT. ANN. § 23-602 (1997); LA. REV. STAT. ANN. § 9:334 (West 1997); MICH. STAT. ANN. § 552.513 (Law. Co-op. 1997); MINN. STAT. ANN. § 518.619 (1997); MO. RCP RULE 88.05 (1997); NEB. REV. STAT. § 25-2913 (1997); N.J. REV. STAT. § 4: 40-20 (1997). Also of note, KAN. STAT. ANN. § 23-602 (1997) does not "require" its mediators to possess the requisite qualifications, but instead urges these qualifications to be "considered" when choosing a mediator.

4. MICH. COMP. LAWS § 552.513 (1998).

5. *Id.*

6. CAL. FAM. CODE § 1815 (West 1994).

7. See LA. REV. STAT. ANN. § 9:334; MICH. COMP. LAWS § 552.513; MO. R. RCP Rule 88.05; N.D. ST. ADMIN Rule 28 (1997); OH. ST. SUP. Rule 16 (1997); GA. ST. ADR App. B (1998); ID. ST. RCP Rule 16(j).

8. GA. ST. ADR App. B; ID. ST. RCP RULE 16(j); LA. REV. STAT. ANN. § 9:334; N.D. ST. ADMIN. Rule 28; OH. ST. SUP. Rule 16. Also of note, though it has no statutory requirements, case law in West Virginia suggests that its domestic mediators possess "appropriate training," and, in an effort to elaborate, has suggested that its mediators possess at least a "college degree." *Carter v. Carter*, 470 S.E.2d 193, 201 (W. Va. 1996).

9. FL. ST. MEDIATOR Rule 10.010(b) (1997); MICH. COMP. LAWS § 552.513; LA. REV. STAT. ANN. § 9:334; MO. R. RCP Rule 88.05; N.H. REV. STAT. ANN § 328-C:5 (1997).

related to marriage and family interpersonal relationships.”<sup>10</sup> Similarly, Michigan requires its domestic mediators to possess a master’s degree in counseling, social work, or marriage and family counseling, in the absence of a license or limited license to engage in the practice of psychology.<sup>11</sup> Two states, North Dakota and Ohio, waive the graduate degree requirement in favor of a bachelor’s degree if coupled with experience with family services or counseling.<sup>12</sup>

#### *D. Professional License Requirements*

Another recurrent requisite qualification for domestic mediators in some states is that of a professional license or professional certification.<sup>13</sup> Typically, statutes in this genre require domestic mediators to hold a license or certification as an attorney, psychiatrist, psychologist, social worker, or family counselor. Louisiana, for example, requires its domestic mediators to hold a license or certification as an attorney, psychiatrist, psychologist, social worker, marriage and family counselor, or clergyman.<sup>14</sup> In the absence of similar professional requirements to those stated above, applicants for certification as a “family and dissolution of marriage mediator” in Florida, must be certified public accountants licensed to practice in any U.S. jurisdiction.<sup>15</sup> Additionally, one state, Idaho, in child custody and visitation disputes mandates mediator membership in the Academy of Family Mediators, or other national organization with equivalent standards, in the absence of previously mentioned professional qualifications.<sup>16</sup>

#### *E. Experience*

A few states obligate mediators to possess past experience prior to engaging in domestic mediation.<sup>17</sup> Generally, these states compel experience as a practicing professional, usually in the fields of counseling, family law, or alternative dispute

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10. MO. R. RCP Rule 88.05; *see also* N.H. REV. STAT. ANN § 328-C:5; FL. ST. MEDIATOR Rule 10.010(b) (requires a master’s degree or doctorate in social work, mental health, or behavioral or social sciences; or status as a certified physician practicing adult or child psychiatry; or status as a licensed attorney or certified public accountant licensed to practice in any U.S. jurisdiction).

11. MICH. STAT. ANN. § 552.513.

12. N.D.C.C. § 14-09.1-04 § 3 (1997); OHIO. SUP. RULE 16 (1997).

13. FL. ST. MEDIATOR Rule 10.010(b); ID. ST. RCP Rule 16(j); ME. REV. STAT. ANN. tit. 4, § 183 (1998); MICH. COMP. LAWS. § 552.513; N.D. ST. ADMIN. Rule 28.

