# MEDIATOR QUALIFICATIONS: REPORT OF A SYMPOSIUM ON CRITICAL ISSUES IN ALTERNATIVE DISPUTE RESOLUTION

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## *I. Introduction*

Professionalization is an increasing source of debate within the field of dispute resolution, as well as among legislators, institutions, and the academic community.[1] This is not surprising since the growing trend is to institutionalize this process, which began essentially as a "grass roots" movement. While the urge to professionalize is sometimes criticized as an effort on the part of those with established practices and experience in the field to protect their "turf" from invasion by newcomers,[2] the stated, if not accepted, premise on which it is based is a desire to protect the public and the reputation of the field itself from the delivery of a questionable quality of service.

Professionalization of dispute resolution is opposed on several grounds. Critics claim that it precludes service by lay volunteers, the "soul" of the original community-based movement,[3] that the paid status of professionals leads to increased costs and decreased availability of services[4] and that not enough empirical data exists to know what skills are required.[5]

The debate as to the necessity of professionalization is new

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1 The debate first emerged with respect to the regulation of private mediation. For a discussion of this debate, see J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 244-90 (1984).

2 Gellhorn, *Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976).

3 *See, e.g.*, Shonholtz, *Certification and Professionalization*, PROCEEDINGS OF THE THIRTEENTH ANNUAL CONFERENCE OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION 43-45 (1985).

4 Pipkin & Rifkin, *The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation*, 9 JUST. SYS. J. 204, 207 (1984).

5 There is an analogy to the debate relating to the use of non-lawyer judges in our lower courts. It has been said that arguments in that debate grow from "broad, unverifiable prescriptions about how litigation works and what the impact of legal education is" and "that legal credentials are necessary to adequate judicial performance in the lower courts without drawing nearer to consensus on what these judges should be doing." D. PROVINE, JUDGING CREDENTIALS 166, 180 (1986).

only insofar as it relates to the emerging field of dispute resolution and to the practice of mediation. The path to professionalize has already been well tread by other occupations, such as law and medicine.[6] Within the field of dispute resolution, it is the labor-management sector that has taken the first steps along this path.[7] Even if there is agreement that some degree of professionalization is desirable, and agreement with respect to the form—licensure, certification,[8] 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.

Many people are of the view that professionalism of business, medicine and the law, with the adoption of academic degrees, or "input," as the basis for objective standards, has led to meritocracy and has discouraged entrepreneurialism. This has deprived those occupations of new ideas and talent on which they might otherwise have drawn.[9] Yet even if "output" is determined to be either the sole or one of several appropriate determinants, the issue still remains as to how "output" can be measured, particularly with respect to mediation, which is a process interpreted in vastly different ways from practitioner to practitioner.[10]

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Provine's own research does not demonstrate the inferiority or incompetence of non-lawyer judges.

[6] A topology of the steps through which "occupations" pass on the way to becoming "professions" is enumerated in Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964). Specialized degree programs and exclusionary licensing generally mark full professionalization of an occupation.

[7] The background paper prepared for the panel by Edward F. Hartfield contains a useful summary of steps that have been taken to qualify neutrals in the labor-management sector.

[8] Unlike licensure, certification does not bar practice by non-certified individuals. Thus it has been suggested as a good compromise in the professionalization debate. *See, e.g.*, S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 520 (1985).

[9] Fallows, *The Case Against Credentialism*, THE ATLANTIC MONTHLY, Dec. 1985, at 49-67.

[10] As Linda Singer stated at the 1987 Opening Plenary Session of the Fifteenth Annual Conference of the Society of Professionals in Dispute Resolution:

We do have a common language—negotiation, mediation, arbitration—

The debate about professionalization of mediation, with its underlying dilemmas, can no longer remain academic. Increasing numbers of public agencies are hiring mediators, and must decide as part of their employment process who is qualified to be hired. Indeed, it has been suggested that this factor will be the impetus for the alternative licensing movement.[11] A number of state legislatures are moving to enact statutory qualifications for mediators.[12] These statutes vary widely from state to state.[13] Because legislators often have little or no knowledge or experience of the mediation process, the Society of Professionals in Dispute Resolution, a leading national organization of neutral practitioners, announced in October, 1987, the formation of a special Commission on Qualifications. Thus, more voices are being added to the debate over how competence should be measured.

