

# REPORT OF THE MEDIATION COMMITTEE OF THE DISPUTE RESOLUTION SECTION

## NEW YORK STATE BAR ASSOCIATION

May, 2010

### **Introduction**

This year, the State Bar DR Section asked its Mediation Committee to examine the issue of mediator quality/credentialing and to make recommendations to the Section. The Mediation Committee, in turn, appointed a subcommittee consisting of its two Chairs, the former Chair of the DR section, and several other Mediation Committee members who expressed interest in participating in this project.<sup>1</sup>

From its beginnings as a “grass roots” movement in the late 1970’s, mediation as an alternative to litigation has become an accepted and often preferred method for resolving legal disputes. It is perhaps not surprising, then, that the issue of mediator quality and credentialing is not only front row center for the New York State Bar, but also has been with us in one form or another for a very long time. This report seeks both to set the context for its recommendations on the subject, and to suggest specific action steps for adoption by the Section.

In taking a fresh look at the issue this year, the Mediation Committee has reviewed much of the literature and reports by other Bar Associations and entities; we have listened at our subcommittee meetings to some key thinkers in this area; and we have debated the issues among our members, the Dispute Resolution Section, and the wider State Bar membership.

### **Background**

#### *A. Earlier Efforts at the National Level*

The issue of mediator quality/credentialing has been and continues to be controversial, both nationally and within our own statewide community. At the national level, one of the earliest efforts to address this issue from a policy perspective occurred when the Society for Professionals in Dispute Resolution (“SPIDR”) appointed a Commission on Qualifications in the late 1980’s to examine the subject of qualifications for mediators and arbitrators in both court-connected and independent programs and services. The Commission’s report contains a useful reminder of the goals of such an endeavor, goals which can often be lost in the din of the controversy:

“The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns have also been raised, particularly about mandatory standards of certification, including 1) creating inappropriate barriers to entry

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<sup>1</sup> The Subcommittee consisted of Simeon Baum, Mark Bunim, Gail Davis, Francis Halligan, Abigail Pessen, Tom Rothschild, Israel Rubin, and Margaret Shaw.

into the field, 2) hampering the innovative quality of the profession, and  
3) limiting the broad dissemination of peace-keeping skills in society.<sup>2</sup>

Another early cautionary note was expressed at a symposium on ADR convened by the Seton Hall Legislative Journal in New Jersey in 1987, where one of the presenters observed:

“Even if there is agreement that some degree of professionalization is desirable, and agreement with respect to the form – licensure, certification, accreditation, or subscription to formal standards of practice – the question still remains as to how competence will be measured. Experts disagree whether competence should be measured on the basis of “input,” on the mediator’s years of schooling, testing and continuing education, on the basis of the individual’s “output” and actual performance, or some combination.”<sup>3</sup>

In the early 1990’s, the State Justice Institute funded another early effort to examine and make recommendations on the issue of mediator quality/credentialing. This effort, which culminated in a document entitled “National Standards for Court-Connected Mediation Programs,” brought together judges, court administrators, academics and experienced mediators to recommend best practices for courts looking to initiate and run mediation programs. The Standards’ section on qualifications of mediators states in part:

Qualifications of mediators to whom courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.<sup>4</sup>

The report presents a detailed list of mediator skills, and suggests that courts continue to monitor the performance of mediators to whom they refer cases and to ensure performance of a consistently high quality.

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<sup>2</sup> Qualifying Neutrals: The Basic Principles (1989).

<sup>3</sup> Margaret L. Shaw, “Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute resolution,” 12 Seton Hall Legislative Journal 1 at p. 126 (1988).

<sup>4</sup> National Standards for Court-Connected mediation Programs, Family and Conciliation Courts Review, Vol. 31 No.2, April 1993.

### *B. Earlier Efforts at the State Level*

In New York State, the subject of mediator qualifications was first tackled formally by the New York State Alternative Dispute Resolution Project constituted over fifteen years ago by then Chief Judge Judith Kaye in February, 1994. The goal of that project was “to examine such {ADR} techniques as augmenting and complementing the work of the New York State courts.”<sup>5</sup> On the issue of qualifications/credentialing, the Project’s final report noted that when ADR is mandated or encouraged by a court, litigants must be able to rely on a certain minimum level of mediator qualifications. The report therefore recommended that all jurisdictions with court-annexed ADR impose requirements regarding qualifications for neutrals combining one or more of the following: academic degrees, training, apprenticeship or mentoring, and practical experience. For mediators, training in mediator skills, knowledge of the law, and participation in the mediation of at least three cases in the subject matter under the apprenticeship of an experienced mediator,<sup>6</sup> were highlighted as important qualifications.

All of this earlier thinking informs our efforts today to grapple with the issue of ensuring mediator quality, albeit in a changed and more complex environment in which the number of mediation users has mushroomed, as has the number of individuals desiring a career in the field.

### *C. Recent Reports*

The subcommittee reviewed the extensive materials and reports reflecting prior work and thinking on this issue, including the American Bar Association’s 2002 report on Mediator Credentialing and Quality Assurance (“ABA 2002 Report”), the New York City Bar Association’s 2006 Report on Mediator Quality (“City Bar Report”), and the 2008 Report of the ABA’s Task Force on Improving Mediator Quality (“ABA 2008 Report”).