14. LA. REV. STAT. ANN § 9:334.

15. FL. ST. MEDIATOR Rule 10.010(b).

16. ID. ST. RCP Rule 16(j).

17. CAL. FAM. CODE § 1815 (mandates that a domestic mediator have at least two years of experience in counseling or psychotherapy, preferably in areas relating to marriage and family conciliation); ME. REV. STAT. ANN. tit. 4, § 183 (requires membership in the Maine Bar with experience in family law); N.J. REV. STAT. § 1:40-20 (1998) (requires 3 years as a practicing mediator, or 3 years experience in a clinical environment as an alternative to additional specialized training in family mediation); UTAH ADMIN. CODE R. 156-39A-302A(2) (requires applicant to provide verification that she has “served as a mediator in three separate disputes, or 10 clock hours, whichever is greater,”); WIS. STAT. § 767.11 (1998) (mandates not less than 3 years of professional experience in dispute resolution, in the absence of requisite 25 hours of mediation training).

resolution.<sup>18</sup> The majority of states within this group require at least 3 years of the particular statutorily prescribed experience.<sup>19</sup> Also, of note, two states, Utah and Wisconsin, allow domestic mediators to alleviate a statutory training hour minimum with relevant professional experience.<sup>20</sup>

### *F. Hours of Mediation Training*

Many states require applicants to have completed a minimum number of hours of training in order to become qualified domestic mediators. There is little uniformity among states, as these requirements take a variety of forms.<sup>21</sup> Generally, however, states require between 20 and 40 hours of training for domestic mediators. Within some of these states' respective requirements, however, requisite numbers of hours are to be specifically apportioned among express areas of training. One such state is Idaho, which requires its child custody and visitation mediators to have completed at least 60 hours of training, 20 of which shall be in the field of child custody mediation, which includes: conflict resolution; psychological issues in separation, divorce, and family dynamics; domestic violence; issues and needs of children; mediation processes and techniques; and family law, including custody and support.<sup>22</sup> The remaining 40 hours of mediation training shall be in the following components, at least 30% of which shall be in the field of practicing mediation skills: information gathering, mediator relationship skills, communication skills, problem solving skills, conflict management skills, ethics, and professional skills.<sup>23</sup> In addition to initial training, a small minority of states require domestic mediators to

18. *Id.*

19. N.J. REV. STAT. § 1: 40-20; UTAH ADMIN. CODE R. 156-39A-302A(2); WIS. STAT. § 767.11.

20. UTAH ADMIN. CODE R. 156-39A-302A(2); ID. ST. RCP Rule 16 (j); WIS. STAT. § 767.11; CAL. FAM. CODE § 1815; ME. REV. STAT. ANN. tit. 4, § 183; N.J. REV. STAT. § 1: 40-20; UTAH ADMIN. CODE R. 156-39A-302A(2); WIS. STAT. § 767.11.

21. CA. ST. RULES APP. DIV. 1 J ADMIN. § 26(e) (recommends child custody and visitation mediators to complete at least 40 hours of training within the first six months of employment); FL. ST. MEDIATOR Rule 10.010(b), (d) (requires 40 hours); ID. ST. RCP Rule 16(j); LA. REV. STAT. ANN. § 9:334 (requires 40 hours of general mediation training, and 20 hours of specialized training in child custody mediation); MICH. COMP. LAWS § 552.513 (requires graduate program with not less than 40 class hours and 250 hours of practical experience unless qualified through some other method); MINN. STAT. § 518.619 (1991) (requires 40 hours); MO. R. RCP Rule 88.05 (requires 20 hours in child custody mediation); NEB. REV. STAT. § 25-2913 (1991) (requires 30 hours in general mediation, and 30 hours in family mediation); N.H. REV. STAT. ANN. § 328-C:5 (requires satisfactory completion of 48 hours, 8 of which are in domestic violence); N.J. R. GEN. APPLICATION R. 1: 40-10 (1996) (prefers that custody mediators have completed a family mediation course in addition to the required 18 hours, or 12 hours required for judicial law clerks); OH. ST. SUP. Rule 16 (requires 40 hours specialized mediation training in family or divorce); OK. ST. DISPUTE RES. Rule 11 (requires 40 hours of family and divorce mediation training); UTAH ADMIN. CODE R. § 156-39a-302a(2) (1994) (requires satisfactory completion of 30 hours); WIS. STAT. ANN. § 767.11(1991) (requires 25 hours); *see also* HAW. REV. STAT. 580-41.5 (1998) (mandates no minimum number of hours, but requires a mediator in divorce cases involving alleged family violence to be "trained in family violence").