## *II. Purpose of Establishing Guidelines*

In 1987, the New Jersey Center for Public Dispute Resolution (the Center) needed more mediators to handle its expanding case load. Established in 1984 within the Department of the Public Advocate, the Center is charged with providing mediation and other conciliation services to regional and statewide public interest disputes, including environmental and public policy disputes.[14] As with other state offices of mediation established

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but the words mean different things depending on who is using them. Take mediation, for example. I, and I suspect most of you, use the term to mean simply helping parties reach their own settlements. Other mediators use it to mean advising parties of appropriate settlements. Still others use mediation to predict what a court might do with a particular dispute. The *Washington Post* recently used the term to describe the decision-making authority of a hearing examiner. And state courts in Michigan use mediators to recommend settlements to parties—with penalties imposed if the recommendations are not heeded. Without a consensus on the meaning of our processes, how can clients choose what makes sense to them? And how do we measure success or failure without a common understanding of what we are about?

11 *See supra* note 8, at 519-20.

12 *See, e.g.*, M. Woods, Statutory Requirements for Mediator Qualifications (Dec. 1987) (unpublished manuscript).

13 *See, e.g.*, ALASKA STAT. § 25.24.060 (1983); LA. REV. STAT. ANN. § 9:353 (West Supp. 1988); N.J. STAT. ANN. § 52:27E-41.2 (West 1986).

14 The National Institute of Dispute Resolution (NIDR) provided matching grants to the New Jersey Center and the experimental state offices of mediation in Massachusetts, Wisconsin, Hawaii, and Minnesota. As one commentator noted:

under multi-year matching grants from the National Institute of Dispute Resolution (NIDR), one of the Center's objectives is "to create a market for the services of private dispute resolution practitioners."[15] To meet this objective, the Center maintains a small core staff, and retains outside mediators on an hourly or *per diem* consulting basis for the purpose of servicing its case load. Thus, the Center had to confront squarely the question of who these outside, private mediators should be.

At the Center's December 7, 1987 Symposium, the Panel on Mediator Qualifications[16] was asked to propose guidelines for selecting and developing mediators in public interest disputes.[17] The panel began by recognizing that the specific content of any guidelines will be determined by its purpose. The Center had indicated that it faced an immediate need for a pool of mediators to service its expanding case load with quality, but had a strong desire to avoid a certification role.[18]

The Center had several more specific objectives in convening the panel to deal with the qualifications issue. First and foremost, the Center sought to ensure the quality of the mediation services offered. Quality, however, can be measured in many ways. One method measures success in engaging clients in the process, or by the number of cases initiated. A second method measures whether the parties reach agreement, or by the per-

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> [One of NIDR's objectives was to] demonstrate that dispute resolution techniques could help state governments deal more effectively with disputes that currently clog the courts and bog down administrative and legislative efforts. Until NIDR announced its program of state incentive grants, there had been surprisingly few attempts at the state level to use mediation, arbitration, and other alternatives as a means of resolving regulatory, permitting, rate setting, budgeting, municipal annexation, facility siting, and other government policy disputes.

Susskind, *NIDR's State Office of Mediation Experiment*, 2 NEGOTIATION J. 323 (1986).

15 *Id.*

16 Other panels convened by the Center at the Symposium addressed the issues of confidentiality and the use of special masters.

17 The panel was facilitated by Margaret L. Shaw. The panel included Gail Bingham, Edward F. Hartfield, Jeanne Mroczko, David L. O'Conner, Donald F. Phelan, Jeffrey B. Tener, and Lester B. Wolff.

