

Southern California Mediation Association
Ad Hoc Committee on Mediator Regulation or Certification

Report

November 2, 2013

“The issue of mediator credentialing provokes strong feelings in many of us. We want to see mediation recognized as a true profession and end stories about incompetent neutrals. At the same time we treasure the openness of the field and do not want anyone to impose a single ‘correct’ way to mediate. Credentialing almost inevitably brings these values into tension.”¹

Whether the practice of mediation should be regulated or credentialed in any way has long been a contentious topic within the ADR community, which has yet to reach consensus on the issue. On the one hand, many practitioners see no compelling need for regulation or certification, as there has been no public outcry for it. They see the advantages to keeping the field open as to mediators’ styles and backgrounds. On the other hand, many mediators desire a credential that would be of benefit to themselves and the public. They are unhappy that persons with minimal or no training can hold themselves out as mediators, in some cases giving parties who attend mediations an unfavorable view of the field. These mediators favor some sort of credentialing out of interest in promoting and supporting the highest standards for our field and, for some, out of fear that unless we mediators regulate or certify ourselves, someone else will do it for us.

The breadth and complexity of this issue is evidenced by the efforts and experience of the two largest organizations of mediators in the United States. Building on work by its predecessor organizations, in 2002 the Association for Conflict Resolution (ACR) created a Task Force on Mediator Certification, whose purpose was to design a national certification program. This Task Force issued its Report and Recommendations in 2004, recommending that ACR establish a national Mediator Certification Program and setting forth the elements of that program, which was to “reflect the importance of an understanding of the full spectrum of mediation models and styles of practice.”² Among its “Guiding Principles, Concerns and Caveats,” the first was: “The certification process is intended to encourage professionalism and the professional development of conflict management practice. It is not meant to ‘professionalize’ the field, but rather to add a degree of quality control assurance to the field.”³ The proposed certificate required 100 hours of training and course work, 100 hours of mediation, three letters of reference, and a written exam.⁴

We do not know what might have happened if ACR had actually tried to implement this certification program, because seven years later it decided that instead of trying itself to administer a national certification program, it would create model standards for mediation certification programs for other organizations to follow. In 2011 the ACR adopted its Model Standards for Mediator Certification Programs, explaining away its earlier effort by saying only that: “The 2004 Task Force recommended creating a national mediator certification program, but subsequent feasibility studies indicated that creating best practices for certification programs might be a more logical first step.”⁵

The experience of the American Bar Association (ABA) was similar. In 2011 the ABA’s Section of Dispute Resolution created a Task Force on mediator credentialing to recommend

whether the Section should adopt a policy on this topic. This Task Force issued its Final Report in 2012.⁶ The Final Report wryly states: “Due to the complexity of the issues raised by credentialing, the Task Force’s recommendations are nuanced.”⁷ The members of the ABA Task Force could not even agree on the basic question of whether credentialing would be useful.⁸ What they could agree on is that the need for credentialing is likely to be strongest under certain circumstances, and that to be effective a credentialing program should satisfy certain guidelines.⁹

The Section of Dispute Resolution has continued to address this issue. In 2012 at the Section’s 14th Annual Spring Conference the ABA hosted a Town Hall, facilitated by AmericaSpeaks, on the topic “Should Arbitrators and Mediators Be Regulated.” Of the approximately 100 mediators and arbitrators who attended, 89% were mediators. Even a cursory glance at AmericaSpeaks’ report shows how deeply divided the mediators were on the questions posed. For example, responding to the statement “Mediators should be regulated,” 21% of the mediators strongly agreed, 24% agreed, 17% neither agreed nor disagreed, 14% disagreed, and 24% strongly disagreed.¹⁰ Most recently, the ABA’s Dispute Resolution Magazine devoted its Spring 2013 issue to the consideration of mediator regulation. The articles make the arguments for and against regulation and, without reaching conclusions, also go on to ask the more nuanced questions such as when and where might regulation be needed and who should be responsible for it.¹¹

Our Task

The Southern California Mediation Association (SCMA) has also wrestled with mediator credentialing for some time. In the late 1990s it held a number of small meetings to discuss the issue. In 2009 it held a Town Hall on the topic. In 2012 SCMA opposed a legislative proposal

that the California State Bar Association regulate the practice of mediation.¹² That proposal prompted the SCMA Board of Directors in 2012 to form the Ad Hoc Committee for Mediator Regulation or Certification (the Committee) to examine, and make a recommendation to our members concerning, the desirability and feasibility of regulating or credentialing mediators in the state of California. This Report sets forth the work of that Committee.