22. ID. ST. RCP Rule 16(j).

23. *Id.*

complete supplementary hours of continuing education subsequent to being certified, in order to maintain status as a certified domestic mediator.<sup>24</sup>

### *G. Observation or Participation with an Experienced Mediator*

Observation of participation with an experienced mediator is another condition incumbent upon mediators of domestic disputes seeking certification in some states.<sup>25</sup> Typically, in addition to other qualifications, these states require an applicant to have performed a minimum number of hours of mediation with an “experienced” mediator.<sup>26</sup> Georgia, a state requiring no hourly minimum, does, however, mandate mediation with an experienced mediator in at least five mediations, as well as two such mediation experiences in divorce or custody proceedings.<sup>27</sup>

### *H. Miscellaneous Qualifications*

A distinct minority of states, in addition to the major themes discussed previously, impose rather unique requirements upon prospective domestic mediators. For instance, two states, Florida and North Dakota, oblige domestic mediators to be possessed of “good moral character”, the exegesis of which is absent within the respective statute.<sup>28</sup> Another state with such a multifarious requirement is Ohio, which requires its domestic mediators to possess “appropriate liability insurance.”<sup>29</sup> In its statute governing mediation of child custody matters, Alaska’s sole requirement is that if the mediator determines there has been domestic violence, the mediation should be provided by mediators trained “in a manner that protects the safety of the victim and any household member, taking into account the results of an assessment of the potential danger posed by the perpetrator and the risk of harm to the victim.”<sup>30</sup>

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24. CA. ST. RULES APP. DIV. 1 J ADMIN. § 26(e) (requires each court “to make it possible” for its child custody and visitation mediators to attend 16 hours of training in domestic violence or child abuse each calendar year); FL. ST. MEDIATOR Rule 10.010(e) (requires its dependency mediators and family and dissolution of marriage mediators to complete 20 hours of supreme court certified dependency mediation training); ID. ST. RCP Rule 16(j) (requires 20 hours every two years in a program approved by the Idaho Mediation Association, the Academy of Family Mediators, or the Society of Professionals in ADR); LA. REV. STAT. ANN. § 9:334 (requires completion of at least 20 hours of clinical education in dispute mediation every 2 calendar years); N.J. R. GEN. APPLICATION R. 1: 40-10 (requires completion of 4 hours of continuing legal education annually); OKLA. STAT. RULE 11 (requires attendance at one continuing legal education course in mediation each fiscal year, or 80 hours of mediation per year and a program evaluation of satisfactory).

25. GA. ST. ADR App. B; LA. REV. STAT. ANN. § 9:334; MICH. COMP. LAWS § 552.513; N.H. REV. STAT. ANN. § 328-C:5; N.J. R. GEN. APPLICATION R. 1:40-20.

26. LA. REV. STAT. ANN. § 9:334 (requires a minimum of eight hours); MICH. STAT. ANN. § 552.513 (requires a minimum of 250 hours); N.H. REV. STAT. ANN. 328-C:5 (requires a minimum of 20 hours).

27. GA. STAT. ADR App. B.

28. FL. ST. MEDIATOR Rule 1.010(e); N.D. ST. ADMIN. Rule 28.

29. OH. ST. SUP. Rule 16.

30. ALASKA. STAT. § 25.20.080 (Michie 1998).

Worthy of mention are two local rules from the California Rules of the Court.<sup>31</sup> Adopted in two respective superior court jurisdictions, these rules summarily require that in domestic matters the Superior Court shall appoint a mediator or evaluator whose skills, training, and background are best suited to the particular needs of the family in the present dispute.<sup>32</sup>

### *III. DIFFERENT QUALIFICATIONS SUGGESTED BY COMMENTATORS*

Commentators on family mediation do not agree on what qualifications are necessary to be an effective family mediator. Some commentators favor in-depth training in substantive and procedural mediation skills, while others believe that personality, not educational requirements, is a better indicator of an effective mediator.

In *The Four Foundations of Family Mediation: Implications for Training and Certification*, Alison Taylor suggests that higher education requirements would make family mediators more effective.<sup>33</sup> She argues that the standards to become a family mediator are set too low and proposes raising the standard by requiring more training in both legal and non-legal fields.<sup>34</sup> Specifically, she proposes that family mediator training encompass “four pillars of knowledge”: (1) mediation, conflict resolution, and negotiation processes; (2) legal and financial knowledge and processes; (3) adult, child, and family development (historical, normal, and assessment); and (4) “helping” professional skills (communications, interviewing, referral, case management, collaboration with other professionals, and strategic case planning).<sup>35</sup>

In addition to expanding the areas of knowledge required before becoming a family mediator, Taylor also recommends expanding the number of hours in training. She says 40-60 hours of training is not enough for mediators to acquire full knowledge in the four pillars of knowledge<sup>36</sup> and argues that mediators need more time spent in training because family mediators cannot respond appropriately to family mediation cases until they are “deeply involved in, not just conversant with” the four pillars of knowledge that she recommends.<sup>37</sup>

Taylor indicates there should not be an arbitrary number of training hours set to become a family mediator, rather she wants to require documentation of adequate course work in all four pillars of knowledge.<sup>38</sup> In addition, Taylor wants all potential family mediators to have experience under supervision.<sup>39</sup> She recommends that a

31. CAL. RULES TULARE SUPER. CT. Rule 491; CAL. RULES EL DORADO SUPER. CT Rule 8.10.04.

32. *Id.*

33. Alison Taylor, *The Four Foundations of Family Mediation: Implications for Training and Certification*, MEDIATION Q., Fall 1994, at 77, 82.