18 Critical Issues In Alternate Dispute Resolution Symposium, Princeton, N.J. (Dec. 7, 1987), transcript of the Panel on Mediator Qualifications, at 34 [hereinafter Transcript]. It can be argued, of course, that prescreening is clearly a form of *de facto* certification. This may be an additional reason why professional organizations such as the Society of Professionals in Dispute Resolution have determined that the issue of qualifications can no longer be avoided.

centage of actual settlements. A third measures client satisfaction by determining whether settlement was reached, whether the parties were pleased with the process and whether their interests and rights were protected. Clearly, each of these measures requires somewhat different skills, and distinct qualification guidelines emphasizing somewhat different criteria.

The panel was also asked to consider many other diverse issues, such as enhancing the public perception and credibility of its program with potential users, as well as within the dispute resolution community, developing a simple and efficient mediator selection process, and anticipating and preventing legal challenges to the selection of mediators in individual cases. Finally, the Center hoped that the discussion would assist other dispute resolution programs in developing their own mediator qualifications.

## *III. Guidelines for the Selection of Mediators*

Without much debate, the panel members came to early consensus on the general factors they believed should be considered in determining mediator qualifications. Defined more specifically below, these factors are: personal qualities; mediation experience; negotiation experience; knowledge of the subject matter of the dispute;[19] mediation training; and formal education.

While there was not complete agreement on the exact ordering or weighting of these factors, the prevailing view of the panel was that personal qualities and mediation experience ranked the highest in terms of importance, and that negotiation experience followed closely. Mediation training and subject matter knowledge were also thought important, but to a lesser degree. Formal education, though a factor, was considered the least significant.

### A. *Personal Qualities*

While personal qualities is the most intangible and elusive factor, the panel agreed that the best mediators draw from their

[19] The panel discussed at length the importance of understanding the decision-making procedures and alternative forums within which public disputes are normally handled. While there was some feeling that this should be considered a separate factor in determining mediator qualifications, it is closely related to both negotiation experience and knowledge of the subject matter of the dispute, and therefore was discussed in relation to each of those other factors.

own personal strengths and qualities. As one of the panel members pointed out, quoting from a study of psychotherapists:

> The effectiveness of therapists is more determined by the presence or absence of certain personality characteristics and interpersonal skills than technical abilities and theoretical knowledge. The skills that make a superb psychotherapist are mainly common sense human skills, warmth, empathy, reliability, a lack of pretentiousness or defensiveness, an alertness to human subtlety, and an ability to draw people out. The necessary qualities are very similar to those one looks for in a good friend. These are not traits that can be detected on a multiple-choice exam.[20]

The personal qualities the panel believed most determine mediator effectiveness were:

- the ability to listen to underlying concerns, subtle offers of movement, and hidden agendas
- integrity and unimpeachable honesty
- intelligence, insight, and the ability to articulate understandings
- ability to inspire confidence with respect to the way in which the process is being directed
- judgment combined with flexibility and timing of style and tactics
- sensitivity to the parties' circumstances and perceptions, as well as awareness of the dynamics of the parties and of the process
- tolerance for stress, and the ability to be objective and to manage the conflict effectively.

In the panel's view, these personal qualities are not simply innate, but are all qualities that can and do grow with mediation experience. This list may not differ substantially from other lists of ideal mediator personal characteristics. The dilemma is how to translate the characteristics of a good mediator into objective measures. In this regard, the panel discussed "assessment centers," which are designed to provide objective testing of personal qualities and performance under hypothetical situations. This concept was successful in identifying sound mediator candidates for an age discrimination project initiated in 1980 by the Federal Mediation and Conciliation Service for the Department of Health, Education

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20 Transcript, *supra* note 18, at 68.

and Welfare.[21] Once a set of personal qualities or skills is identified, candidates are observed by several assessment teams and ranked according to a standard scale as to the degree to which those qualities or skills are present in a role-play or simulated setting. The candidate profiles that result can be helpful in the mediator selection process.[22]

B. *Mediation Experience*

Practical experience as a mediator was also thought by the panel to be a valuable asset, and an important factor in the mediation selection process. Most valuable is experience mediating public policy disputes. This is a strong reason for establishing apprenticeship programs. In the absence of such experience in public policy disputes, experience mediating disputes which have attributes similar to public policy disputes should be considered. Such attributes include:

- the presence of multiple parties and multiple issues
- the negotiators represent institutions or organizations
- the negotiating team has little internal cohesiveness
- the decision-making process for preparing for and ratifying the negotiation is weak
- the parties have no prior negotiating relationship, or the nature of that relationship is unclear
- major, changing external influences on the parties and issues that create challenges in terms of both the process and implementation of agreements
- the issues have a public dimension and are subject to media attention and political pressure.

