

**NEW YORK CITY BAR ASSOCIATION**  
**COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION**  
**REPORT ON MEDIATOR QUALITY**

**JUNE 2006**

**I. INTRODUCTION; SUMMARY; RECOMMENDATIONS**

**The Quality Issue.** As the use of mediation to resolve a wide variety of disputes has increased, sharper focus has been placed on the qualifications of those holding themselves out as mediators. How can parties who want to use mediation, especially those not represented by counsel, choose neutrals qualified to mediate competently, ethically and cost-effectively?

Critics of mediation, including some advocacy groups who are wary of it, observe that anyone can act as a mediator because no agreed-upon system exists to substantiate mediator competence and reliability. This is also a matter of concern to skilled and conscientious mediators who wish to promote public confidence in the process. The need is real: the public deserves protection from the risk of exposure to incompetent and untrustworthy mediators. Moreover, the perceived absence of such protection has discouraged legislative support for enactment in New York of the Uniform Mediation Act, a proposed uniform law which would provide a much needed clear-cut evidentiary privilege for disclosures made in mediation.

The viability of any system used to promote mediator quality will depend on adherence to what may be called the core values of mediation. Before proceeding further we need to say more about what we believe those core values are.<sup>1</sup>

The essential core values of mediation have been expressed in various codes<sup>2</sup>, most recently the 2005 Model Standards for Mediation. They serve as generally accepted reference points for ethical mediation practice. Succinctly stated, those values are: a) self determination by the parties; b) mediator neutrality; c) avoidance of conflicts of interest; d) mediator competence; e) confidentiality; and f) integrity of the process. To implement these values effectively the neutral must have a solid grasp of fundamental mediation knowledge and skills. These fundamentals can be gleaned from the developing academic

---

1. Mediation comes in many forms, with a wide range of styles and approaches, but there is a basic commonality. For the purpose of considering mediator quality advancement, mediation can be defined simply as a process in which a designated neutral, adhering to certain constant core values, helps disputing parties to identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

2. American Arbitration Association, American Bar Association/Section of Dispute Resolution, Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (September 2005); Association of Family and Conciliation Courts, American Bar Association/ Family Law Section and National Council of Dispute Resolution Dispute Resolution Organizations, *Model Standards of Practice for Family and Divorce Mediation* (August 2000)

literature, books and articles by recognized practitioners and curriculum guides developed by experienced trainers. An outline of the knowledge and skills which mediators should have is annexed as Appendix “A”. Experience has shown that the most effective way to master these fundamentals is a balanced combination of formal education, mediation training, apprenticeship, performance-based standards and assessments, practical experience and continuing education. The principal elements of these factors are discussed in more detail in Appendix “B”.

**The Current Environment.** Several systems now address the mediator quality issue in New York. In court-connected mediation, administrators help to formulate minimum qualifications for rosters of approved mediators, screen applications and oversee training programs.<sup>3</sup> Community mediation administrators perform similar functions under guidelines of the state Office of Court Administration.<sup>4</sup> Some non-governmental organizations such as NASD establish qualification criteria and screen mediators for their matters. However, parties not working under those auspices would clearly benefit from some external source to help them assess the quality of mediators for their disputes. For practical purposes, that kind of resource does not exist in New York State.

Not surprisingly, New York has no system for licensing mediators; indeed, no state does. However, many other jurisdictions, which encourage mediation in court-filed matters, have established detailed procedures and demanding requirements for accrediting mediators to act in their court-annexed mediation programs. These procedures tend to make court certification a valuable credential for selection as a mediator in other disputes.

**Recommendations - Summarized.** New York has in place a potential platform for promoting mediator quality: The network of mediator membership organizations that provide forums for discussion, training opportunities and in some cases a nascent voluntary accreditation system. These organizations include, among others, the New York State Dispute Resolution Association (NYSDRA), the New York State Council on Divorce Mediation and the Greater New York Chapter of the Association for Conflict Resolution.

The New York City Bar Association Committee on Alternative Dispute Resolution recommends:<sup>5</sup>

- (1) That membership organizations for New York State mediators develop voluntary accreditation systems to provide incentives for mediators, whether members or not, to acquire the training and experience to qualify for accreditation; and

---

3. See, e.g., *Rules of the Alternate Dispute Resolution Program, Commercial Division, Supreme Court, Civil Branch, New York County*, as revised (4/16/2001); *Standards of Conduct for Mediators* (3/1/2000).