34. *Id.*

35. *Id.*

36. *Id.* at 81-82.

37. *Id.* at 82.

38. *Id.* at 85.

39. *Id.* at 86.

mediator be allowed to practice solo only after direct supervision of three cases or thirty hours.<sup>40</sup>

Taylor favors having one national standard to qualify as a family mediator rather than the current practice of having different standards throughout the states.<sup>41</sup> She argues that “[i]f all plumbers and cosmetologists must be licensed according to one standard of knowledge, adequacy, and proficiency, then all family mediators should also be licensed or certified to one standard, no matter the state in which they reside.”<sup>42</sup>

In *Mediators' and Lawyers' Perceptions of Education and Training in Family Mediation*, Linda Neilson recommends developing education programs on family mediation but she cautions that “strengthening of educational standards for mediators, however, may pose a danger ... lead[ing] to professionalization and, in turn, reliance on professional knowledge and expertise to the detriment of disputant autonomy and control.”<sup>43</sup>

Neilson attempts to identify what qualifications are necessary to be an effective family mediator.<sup>44</sup> She notes that there is little agreement on what these qualifications should be and she says this is due to the fact that people from different professional backgrounds mediate family disputes.<sup>45</sup> “[V]ariations in professional perspectives have made it difficult, if not impossible, to isolate the educational requirements of those who practice family mediation.”<sup>46</sup> Neilson says that the “differences in perspective [among family mediators] appeared to be at least partly due to deficits in the mediators’ educational preparation.”<sup>47</sup>

In addition to these differing perspectives being a source of difficulty, Neilson says there are four other problems that hamper the efforts to improve education in the field of family mediation.<sup>48</sup> First, Neilson says “there are no legal requirements in most jurisdictions that mediators belong to professional associations with established educational guidelines.”<sup>49</sup> Second, most associations offer members educational guidelines only.<sup>50</sup> Third, “researchers have yet to establish positive correlations between education and training or between professional background and successful mediation . . . . Researchers currently suggest that conflict resolution skills and experience are more important to mediator success than is substantive knowledge of the matters in dispute.”<sup>51</sup> Finally, “the various disciplines, professions, and occupations involved in the practice of family mediation have distinct

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40. *Id.*

41. *Id.*

42. *Id.*

43. Linda C. Neilson, *Mediators' and Lawyers' Perceptions of Education and Training in Family Mediation*, *MEDIATION Q.*, Winter 1994, at 165, 181.

44. *Id.* at 165.

45. *Id.* at 166.

46. *Id.*

47. *Id.* at 167.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

understandings, perspectives, and concerns about the needs of disputing families and about how those needs ought to be addressed.”<sup>52</sup>

Neilson examined a study that surveyed family mediators and lawyers in the Greater London area about what qualifications family mediators need.<sup>53</sup> She found that “[a]lthough the mediation practitioners in Greater London almost unanimously recommended specialized education and training for new mediators, the vast majority considered personal characteristics more important than the acquisition of either substantive knowledge (that is, knowledge of law, knowledge of adult and child psychology) or procedural conflict resolution skills.”<sup>54</sup>

Neilson grouped the personal characteristics that the London practitioners identified into five broad categories: (1) respect for the individual and a belief that families ought to have the right to determine their own destinies, (2) firmness or strength of character to enable the mediator to tackle unpleasant issues and to provide structure and control, (3) self-understanding and interpersonal knowledge and sensitivity, (4) professional objectivity or the ability to be empathetic yet personally detached from the disputants and their problems, and (5) intelligence and common sense.<sup>55</sup>

Neilson comments that there was no consensus among the survey participants about what sort of professional or occupational background might be of assistance to the mediator.<sup>56</sup> She notes, however, that this “is in accordance with the research and mediation literature, where there is little evidence that those with particular professional backgrounds make for better mediators than do others.”<sup>57</sup> However, Neilson points out that the “mediators’ comments and recommendations lead to the conclusion that personal traits, rather than professional, occupational, or academic standards, constitute the better gateway into mediation training.”<sup>58</sup>