Volume alone does not determine the value of prior mediation experience. As one panel member noted, a person who has had one good public policy mediation experience could be better for another assignment than someone of ten years experience mediating labor disputes.[23] It is the quality of prior experience, not its quantity, that should be considered in the mediator selection process. While testimony from prior clients should not necessarily be accepted without

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21 The concept has also been used effectively by a number of business firms, such as McDonnell Douglas, Mobil, and Digital Equipment. *See supra* note 9, at 66.

22 The panel suggested that the Center could implement this assessment center concept itself. In the alternative, there are outside firms that specialize in this service with whom the Center could contract.

23 Transcript, *supra* note 18, at 109.

corroboration, attention should be paid to negative or indifferent comments about the mediator.

C. *Negotiation Experience*

Another factor that should be considered in selecting mediators is negotiation experience. This is particularly important for public policy disputes, where the parties have little or no prior negotiating relationship.[24] Thus, they will need assistance from the mediator in deciding how to structure that process. Unless a mediator understands and has experience with the decision-making procedures and institutions in the public policy arena, the mediator may have difficulty assisting the parties in making an informed choice about their decision-making forum (mediated negotiation, congressional lobbying, and use of administrative procedures or litigation).[25] In addition, such experience and knowledge will enable the mediator to raise additional issues the parties may need to address.

D. *Subject Matter Knowledge*

General knowledge of the subject matter of a public policy dispute is valuable for several reasons. Initially, it enables the mediator to facilitate communication between the parties. An understanding of the parties' terminology obviates the need for the mediator to stop and ask for clarification, and enables the mediator to understand when semantics are impeding the process. It also enables the mediator to understand the implications of the parties' communications and to raise relevant and often important questions. With general subject matter knowledge the mediator is also able to draw analogies to similar, related disputes, and to help the parties view their immediate dispute from a different or larger perspective. Finally, the parties must trust the mediator before they can trust the process, and must trust the process before they can begin to trust each other. A mediator's

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24 In contrast, in the labor sector, the institutions the negotiators represent have already determined what good faith bargaining is and what unfair labor practices are. Likewise, customs are established with respect to expected negotiating behaviors.

25 In labor disputes, by analogy, a mediator's effectiveness is enhanced by knowledge about the alternatives to a negotiated agreement, such as a strike, a lock-out, and administrative remedies.

general knowledge of the subject matter of the dispute will give the mediator credibility with the parties, and thus enhance trust building, an essential element of successful mediation.

The panel specifically distinguished general knowledge of the subject matter of a dispute from technical expertise, and defined its recommendations for mediator qualifications solely in terms of general knowledge. However, the panel also recognized that technical expertise may be relevant in particular cases where the mediator will be called upon to play a very assertive role which occurs when the parties are either unusually hostile or passive. Given this possibility, coupled with the inability to predict future case load, the panel recommended that the Center devise a procedure to add mediators with technical expertise to the pool on an *ad hoc* basis in appropriate cases. It should be stressed that subject matter knowledge as a factor in mediator selection relates solely to its value in facilitating the process, and not to the influence such knowledge might have on the outcome of the negotiations.[26]

### E. *Mediation Training*

Mediation training should also be considered in selecting mediators, since it provides a useful framework within which mediators can organize and continue to build on their subsequent experience. However, it is a factor that should not be unduly emphasized. While elementary mediation training is easily obtained, such training alone does not determine mediator effectiveness. Experience is also important. The panel embraced the apprenticeship model of training, and recommended that preference be given in the selection process to applicants who have apprenticed with more experienced mediators in public policy disputes, or in disputes that share similar attributes.