4. New York State Unified Court System, Community Dispute Resolution Centers Program Manual, Chapter 7, *Standards and Requirements for Mediators and Mediation Trainers* (6/11/2003)

5. While this report is intended to recommend a framework for those in the private sector interested in establishing a mediator quality system, others who currently oversee such programs may also wish to consider implementing some or all of our recommendations.

- (2) That a registration system be established for the filing of publicly accessible statements of qualifications by persons offering mediation services to the public, on a mandatory basis for compensated mediators and optionally for others.

The reasons for these recommendations are discussed below.

## II. RECENT HISTORY; ALTERNATIVE APPROACHES

**History.** The desire to promote good mediation practice on a universal level is not new. As early as 1982, when wide use of mediation was just beginning, 30 ADR organizations met in San Diego to address the issue. In 1987 the Society of Professionals in Dispute Resolution (SPIDR), a national organization, commissioned a feasibility study which concluded that mediator certification would help to assure a consistent level of quality of service. The SPIDR report recommended basing certification on performance rather than paper credentials. In March 2004 the Association for Conflict Resolution (ACR), an ADR organization based in Washington, D.C. with international scope (and the successor to SPIDR and several other organizations) produced a report recommending that ACR establish and fund a voluntary mediator certification program. The ACR board of directors approved the report but ACR has yet to implement its recommendations.<sup>6</sup> Closer to home, in August 2005 NYSDRA completed a six-year effort to develop a certification program to delineate “the training, experience and skill necessary to mediate in a competent manner involving generalized disputes”.<sup>7</sup> NYSDRA is preparing to launch its program in 2006.

**Proposed Solutions.** Over the past two years, deliberations by the Committee reflected widely differing attitudes on proposals to address the perceived need for mediator quality advancement. At least six different approaches were considered:

- (1) At one extreme, it was argued that the only reliable way to protect the public is mandatory licensing. Under this regime an unlicensed mediator could not practice in the state.
- (2) A second approach was voluntary certification, whereby established membership organizations would certify the qualification of mediators who meet their requirements for training and experience. Uncertified mediators could not claim that credential but would not be barred from practicing.

---

6. Association for Conflict Resolution, ACR Mediation Certification Task Force, *Report and Recommendation to the ACR Board of Directors* (3/31/2004). The Task Force recommended that the ACR Board of Directors make certification a strategic priority. The ACR Board of Directors thereafter commissioned an on-line survey of attitudes on issues relating to certification which showed there was substantial agreement on the value of a national mediation certification program to mediators (64%) and to users of mediation services (63%), but that few mediators (25%) would be willing to pay more than \$300 for processing fees. If an acceptable program were developed, however, 74% of responding mediators agreed or strongly agreed that they expected to seek national mediator certification. *ACR/ABA Mediator Certification Feasibility Study* (4/21/2005).

7. New York State Dispute Resolution Association, Inc., *NYSDRA Certification Update* (8/10/2005); NYSDRA Letter (8/11/2004)

(3) A variant of voluntary certification would have the state authorize designated membership organizations to certify mediators in accordance with its own criteria. Non-authorized organizations could not certify mediators but non-certified mediators could still practice.

(4) A fourth approach, combining some features of the first three, posits mandatory certification by state-authorized membership organizations. A mediator not certified by an authorized organization could not practice in New York.

(5) Another approach, borrowing from the securities regulation disclosure model, would require anyone mediating for compensation, and permit a non-compensated mediator, to file a publicly accessible registration statement attesting to the mediator's qualifications including education, mediation training and experience. Anyone charging for mediation would be required to provide the parties with a copy of the filed registration statement.

(6) The last approach would leave well enough alone. Supporters believed that mediation is still in its developmental stage and should not be saddled with a fixed qualification system that might inhibit further development, and that mediation has grown rapidly and produced satisfactory results so far without formal quality assurance.

**Comparative Analysis.** Each of these six approaches has its own advantages and drawbacks. In recommending how to establish acceptable quality standards, which all Committee members see as a desired goal, we must consider the relative merits of each approach.