The survey participants were divided on whether family mediation should be professionalized.<sup>59</sup> “Those in favor of the professional development of mediation stressed the need to upgrade mediation’s education requirements in order to enhance its public acceptance and social status . . . Those who were opposed to this professional development were troubled by the possibility that the formation of mediation as a separate discipline would inhibit or prevent cross-disciplinary developments.”<sup>60</sup>

Despite this disagreement over professionalization, the practitioners agreed that there was a need for better education and family mediators need to acquire procedural competence, as well as a practical, rather than a theoretical, understanding of how families operate.”<sup>61</sup>

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52. *Id.*

53. *Id.*

54. *Id.* at 171.

55. *Id.* at 172.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 173.

60. *Id.*

61. *Id.* at 174.

Neilson highlights three common themes that emerged from the mediators' comments: (1) mediators need acquire only mental health knowledge relating to divorce or family reorganization and to conflict resolution processes; (2) mediators need to learn how to introduce substantive mental health information in ways that enhance rather than inhibit autonomous disputant decision making; and (3) mediators need to acquire knowledge of normal rather than abnormal family responses to crisis, separation, and divorce.<sup>62</sup> In addition to substantive and procedural training, the survey participants gave high priority to the need to include an apprenticeship period in all training programs.<sup>63</sup> Interestingly, the mediators did not consider ethical training to be an important component in achieving success as a mediator.<sup>64</sup>

The family lawyers and mediators in the survey recommended that training programs be approximately one year of part-time training, or 120 hours, for those who would exclusively mediate issues relating to children; and two years of part-time training or one-year of full-time graduate-level training for those who would also mediate property and financial issues.<sup>65</sup> Neilson concludes that mediators need specialized education and training to effectively mediate family disputes.<sup>66</sup> Neilson does not say, however, how much education and training is necessary, and she is not clear on how important she thinks personality is in this effectiveness equation. As the survey indicated, however, many practitioners consider personal characteristics more important than any education or training that may be learned.<sup>67</sup>

The need for family mediator education is not advocated by everyone. Nichol M. Schoenfield does not think that research has shown that there is a correlation between family mediator education and performance.<sup>68</sup> "Given that few substantive differences have been documented between the quality of mediation conducted by professionals, such as attorneys and mental health experts, and those conducted by volunteer lay persons, one might argue that money spent on employing the services of a highly-educated mediator is better spent elsewhere."<sup>69</sup>

As these articles illustrate, the area of family mediator qualification is confusing and there are many different opinions on what qualifications are necessary to be an effective family mediator. In trying to address this confusion, the authors of *National Standards for Court-Connected Mediation Programs* developed standards that recommend what kinds of qualifications family mediation programs should include.<sup>70</sup> The authors note that "[w]hile many jurisdictions require their mediators to have a particular educational background or professional standing, no degree

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62. *Id.* at 175.

63. *Id.* at 178.

64. *Id.*

65. *Id.* at 179.

66. *Id.* at 180-81.

67. *Id.* at 171.

68. Nichol M. Schoenfield, *Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 469, 487 (1996).

69. *Id.*

70. Shaw, *supra* note 1, at 156. These standards were developed as a joint project of the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City, along with the involvement of an 18-member Advisory Board comprised of "experienced and respected individuals throughout the country." *Id.*

ensures competent performance.”<sup>71</sup> Like Schoenfield<sup>72</sup> and the practitioners in Greater London,<sup>73</sup> the authors suggest that “performance may be attributable to personal characteristics rather than to education, profession, or age or other criteria.”<sup>74</sup>

Although the standards do not clearly state what kind of personal characteristics or education are necessary to be a family mediator, it does recommend that qualifications be based on skills which may be acquired through training, experience, and skills-based education, because these are the only criteria that have correlated with successful mediation.<sup>75</sup> The standards make no recommendations on the number of hours of training that should be required.<sup>76</sup> They do suggest that the education training include role-playing with individual feedback, as well as an orientation on court procedures.<sup>77</sup> The standards also stress the importance of monitoring mediators’ performances, even after they have become qualified to mediate.<sup>78</sup> The standards suggest using peer review, supervisor observation, client surveys, judges’ feedback, and outcome data to monitor mediators’ continued abilities.<sup>79</sup>

As these different articles show, commentators have different opinions on the necessary and worthwhile qualifications for family mediators. Although many commentators and practitioners agree that education and training are important, they cannot agree on what kinds of education and training are important, or on how much training time is sufficient. Also, commentators do not agree on whether family mediators should be professionalized and held to a national standard. Because there are so many disagreements on the issue of family mediator qualifications, it is no surprise that there is no coherent qualification system in place throughout the country.