What We Considered

Starting in January of this year the Committee met every three weeks throughout the year. We informed ourselves about existing research and programs in this area and looked at an abundance of literature containing arguments both for and against credentialing. We began with an open mind and a blank slate; we did not know where our work would lead. While not exhaustive, this is an overview of the issues we considered.

1. We looked at the work of ABA and ACR, set forth above.
2. We looked at credentialing programs in other states.
3. We read widely on the topic. See the attached list of Resources.
4. We looked at statutes, both federal and state, which mandate mediation. See study by Christine Harwell.¹³
5. We considered existing credentialing programs in California and looked at the many and varied local opportunities for mediation training.
6. Very early on we delved into the complex issue of whether mediation is a profession. In her comprehensive article on mediator complaint systems, Paula Young states: “No agreement therefore exists about whether mediation is a profession.”¹⁴ The International Academy of Mediators, whose members include some of the most successful mediators in the world, has as

one of its goals “ the general acceptance of the concept of mediation as a separate discipline and profession, distinct from other fields.”¹⁵ In his thoughtful article “Giving Meaning to Mediator Professionalism,” however, Craig McEwen notes the ambivalence and challenges surrounding this aspiration:

By several common definitions, mediation would not qualify as a profession, given that paid and unpaid individuals, many of whom have 100 or fewer hours of training, engage in practicing it. In one such view, professions are those occupations - such as law, medicine and architecture - that are based on a substantial body of formal knowledge and lengthy, formal training. Dictionary definitions of profession range from the exclusive group of four traditional professions (law, medicine, clergy, military) to almost any paid work (professional as compared to amateur). And in common idiom, professional can refer as easily to a standard of attire (“professional dress expected”) as to the nature of particular work. Such widely varied usage makes it problematic to use the rhetoric of professionalism as a guide to collective action. . . .”¹⁶

The complexity of the term “profession” in the context of mediation is more fully explored in a forthcoming article by Jack R. Goetz and Jennifer L. Kalfsbeek.

7. Throughout, the Committee had an overriding concern that any structure we came up with - should we come up with one - had to take into account the broad diversity of the field: the different styles of and theories regarding mediation; the fact that mediators come to the practice from different careers of origin; the fact that mediation takes place in a wide variety of settings and institutions; and the fact that some mediators are paid while some are volunteers.

What We Found

We learned first of all that “[a]lthough many states recommend qualifications for mediators, no state has requirements for the practice of mediation. In any state, a mediator can practice in private settings without being licensed, certified, or listed.”¹⁷ The State of California imposes no requirements on mediators except for child custody mediation through our court system.¹⁸

Definitions

We learned that terms need to be clarified, distinguished, and used carefully.

a. The word “credentialing” is a general term to include the many ways of establishing mediator qualifications, including certification and licensure.¹⁹ “There is no nationwide system of credentialing, and states and local organizations have reached different conclusions as to its desirability.”²⁰

b. “Licensure” or “regulation” “is mandatory for practicing in a particular profession or trade and is granted by the state in which the person works. It regulates both the use of the title and the ability to work in that state. Licensure can be revoked for cause.”²¹ As set forth above, no state currently licenses ADR practitioners. . . .²²

c. “Certification” is voluntary, conferred by some type of organization rather than the state. Certification is generally granted in recognition of attainment of standards that have been established by the organization. Standards for certification may include, for example, education degrees, completion of training, completion of supervised practice, taking and passing a test, and experience requirements. . . .²³ A fine example of certification can be seen in the Summative Assessment Process of the Institute for the Study of Conflict Transformation at Hofstra University. This program, which includes submission of a videotaped mediation and a written

self assessment, provides for certification of an individual as a competent practitioner of transformative mediation. A mediator who successfully completes this program is entitled to use the designation "Certified Transformative Mediator."²⁴ Another example of certification can be seen in the Mediator Assessment of the private non profit Maryland Council for Dispute Resolution, which conducts a performance-based review of a one-hour videotaped role-play by the candidate. Mediators who pass this review and meet other requirements are considered "MCDR certified."²⁵ Other certification programs of which the Committee is aware include those of Mediate.com,²⁶ the International Mediation Institute (IMI),²⁷ and the National Conflict Resolution Center (NCRC) in San Diego.²⁸