The ABA 2002 Report summarized past and then-current dispute resolution professional credentialing practices, provided an overview of generic professional credentialing practices, and recommended certain action steps. Recognizing that mediators may want credentials, the Report minimized the value of pro forma paper credentials:

“Professional credentialing is typically thought of as licensing, certification and accreditation. The task force believes that credentialing is a part of quality assurance, and that the primary goal of credentialing program is to support the assurance of quality practice. The Task Force has looked for a model that will do more than simply create a hurdle for mediators to leap over in order to have the status that permits them to practice. We believe that a more practical approach to start with is to develop a mechanism to accredit mediator preparation programs, either through a national system, or state by state.”

(ABA 2002 Report at p. 5).

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<sup>5</sup> Court-Referred ADR in New York State: Final report of the Chief Judge’s New York State Court Alternative Dispute Resolution Project, May 1, 1996.

<sup>6</sup> *Ibid.*

The City Bar Report, for its part, 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”: intensified development of voluntary certification programs by mediator membership organizations, and development of disclosure registration systems for mediators. (City Bar Report at 6-7).

“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 mediator community... 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.” (City Bar Report at p.8).

More recently, and as a follow-up to its 2002 report, the ABA formed a Task Force to investigate factors that define high quality mediation practice. The Task Force reviewed existing policy documents, reports, and research on mediation quality, and then organized a series of focus group discussions of mediation users with follow-up questionnaires. With its emphasis on mediator quality rather than credentialing, the Task Force’s Final Report includes a useful “Tool Kit for Improving the Quality of Mediation in Your Geographic or Practice Area,” a publication that has been useful in the implementation of one of the State Bar Mediation Committee’s initiatives described later in this report.

### **Mediation Committee Efforts**

As set forth above, the subcommittee reviewed the extensive materials and reports reflecting prior work and thinking on this issue, including the American Bar Association’s 2002 Report on Mediator Credentialing and Quality Assurance, The New York City Bar Association’s 2006 Report on Mediator Quality, and the 2008 Report of the ABA’s Task Force on Improving Mediator Quality. The subcommittee also interviewed OCA’s statewide ADR coordinator Dan Weitz, who discussed with us the efforts of the Office of Court Administration to establish training and experience requirements for mediators in the courts and in community dispute resolution centers. Another contributor to the subcommittee was Rachel Wohl, head of the Mediation and Conflict Resolution Office in Maryland. This office has initiated a Program for Mediator Excellence with branches for, among other things, a mentoring program, ethical practice standards, ethical training, an ombuds program and continuing education, along with an on-line mediator directory. Finally, the subcommittee presented a panel discussion of mediator quality at the Dispute Resolution Section’s Annual Meeting in January, 2010; the panelists’ observations were insightful and instructive.<sup>7</sup>

### **Analysis**

As previous failed efforts have shown, the qualities which any credentialing system would be required to measure, defy precise definition or measurement. Because of this problem, the Mediation Committee has concluded that licensing and/or other credentialing efforts are impractical, prohibitively costly, and

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<sup>7</sup> The panelists were Daniel Weitz, New York City Bar Association ADR Committee Chair Peter Woodin, and Cardozo Law School Professor and scholar Lela Love.

unnecessary; and, instead, determined that the most appropriate approach is to act based on the consensus that was reached with respect to the following principles:

1) a mediator credentialing system or other changes to the profession should not be a pre-ordained recommendation; rather, we should be open-minded and not feel compelled to fix a system that isn't necessarily broken; 2) the subcommittee should focus on ways of enhancing mediator quality; and 3) practitioners' freedom and autonomy should be respected while also recognizing the need to protect the public.

### **Recommendations**

The Committee recommends instead that the State Bar pursue the initiatives listed below, some of which are already being implemented. These initiatives, which reflect the principles stated above, will enhance mediator quality in New York without creating barriers to the profession:

- Ongoing mediator skills and ethics training should be offered and encouraged.
  - The Section recently sponsored such training at Fordham Law School, which benefitted the enrollees and the Section.
- Mentoring opportunities for inexperienced mediators should be provided.
  - The Mediation Committee is establishing a protocol for matching mentees and mentors; the most likely mentoring opportunities are in court-annexed mediations.
- Feedback from mediation consumers should be encouraged and integrated into our practice.
  - The Mediation Committee is currently conducting a survey of New York litigators to learn more about their concerns and suggestions regarding the conduct of mediators. The results will be made available to the Section.
- Forums, peer discussion groups, and other opportunities for professional development should be provided and encouraged.
  - The Mediation Committee has begun to devote a portion of its meetings to discussions of practice issues, such as best practices regarding settlement agreements, mediator's proposals, techniques for moving through impasse, and business development. Future topics under consideration are risk analysis techniques and ethical dilemmas.
- Mediator Registry.
  - The Mediation Committee has appointed a subcommittee to investigate the feasibility of creating an online registry of mediators who are Committee or Section members, similar to the registries maintained by the State Supreme Court Commercial Division, the U.S. District Court for the Eastern District of New York, and the Eastern and Southern District Bankruptcy Courts, and containing such information as education, background, training, and experience. One idea under consideration is that the registry be hosted by the State

Bar, posted on its website, and be accessible to State Bar members. While a mediator's inclusion in the registry would not constitute "certification" or indicate any "seal of approval" by the State Bar, the registry would provide a convenient way for consumers to get information about various mediators in one place.

### **Conclusion**

The Mediation Committee requests that this Report be endorsed by the Dispute Resolution Section of the New York State Bar Association to reflect the Section's desire to encourage the use and enhance the quality of mediation in New York.