(1) **Mandatory Licensing.** Mandatory licensing could shield the public against incompetent and unethical mediators by entrusting supervision to a presumably neutral government authority. The job could be done by an existing body – for example, the state Board of Regents, which now screens many professions and trades. But we believe the price would be disproportionate to the gain. Licensing would require substantial additional funding by the legislature, an uncertain prospect. Delays in processing could halt mediation for indeterminate times. Most importantly, a licensing requirement would unduly restrict the number and kinds of mediators able to offer services in the numerous contexts where mediation has proved useful. No other jurisdiction in the United States has adopted such an expensive and limiting solution. Given the scant evidence of mediator malfeasance to support its imposition, it is best not pursued.

(2) **Voluntary Membership Organization Certification - Unregulated.** An enhanced voluntary system would allow qualified mediators to seek waivers of particular requirements, or even mediate without certification if they choose. But the prestige and value of certification as a credential would provide an incentive to acquire the requisite training and experience, raising the general level

of mediation practice and public confidence in the profession. At the consumer level it would give parties new to mediation an easily understood measure for judging the qualifications of proposed mediators. A potential disadvantage of relying on existing membership organizations derives from their unregulated nature: Standards and effectiveness will vary with the quality, viewpoints and finances of the organizations granting certifications, the limitations of their leadership, and their ability to marshal the large blocks of qualified volunteer time needed for this labor-intensive process.

**(3) Voluntary Certification by State-Authorized Membership**

**Organizations.** The hybrid solution of a voluntary certification system run by State-authorized membership organizations might seem to offer the best of both worlds, but would actually involve significant disadvantages. Non-certified mediators could still practice, a perceived advantage. But there would be additional government expense for the small bureaucracy needed to conduct investigations and issue authorizations, and it could create delay in the authorization process and impose financially prohibitive requirements on thinly funded organizations.

**(4) Mandatory Certification by State-Authorized Membership**

**Organizations.** Another solution – mandatory certification for all mediators by state-authorized membership organizations only – might also seem a benign compromise but suffers from its own defects. It would entrust mandatory certification to private organizations subject to only limited public oversight, thus implicating issues which have prompted wide misgivings about private exercise of governmental authority. Qualified mediators might legitimately object to having their entitlement to practice dictated by non-public bodies with unregulated abilities and motives. Also, the same factors would harm the public by depriving parties of the services of experienced mediators who would be discouraged or excluded by a certification process or its control by a privatized regime.

**(5) Qualification Disclosure Registration.**

The proposed disclosure registration procedure is attractively simple. A mediator would only have to file a form stating his qualifications on a public registry and make copies available to mediation parties. That procedure, standing alone, would not be entirely free of drawbacks: While it might be highly useful to experienced or counseled parties, those less able to evaluate the registrations might find it less useful. They might fail to address or find it difficult to assess the value of particular mediation training, of apprenticeship to a qualified mentor or the lack of it, or the level of experience conducting mediations at varying levels of difficulty. The Committee believes, however, that this shortcoming does not detract from the potential value of the procedure and has included the adoption of a registration system in its recommendation.

(6) **Laissez Faire.** The last option – doing nothing – has some appeal. It would let mediation continue to develop while the quality assurance debate continues at its own pace. It would add no cost and require no bureaucracy. It would avoid negative reflection on experienced and qualified mediators who do not seek certification and keep them available to help resolve disputes, thus allowing the marketplace to govern mediator selection unconstrained by certification requirements. It would also avoid the risk of discouraging otherwise capable neutrals from practicing mediation, if not excluding them outright, by reason of improvident regulatory barriers. But, in the final analysis, continuation of the status quo would represent a triumph of inertia in the face of a strongly perceived need for a consistent standard of mediator quality. The mediation landscape is far different than it was 25 years ago. Doing nothing would leave the uninitiated and unrepresented party without any compass in seeking a competent and trustworthy mediator and would not promote the cause of good mediation practice.

### III. **RECOMMENDATIONS; DISCUSSION**

The Committee has concluded that the most practical, flexible and effective way to promote mediator quality advancement, and the one with the least serious disadvantages, would be adoption of two mutually compatible programs:

(1) **Intensified development of voluntary certification programs by mediator membership associations.** A good number of such organizations have sprung up on national, state and local levels. Their principal *raison d'être* have been updated training for mediators, communication among members, promoting mediation to the public, improving the level of mediation practice and offering networking opportunities. Some of them have already established mediator certification or accreditation systems, and there is a remarkable commonality, if not uniformity, in the principles and procedures they follow in reviewing applications.