d. "Certificates' are provided upon completion of a training program or series of courses to indicate that a person has completed the requirements of that program or course. In the mediation world, receiving such a certificate has often been confused with certification because the strict definition of 'certification' includes receiving a certificate of completion of a course of study. *In mediation, though, saying someone is certified simply because he or she has completed a course is considered misleading and unacceptable, since that conveys a level of competency that may be unwarranted.*" (Emphasis added.) There is generally no uniformity among providers as to what a "certificate" represents, and there is no general acceptance of equivalence one for the other.²⁹

e. "Membership on a roster or panel can be viewed as a form of credential if the roster uses standards to choose the members. Standards may include amount of training, type of education, level of experience, and other matters."³⁰ This is perhaps the most widespread form of credentialing. Locally the Los Angeles County Superior Court has requirements for the Family Law Mediation Non-Custody Panel,³¹ and the U. S. District Court has requirements for its

mediator panel.³² Though California does not, some states such as Florida,³³ Maryland,³⁴ and Michigan³⁵ have state-wide requirements to be on the court mediator panels in those states.

California

As set forth above, mediators in California, as in other states, are unregulated and unlicensed. In California there is also no state or universally accepted professional agency that certifies mediators and no uniform criteria for certification. Consider the three certification programs mentioned above, which are available to California mediators. Mediate.com offers a certification program for a fee. It requires at least 100 hours of mediation training and 500 hours of mediation experience, with at least 12 hours of annual continuing education. It will soon begin requiring a video as part of the certification process as well. Fifty-five mediators from across the country have taken advantage of this process.³⁶ The IMI provides a more complicated certification program which begins with a pre-qualification by a Qualified Assessment Program (QAP). The only QAP present in California is the American Arbitration Association. It requires that applicants have mediated at least 25 disputes encompassing at least 200 contact hours with parties and have received payment for at least fifteen of the mediations conducted. The AAA goes on to require at least 40 hours of training in mediation theory and skills, another 100 hours of training in certain topics, a written exam, and a live performance evaluation. There are additional steps following this pre-qualification process. The IMI has certified 401 mediators from various countries³⁷ The NCRC in San Diego, which is also a mediation provider, has a credentialing process for a fee. It requires 32 hours of training, 20 hours of supervised mediation experience over a period of six to 12 months, and a live performance evaluation.³⁸

Besides the lack of uniform criteria for certification, we found that there are wide variations in mediator training. Mediators in California may have degrees or certificates from academic institutions, or certificates from various training institutions, whose training may be designed to accomplish a particular goal, for example to service an organization's need to staff a volunteer community center. Because universities provide credit by units, while other training institutions provide credit by clock hours, comparative analysis of the various programs is difficult. These variations in mediator training also produce different styles of mediation, leaving users of mediation services without a standard by which to evaluate the qualifications of mediators they might be interested in using.

Consider the opportunities for mediators in Southern California to obtain an academic degree or certificate in mediation or conflict resolution:

California State University Dominguez Hills - a B.A. and an M.A. in Negotiation, Conflict Resolution and Peacebuilding. The program "involves a comprehensive study of applied methods, theory, and research and a choice of various electives covering a wide range of applicable subjects," designed for counselors, law enforcement, teachers, social workers, therapists, court personnel, labor, human resources, management professionals, government workers, public interest groups, organizations (profit and non-profit), lobbyists, foreign service professionals, and international business and peace organizations. There is no practice element.³⁹

California State University Northridge, Tseng College - Certificate in Mediation and Conflict Resolution. This single semester program requires 100 hours of training in landlord-tenant, neighbor-neighbor, and customer-merchant disputes as well as "workplace and other matters commonly seen in small-claims courts statewide." It also includes a practice element.⁴⁰

Pepperdine University School of Law, Straus Institute for Dispute Resolution - two tracks of training: professional training programs and academic programs in dispute resolution including the Certificate, Master's (M.D.R.) and LL.M. in Dispute Resolution. Each track and program has its own requirements.⁴¹

University of California Santa Barbara Extension - Mediation and Dispute Resolution Professional Certificate Program “designed for people who are seeking or contemplating a career in dispute resolution, to improve their communication skills for personal growth, as well as for those wanting to enhance their knowledge and practice of dispute resolution processes.”⁴²