#### IV. COMMENT

Although the advantages of alternative dispute resolution over participation in traditional litigation are clearly recognized by attorneys, judges and clients, the use of mediation in the family law arena provides some distinct and additional benefits to the parties involved. Mediation is “cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants.”<sup>80</sup> In addition, studies have demonstrated that “children of mediated divorces appear to adjust better to the divorce, and their parents are less

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71. *Id.* at 186.

72. Schoenfield, *supra* note 68.

73. Neilson, *supra* note 43, at 169.

74. *Id.*

75. *Id.*

76. *Id.* at 187.

77. *Id.* at 188.

78. *Id.*

79. *Id.*

80. Schoenfield, *supra* note 68, at 469.

hostile toward each other.”<sup>81</sup> Family law is unique in that it frequently involves parties who must remain in close contact with one another regardless of the outcome; therefore, an approach which minimizes conflict and seeks to preserve lines of communication is obviously desirable.

Given the increased importance mediation can play with respect to families, it is logical to expect that the individuals who elect to participate as mediators in domestic cases will be required to obtain training and experience. The justifications for such requirements are to protect the parties from an inexperienced or ineffective mediator and to protect the integrity of the dispute resolution process.<sup>82</sup> To effect these goals, many states have statutorily implemented qualifications that an individual must meet in order to serve as a family law mediator. The problem with such qualifications is that they are inconsistent across states, creating the impression that they are randomly chosen without an evidentiary basis for establishing their effectiveness.

Despite the confusion surrounding which qualifications are truly helpful and necessary, there are at least five areas in which the value and importance of a specific qualification is firmly supported. For example, it is clear that states should require family law mediators to have participated in or observed at least five mediation cases before conducting their own. Research indicates that the number of agreements reached and the approval ratings of lawyers and social workers increase significantly after they have mediated or observed five cases.<sup>83</sup> An additional advantage to such a requirement is that it could help to develop a level of consistency throughout family law mediation, at least with respect to the way in which techniques are chosen and employed. If consistency can be achieved, then the selection of an experienced, quality mediator will become a less crucial variable in the degree of success a particular mediation is expected to attain. The value of such a requirement has been recognized by several states, including Louisiana, Florida and Nebraska, which all require an experienced mediator to observe or supervise a family law mediator for a specified number of mediation sessions before the latter are allowed to conduct such sessions on their own.<sup>84</sup>

Another requirement states could add to their mediation statutes is that judges attempt to match the mediator’s characteristics and experiences to the needs of the family when selecting a mediator to assign for a court-connected mediation. Studies have found “competence . . . in individuals with very different backgrounds and experiences, suggesting that [successful mediator] performance may be attributable to personal characteristics [of the mediator].”<sup>85</sup> Even without the support of research in the area, such a requirement makes good common sense with respect to the forging of bonds and creation of trust between the mediator and family members, as well as the ability of the mediator to understand the socioeconomic and cultural reality of the family she is helping. Although this guideline does not truly qualify

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81. *Id.*

82. Shaw, *supra* note 1, at 184.

83. Schoenfield, *supra* note 68, at 486.

84. LA. REV. STAT. ANN. § 9.334 (West 1996); FL. ST. MEDIATOR Rule 10.010(b), (d); NEB. REV. STAT. § 25-2913 (1996).

85. Shaw, *supra* note 1, at 186.

as a “mediator qualification,” its importance to the mediator’s level of success warrants its inclusion.

A third qualification that mediators should be required to meet, and indeed in many states already are, is cross-professional training in both the law and mental health. There is currently “no single discipline . . . taught as an organized program [that] duplicates the foundations of knowledge and skill necessary to be a family mediator who is adequately equipped to handle all cases.”<sup>86</sup> In one study, mediators surveyed indicated that a variety of knowledge with respect to mental health and the law or the legal system is important for a mediator to be adequately prepared.<sup>87</sup>

Since attorneys and mental health professionals constitute the majority of active mediators, it is vital that one understand how the use of one professional approach to the complete exclusion of the other can be disadvantageous. One cannot appreciate the necessity of the proposed requirement without a realization of the weaknesses inherent in both professions. The downside of using solely attorney-mediators has two distinct parts: “(1) their education and approach to problem-solving is seen to be inimical to the peaceful resolution of such emotionally-charged issues as child custody; and (2) [there is an] increased risk that the weaker party . . . will be exploited.”<sup>88</sup> The exclusive use of mental health professionals as mediators is also susceptible to such a lack of understanding or risk of exploitation.<sup>89</sup> Most notable is the mental health professional’s “inadequate understanding of the law and the types of agreements that judges will accept.”<sup>90</sup> Given these career inadequacies, it seems clear that mediators must gain experience in both the law and mental health before they can provide their clients with the best possible guidance.