Given the wide variety in the geographic locations of those organizations and the mediation styles and kinds of disputes of interest to their members, it makes sense to defer to them in establishing their own systems for mediator quality assurance. A particular organization, familiar with its own locality or specializing in a particular field of mediation, is best able to pass on the qualifications of mediators in its geographic or professional areas. Its own interest in promoting mediation to the public and enhancing the reputation of its membership should provide strong incentives to conduct a certification process characterized by thoroughness, flexibility and integrity. Where an organization already has a system in place, this approach avoids a need to develop new procedures or establish a new bureaucracy.

Objections that such a certification process would exclude or discourage qualified mediators from practice are met by allowing waivers based on demonstrated

experience, at least at the outset. Requirements deemed inapplicable or unjust in particular cases might be addressed by the point system recently adopted in Florida<sup>8</sup> or some variation. Some established mediators might see no need for certification, but even they would profit from any additional training required should they choose to apply for it.

There are three critical ingredients for success if membership organizations are to be vehicles for advancing the cause of mediator quality assurance. The first is their willingness to commit the necessary resources, time and effort. In order to prevent arbitrary and unjust decisions, they must be prepared to maintain adequate administrative structures for processing applications, ready supplies of qualified mediators to mentor applicants, processes for appeal to rectify inappropriate denials of certification and procedures for periodic recertification, as well as procedures for review of complaints by parties that might result in mediator de-certification. The second ingredient is a commitment to encourage members to apply for certification. Making certification a valued credential will motivate more practitioners to improve their knowledge and skills, thus raising the level of mediator competence generally. The third critical success factor will be the education of the public about the meaning of a certification. Initiatives to educate potential users of mediation services will help consumers understand the value of certifications and will assist them in identifying qualified neutrals to meet their needs.

The success of a voluntary certification system will depend on the commitment and ability of the organized ADR community to meet the demands described above. Among other things, each certifying organization should clearly disclose its specific certification standards to give the public a transparent way to compare certification criteria.

(2) **Development of disclosure registration systems for mediators.** We recommend that mediators offering their services to the public for compensation be required to file disclosure registration statements, and that non-compensated mediators be permitted to do so in their discretion. The statements should be in an established form, the registries should be accessible to the public, and the statements should be provided to the parties for review before any engagement for compensated mediation. The categories of information disclosed should include those articulated in Appendix “B”, which sets forth the framework for mastering the core mediation knowledge and skills; relevant disciplinary history; and other pertinent factors. For example, a simplified and easy-to-read registration statement would include at least the mediator’s academic credentials and specific

---

8. In Re: Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998 (May 11, 2006). The Florida system assigns differing point values to various qualifications such as education, training, mentoring and the like. It sets a minimum point score for certification but allows for some discretion in prescribing rules for how the total qualifying score may be accumulated. The viability of the system will depend, to a significant extent, on the care with which points are assigned to particular activities and the ability of framers and administrators to maintain a sufficient level of flexibility without sacrificing standards and common sense.

mediation training, any apprenticeship or mentoring, and the amount and kind of mediation experience.

We expect certified mediators to follow a generally recognized code of ethics in their practice. However, in different practice areas such as family and divorce mediation, a specific code might apply. Therefore, we recommend that the registration statement refer to the code or codes followed by each mediator.<sup>9</sup>

Initially, the statement format should be developed, and the registries maintained by the membership organizations that assume the responsibility of granting certification status to mediators. At some future time it may make sense for a government agency or court office to administer the system.

The Committee perceives no disadvantages in a disclosure registration system except some cost. But it should not be prohibitive, and the benefits to be gained – promotion of good mediation practice and protection of the public – are substantial.

#### IV. **CONCLUSION**

The worthy goals of promoting quality in all mediations and protecting the public from untrustworthy and incompetent mediators are best met by drawing upon existing strengths within the mediation community. The various and well-regarded mediator membership organizations that have been formed over the past 25 years or more are naturally suited to the task. By committing resources of time, energy and money to an expanded mediator certification process combined with a mediator disclosure registration system, these organizations will benefit practicing mediators, mediation parties and the public at large and advance mediation as a preferred means of resolving disputes.

---

<sup>9</sup> In footnote 2 we reference two widely recognized codes, the *Model Standards of Conduct for Mediators* (September 2005); and the *Model Standards of Practice for Family and Divorce Mediation* (August 2000). The American Bar Association was a principal sponsor of both documents and has approved each code in final form.