In addition to the academic programs, there are dozens of state funded training programs from which mediators can get basic and advanced training. The Dispute Resolution Programs Act (DRPA), California Business and Professions Code Sections 465-471.5, provides for the local establishment and funding of informal dispute resolution programs.⁴³ Each DRPA grantee is to provide training for the mediators in its programs. The training is to consist of a minimum of 25 hours of classroom and practical training.⁴⁴ In Los Angeles County alone there are some 13 Community Mediation Programs and Trainings funded by DRPA.⁴⁵ We also have world class private mediator training institutions. See, for example, American Institute of Mediation (AIM),⁴⁶ the Center for Dispute Resolution,⁴⁷ and Forrest S. Mosten Mediation and Collaborative Law Training.⁴⁸

The absence of a certifying agency and lack of a certification program along with the variety of training paths taken by mediators present a potential dilemma for users of mediation, who have no way to judge the education, training, and experience of a mediator. The Committee found that: a) barriers to entry into the mediation field are non-existent or very low and anyone can self-identify as a mediator and begin practicing without meeting any training requirement at

all; b) any organization can offer mediation training or certificates with no universally accepted standards to guarantee degree of expertise or ethical practice; and c) the public may not know how to choose among mediators offering service.

The Committee also found, however, that mediation is a unique method of conflict resolution and requires specialized training no matter what the background of the potential mediator, and that a voluntary certification program is the most currently feasible way to address the interests of the various groups and their concerns. The Committee is therefore recommending that SCMA support a voluntary mediation certification program, as set forth below. While the Committee reached consensus on parameters for the certification program, the Committee believes the community would be best served if SCMA takes the initiative and functions as a catalyst in seeking input from other key organizations to determine the exact specifications for this program.

The Voluntary Certified Mediator (CM) Program

The goal of the Certified Mediator (CM) Program is to raise confidence and ensure credibility among the public that a person with the CM has received the necessary training and has demonstrated the expertise and ethical behavior expected of someone in practice as a mediator. The elements of the program offered for consideration here have been drawn from existing programs and take into account the recommendations of the ABA and ACR reports. The program clearly defines “the skills, knowledge and values which persons it credentials must possess,” ensures that candidates have adequate training, is administered by an organization distinct from the organization which trains the candidates, has an assessment process, and explains clearly what is being certified.⁴⁹

The program recognizes the unique quality of mediation as a conflict resolution process as well as the very varied expertise and experience brought to the process by mediators who demonstrate a wide variety of mediation styles and practice in an equally wide variety of settings, from community mediation centers, to schools, to court and other panels, to private mediation practices with legal or other specializations. The certification process can promote both credibility and confidence with proper implementation and oversight.

The standards and requirements of the recommended program were designed to address these three primary considerations:

- a. Mediation is a unique conflict resolution process with a complex body of knowledge and techniques that all mediators must be trained in no matter what expertise or experience the candidate for the CM brings to the process;
- b. The different perspectives and professions mediators bring to the practice are a valuable asset to the public, which may want to work with mediators with different backgrounds for different types of conflict, and should be accommodated in the certification program; and
- c. The basic training content must be similar among all training programs to maintain the consistency necessary to ensure mediator competence and public confidence.

The program would be implemented by a group of associations that have joined together as a Consortium which would become the governing body of the certification process.

Consortium members would agree to support the standards set by the requirements below and act as a reviewing organization to ensure that the standards of the program are maintained. Besides SCMA these organizations might include bar associations; professional societies such as ACR, Professionals in Human Resources Association, the American Society for Training & Development, the Society for Human Resources Management, and others; mediation training

entities such as universities and community mediation centers; law firms; business associations that can promote mediation as a first step toward resolution such as the Better Business Bureau; and other organizations that agree to abide by the governance of the certification program as defined and implemented by the Consortium. The Responsibilities and Activities of the Consortium are listed in Appendix A.

Requirements for Certification and Point System

To achieve the CM credential, an applicant must meet requirements in three different areas: education; performance; and professional activity. These requirements would be represented on the application for the CM through a series of point allocations, with a total of 200 points required - 110 points from education, 50 points from performance, and 40 points from professional activity. See Appendix B, Requirements for Certification Point Chart. [Note: In discussing the suggested point system, the point allocations are used as illustrations only, except in the case of the educational component, which the Committee recommends as the minimum amount required for certification. Other point values can be changed as the program develops.] While the classroom and practical training are designed to ensure consistency in standards of knowledge for certification, the point system is also designed to accommodate and include the wide variety of professional expertise, academic training, and practical mediation experience that people bring to the practice of mediation and to recognize the value of the diversity of experience and expertise.