The adoption of the cross-professional training requirement begs another question: how much training is necessary before a mediator can be considered qualified? The majority of states require that mediators attend between twenty to forty hours of training. Although the subject matter of the training varies greatly from one state to the next, most states that require a specified number of training hours have settled around the forty hour mark.<sup>91</sup> Unfortunately, there is no indication as to why the legislators chose anywhere from between twenty to forty hours as the basis of their requirement. If, in fact, these time specifications are arbitrary and not supported by evidence of their necessity, it is open to debate whether the hours of training that states require are excessive, insufficient, or whether the requirement serves any legitimate purpose at all.

Some mediators surveyed submitted that current hourly training requirements are woefully inadequate.<sup>92</sup> These mediators would require training of between one year part-time (or 120 hours) and two years part-time (or one year full-time) for mediators dealing with child issues or, in addition, with property and financial

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86. Taylor, *supra* note 33, at 82.

87. Neilson, *supra* note 43, at 175.

88. Schoenfield, *supra* note 68, at 474.

89. *Id.* at 480.

90. *Id.*

91. See, e.g., FL. ST. MEDIATOR Rule 10.010(b); LA. REV. STAT. ANN. § 9.334; MICH. STAT. ANN. § 552.51; MINN. STAT. ANN. § 518.619; ID. ST. RCP Rule 16(j).

92. Neilson, *supra* note 43, at 179.

issues.<sup>93</sup> Still others contend that “we should stop thinking of training by the hour” and focus instead on the mediator’s mastery of issues central to family mediation.<sup>94</sup> It is clear that there is no consensus on what hourly amount of training, if any, is sufficient to ensure that mediators are adequately prepared to serve. In light of this deficit, we decline to recommend a set number of hours for training and, instead, defer to future research that we hope will supply states with information from which they can derive a meaningful training-time requirement.

An additional consideration with respect to the adoption of the cross-professional training requirement is precisely what types of training are involved. In order to be effective in offering guidance in family law cases, a mediator must have knowledge of the law and the procedural issues that accompany it.<sup>95</sup> It is also important that mediators possess conflict resolution skills<sup>96</sup> and mental health training.<sup>97</sup> Training in these areas helps mediators to manage human emotions, facilitate communication, and offer valuable conflict management advice to participants.<sup>98</sup>

Taylor identifies four “pillars” that form the foundation of the mediation process and on which training requirements should be based: (1) mediation, conflict resolution, and negotiation processes; (2) legal and financial knowledge and processes; (3) adult, child, and family development (historical, normal, and assessment); and (4) helping professional skills (communications, interviewing, referral, case management, collaboration with other professionals, and strategic case planning).<sup>99</sup> Although many states already include these subjects in their training requirements, this introduction to vital areas of family mediation might serve as guidance for states that have not yet adopted qualifications for family mediators.

In addition to the topics endorsed in Taylor’s article, many states require mediation trainees to engage in specialized training with respect to domestic violence.<sup>100</sup> Given the volatile nature of domestic violence situations, it seems appropriate to require mediators to obtain some familiarity with family violence cycles and other related issues. Although some states do not require court-connected mediation in cases that involve domestic violence,<sup>101</sup> it is important that parties choosing to proceed with mediation under such circumstances be provided with a mediator who is knowledgeable in this area.

Those states that choose to adopt the cross-professional training requirement might want to consider also adopting an exception to that prerequisite. In short, states could allow mediators who elect to participate as a part of a co-mediation team that charges reduced rates to be exempt from some of the cross-professional training. Co-mediation teams typically involve one attorney and one mental health

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93. *Id.*

94. Taylor, *supra* note 33, at 85.

95. Shaw, *supra* note 1, at 188.

96. Neilson, *supra* note 43, at 167.

97. Schoenfield, *supra* note 68, at 478.

98. *Id.* at 479.

99. Taylor, *supra* note 33, at 81.

100. *See, e.g.*, HAW. REV. STAT. § 580-41.5; CAL. FAM. CODE § 1816 (West 1994); N.H. REV. STAT. ANN. § 328.