# The Committee on Alternative Dispute Resolution

Kenneth L. Andrichik, Chair \*\*

Dana M. Berman	Regina M. Eaton	Regina L. LaPolla	Peter A. Scarpato**
Michael Bertty	Pamela R. Esterman	Jessica A. Magaldi	Amy W. Schulman
Tricia A. Bozyk	Laurie E. Foster	Jeffrey R. Mann	Elizabeth J. Shampnoi
Lorraine M. Brennan	Romaine L. Gardner	Michael R. Marra	William C. Struyk
Lalita A. Brockington	Sarah L. Gartner	Lawrence D. McGovern	Karen J. van Ingen
Mark Jeffrey Bunim	Andrew J. Gerber**	Peter J. Mitchell	Robin S. Weinberg
Peter C. Clemente	Judith Carlson Greene	Stephanie Morse-Shamosh	Alice Winkler
Joel E. Davidson**	Kathy J. Holub	Sandra B. Otero	Daniel M. Weitz**
Jeffrey S. Davis	Leo J. Jordan	Margaret Ann Porcelli	Faith. F. Wu
Graham Daw**	Rachel Kalman	T. Gorman Reilly*	
Stephen DeHoff	Ann M. King	Keith Roberts	

\* Subcommittee chair

\*\* Subcommittee member

The Subcommittee would also like to acknowledge the significant contributions of former Committee members Diane R. Cohen, Steven B. Feigenbaum, Florence D. Horowitz, Norman Jay Izkoff, William L. Kandel, Christopher M. Mason, and Thomas N. Rothschild.

## APPENDIX “A”

### The Core Knowledge and Skills Required of Mediators

Experience and study of the developing academic literature confirm that effective mediators need to possess an understanding and mastery of the following core knowledge and skills:

- A. The Dispute Resolution Continuum** – the ability to define and distinguish various dispute resolution processes; familiarity with relevant laws pertaining to aspects of mediation, including confidentiality;
- B. Dynamics of Conflict** – an understanding of underlying emotional, psychological and economic factors as they impact on the parties and the mediation process;
- C. Goals, Purposes and Core Values of Mediation** – skill in enhancing the parties’ abilities to communicate and negotiate consistently with applicable standards of practice;
- D. Limits of Mediation** – an ability to identify power imbalances and other circumstances that may preclude commencement or continuation of mediation and necessitate bringing mediation safely to closure;
- E. Preparation/Opening** – the ability to create a private, safe and supportive environment for the conduct of the mediation;
- F. Information Exchange** – a variety of skills to allow the development and exchange of communications between the parties;
- G. Developing the Agenda** – identifying negotiable issues and helping parties organize information for discussion;
- H. Generating Movement** – helping parties to move beyond impasse, whether by selective use of caucus or other means;
- I. Agreement/Closure** – assisting parties to reduce agreements to a satisfactory and balanced writing;
- J. Standards of Practice** – an ability to identify key ethical issues and act on them appropriately; and
- K. Diversity** – the ability to help parties of different backgrounds deal with conflict or resolve disputes.

## APPENDIX “B”

### **A Framework for the Mastery of the Core Knowledge and Skills of Mediation**

Mastery of the core knowledge and skills of mediation is best accomplished by adherence to a regime that includes a mix of formal education, practical training, apprenticeship, standards based evaluation and assessment, actual experience and continuing education. The principal elements are the following:

- A. **Academic and Professional Credentials** – depending on the substantive area of mediation involved, academic or professional qualifications may play an important role, have some importance or none at all;
- B. **Practical Training** – (i) participation in an initial or basic mediation training program covering the core knowledge and skills needed to mediate in a manner consistent with the core values of mediation; and, (ii) completion of training in specific mediation techniques, laws, rules, court procedures and particular issues pertaining to the subject area to be mediated;
- C. **Apprenticeship** – a structured and supervised program to allow the mediator to gain practical experience in applying the core knowledge and skills of mediation, combining structured role-plays, observations of mediations involving actual controversies between actual parties (passive mentoring) and mediation or co-mediation of actual disputes with actual parties under the guidance of an experienced and qualified mediator (active mentoring);
- D. **Performance-Based Standards and Assessments** – evaluation by qualified mediators and/or supervisory staff in accordance with performance-based standards and/or, where appropriate, written tests;
- E. **Experience as a Mediator** – experience as a mediator may be a more effective way of learning than classroom training; and
- F. **Continuing Education** – completion of a designated amount of continuing education over a period of time and on a regular basis to maintain competence as a mediator.