Most requirements for certification apply to all those working toward the CM and planning to mediate in any environment. Except for those planning to mediate litigated cases, or those wanting to join a specific panel which requires it, an academic degree is not a requirement

for certification based on the following considerations: the ABA recommended against requiring a J.D. for mediation even for litigated cases;⁵⁰ the ACR report recommended against any academic degree at all;⁵¹ some mediators may be working in communities where community knowledge, trust, and experience are recognized as more valuable than academic training, and this activity may be accepted in place of the academic degree by the Consortium.

A. Educational Requirements (110 points) (See also Appendix C.)

To achieve CM status the candidate must accumulate 110 points for education as follows:

1. 60 hours of mediation specific classroom training (60 points)

Mediation specific classroom training shall consist of a minimum of 40 hours of lecture and discussion, 10 hours of practical training, as well as 10 hours of training in ethics.

a. 40 hours of lecture and discussion (40 points)

The 40-hour minimum of classroom training reflects the current basic training programs of many of the organizations reviewed for this report and was chosen so that those organizations would not have to make changes to their programs that would preclude them from joining the consortium. This training shall cover the following mediation-specific topics.

(1) The structure, design, practice, and theory of dispute resolution proceedings and services, including the varying roles, functions and responsibilities of neutral persons, and the distinction between binding and non-binding processes;

(2) Intake and convening skills, including agreements to mediate, and preparing parties and their counsel for mediation;

(3) Mediation theories and styles, including evaluative, facilitative and transformative models, assessing risks and advantages of models; matching models to contexts and parties;

(4) Communication skills and techniques, including developing opening statements, building trust, gathering facts, framing issues, taking notes, agenda setting, empowerment tactics, effective listening, framing, and clarification skills. Face-to-face as well as over-the-telephone communication skills shall be addressed;

(5) Managing challenges in dealing with different cultures, gender differences, language barriers, and other unique situations;

(6) Problem identification and disagreement management skills, including instruction in the establishment of priorities and areas of agreement and disagreement; and

(7) Techniques for achieving agreement or settlement, including instruction in creating a climate conducive to resolution, identifying options, understanding BATNA, facilitating negotiations, methods for breaking impasse, reaching consensus, and working toward agreement and drafting of settlement agreements.

b. 10 hours of Ethics Training (10 points)

The classroom training shall also consist of a minimum of 10 additional hours of lecture and discussion on mediator ethics, including but not limited to self-determination and the necessity of the voluntary and consensual nature of a disputant's participation in any dispute resolution proceedings; mediation confidentiality; and model standards of conduct for mediators.

c. 10 hours of Practical Experience (10 points)

The practical training shall consist of a minimum of 10 additional hours, which shall include role plays of simulated disputes and observations of actual dispute resolution services, including intake procedures as well as actual dispute resolution proceedings.

2. Specialized Training (20 points)

In addition to the required educational component which is defined by the topics to be included (see above), the applicant must also complete training in two areas of specialization such as elder mediation, family mediation, EEOC training, transformative mediation or other training within two years of submitting the application for certification. Each training should be 20 hours or longer, and is worth 10 points toward certification.

3. Written Exam/Ethics Agreement (30 points)

The training program shall be followed by a required exam on the core topics and ethics worth 30 points toward certification.

B. Performance Requirements (50 points)

Performance points may be accumulated from a variety of sources, including documented paid or volunteer mediations, letters of recommendation, observed mediations, and mentoring, and must have been completed in the two years immediately prior to applying for the certification.

C. Professional Activity Requirements (40 points)

Professional activity requirements may also be accumulated from a variety of sources, including membership and participation in professional societies, published articles, presentations at conferences, and training and university teaching, and must have been completed in the two years immediately prior to applying for the certification.

Requirements to Maintain CM Status

To maintain the CM the mediator must document 50 hours of Continuing Professional Development (CPD) each year in areas acceptable to the Consortium. The Consortium may change the requirements at its discretion with 90 days notice to member organizations and CMs.

Where We Go from Here

The next step will be to circulate the Committee's Report and recommendations to the larger mediation community - educational institutions, mediation provider organizations, and organizations statewide that serve the mediation community - to form the Consortium, the organizations, including SCMA, that agree to participate in implementing a new certification program in California. That group will need to assess the projected demand for the certification program, determine a budget for administering the program based on the fees or dues that would have to be collected from certified members, finalize the procedures and requirements for certification, and determine how the consortium itself is to be organized and governed.

SCMA Ad Hoc Committee on Mediator Regulation or Credentialing

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