101. *E.g.*, HAW. REV. STAT. § 580-41.5.

professional who work together to conduct the mediation.<sup>102</sup> Such an “interdisciplinary” team offers mediation participants the advantages of: “(1) [an] increased potential for identifying issues of various kinds [e.g. legal issues, child development issues, etc.]; (2) reduced concerns regarding mediator bias (male and female mediator teams are particularly helpful for divorce and child custody cases); and (3) division of labor and continual cross-training.”<sup>103</sup> Despite the clear advantages, to require all mediation to be conducted by co-mediation teams would pose at least two logistical problems: it can be difficult to find professionals willing to participate on such teams and the cost of mediation is increased due to the additional mediator.<sup>104</sup> Allowing those who are willing to co-mediate at a reduced pay rate to be exempt from some of the cross-professional training requirements serves the dual purpose of encouraging the creation of co-mediation teams and keeping the costs of such teams reasonable for the participants.

The fourth suggestion for states creating or revising their family mediator qualifications is to eliminate formal degree requirements. Although many states include a college degree as an alternative to licensing as an attorney or physician or certification by a national alternative dispute resolution organization,<sup>105</sup> a few states require that family mediators possess a college degree before being allowed to serve.<sup>106</sup> Legislators and courts around the country might be surprised to learn that research has “failed to show a correlation between the mediator’s education and rough indicators of performance, such as settlement rates or satisfaction by the parties . . . [that casts] a shadow of a doubt on whether mediator qualifications, particularly those requiring educational degrees, make a substantial contribution to the fairness of the process.”<sup>107</sup> As Shaw puts it, “no degree ensures competent performance.”<sup>108</sup> In addition, for those states that allow an attorney’s or a physician’s license to substitute for a college degree,<sup>109</sup> there is very little support for the idea that “those with particular professional backgrounds make for better mediators than do others.”<sup>110</sup>

The fifth and final qualification that states should consider concerns continuing education. As noted earlier, many states require that mediators participate in continuing education programs in order to continue serving as mediators. The advantage of such a requirement is obvious; it assures that mediators stay abreast of changes in the law, behavioral sciences, and conflict resolution techniques in order to maintain quality and effectiveness in the service they provide. States differ greatly as to how much and what type of continuing education is required, but most appear to agree that it is necessary.

102. Schoenfield, *supra* note 68, at 482.

103. *Id.* at 483.

104. *Id.* at 485.

105. See, e.g., N.D. CENT. CODE § 14-09.1-04(3) (1997); FL. ST. MEDIATOR Rule 10.010(b), (d); LA. REV. STAT. ANN. § 9.334; MICH. STAT. ANN. § 552.513; MO. R. RCP Rule 88.05.

106. See, e.g., CAL. FAM. CODE § 1815; GA. STAT. ADR App. B; ID. ST. RCP Rule 16(j); OH. ST. SUP. Rule 11.

107. Schoenfield, *supra* note 68, at 487; Neilson, *supra* note 43, at 167.

108. Shaw, *supra* note 1, at 186.

109. This approach is rather illogical given that few, if any, attorneys or physicians will be able to obtain graduate standing or professional licensure without first earning a college degree.

110. Neilson, *supra* note 43, at 172.

## V. CONCLUSION

It is clear that mediation is a valuable tool in the family law arsenal. It can be less expensive, faster and can allow for creative solutions and flexibility that might not be present in the traditional adversarial process.<sup>111</sup> In addition, it has been shown to lessen hostility between divorced parents and to have a positive effect on the children of those divorces.<sup>112</sup>

Given its importance in this context, it is vital that mediators be held to basic standards or qualifications before being allowed to preside over situations that have a profound effect upon their participants. This goal could be achieved by the adoption of national standards for family mediators, or at least state standards that are consistent across that particular state. As Taylor states, "if all plumbers and cosmetologists must be licensed according to one standard of knowledge, adequacy, and proficiency, then all family mediators should also be licensed or certified to one standard, no matter the state in which they live."<sup>113</sup>

Although we were unable to address the full scope of potential mediator qualifications, we did strive to identify five areas in which states could adopt requirements with the knowledge that the requirements have been proven effective or are supported by studies. States should require family mediators to have participated in or observed at least five mediations before conducting their own and, in court-connected mediation, should require judges to try and match the experiences and characteristics of the mediator to those of the family. States should also require cross-professional training in the law and in mental health and should abandon the extreme emphasis on the attainment of a college degree. Finally, states should demand that family mediators attend continuing education sessions in order to stay current on changes in the law, behavioral sciences and in successful conflict resolution techniques and skills. If states will commit to the adoption of such requirements, it could go a long way toward improving a service that has been shown to have a dramatic effect on one of our most precious institutions, the American family.

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111. Schoenfield, *supra* note 68, at 469.

112. *Id.*

113. Taylor, *supra* note 33, at 86.