### F. *Formal Education*

While formal education is a factor to consider in selecting

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[26] Lawrence Susskind, for example, has suggested that the mediator's role in public policy disputes goes beyond helping the parties reach agreement to "ensuring wise outcomes." *See, e.g.*, Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 NEGOTIATION J. 117, 119 (1985). This view was not adopted by the panel in the course of its discussion.

mediators, this is not a factor that should be stressed. The existence of a degree does not affect performance. Therefore, the lack of a degree should not exclude an applicant from being selected as a mediator. At the same time, there may be instances in which the mediator's education may affect the acceptability of the mediator by the parties, and thus some applicants with advanced degrees should be selected for a mediator pool.

### *IV. Guidelines for the Development of Mediators*

Developing the skills of mediators selected for a pool and monitoring the quality of their performance may be equal in importance to the initial selection process. The panel recommended self-monitoring, peer review, and continuing education.

Self-monitoring and peer review are particularly valuable tools. Mediators are asked to complete confidential forms after each case addressing questions concerning the obstacles experienced during the mediation, the methods that worked or did not work, and what was learned from the mediation. Such forms can be the basis for peer or staff performance conferences, that enable mediators to identify and assess areas for continued learning. Supervisor observation may be another helpful way of monitoring mediator performance. However, this procedure should be implemented only with extreme sensitivity and care, since it has the potential of affecting the dynamics of the dispute and of casting doubt on the mediator's credibility.

### *V. Implementation of Guidelines*

There are four dimensions to the implementation of any guidelines: the selection of mediators for a pool; the selection of a mediator from among those in the pool for a particular case; the determination of who selects a mediator from among those in the pool for a particular case; and the procedure for parties to nominate additional mediators to the pool on an *ad hoc* basis.

One of the first questions that arises with respect to the implementation of guidelines for establishing a mediator pool is numbers. The size of the potential case load should be considered. If there are few cases, the lack of opportunity to mediate is likely to cause qualified mediators to leave the pool. A competing consideration is the advantage of diversity among the

mediators, which can only be achieved with a larger pool. The use of mediator teams may address the tension between these competing considerations, as well as provide a number of other benefits. For example, experienced mediators can be teamed with mediators who are less experienced but have greater knowledge of the subject matter of a dispute.

The pool can also be defined according to seniority or skill levels. This procedure, unlike blanket authorization, certification, or licensing, allows mediators to work their way up to a defined status through demonstrated competence and performance, rather than be excluded at the outset because they do not meet stated qualifications.

Another question relates to the goal of the pool itself. Implementation of the application and selection process recommended by the panel takes many months and has the appearance of certification. Furthermore, it requires substantial administrative management and presumes knowledge about future case load. One panel member suggests that it is better to allow a pool of mediators to develop on a *de facto* basis.[27] This overcomes the bureaucratic need to use applications and to establish formal criteria.[28] Furthermore, it prevents mediators from remaining in a pool when there is not enough work for them.[29]

The Center could meet its goals of providing quality mediation and enhancing public confidence in its service by identifying individual mediators to serve on an as-needed basis. In particular, individuals could be identified whose personal qualities and experience levels are consistent with the recommended guidelines. In this manner, the pool could grow incrementally over time. If this kind of approach is adopted, monitoring procedures should still be implemented.

If the Center chooses to implement a more formalized selection process to establish a mediator pool, the following procedures should be followed:

- potential applicants should be determined through a survey
- applicants should be solicited
- applicants should be screened

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27 Transcript, *supra* note 18, at 164.
28 *Id.*
29 *Id.*

- applicants should be selected by an assessment center
- the pool should be defined according to seniority or skill levels
- explicit announcement should be made that additions to the pool will be made over time, and procedures should be developed for nomination of add-ons by parties.

## *VI. Conclusion*

In sum, the Panel on Qualifications was presented with an enormous task. The guidelines recommended for selecting and developing mediators in public interest disputes reflect the broad view that competence should be measured in terms of human skills and demonstrated performance, rather than by technical abilities and theoretical knowledge. While the panel did not address certification directly, it was clear that the panel had reservations about certification of mediators, especially certification that either excludes those who could become competent mediators, or that is designed to be so inclusive as to reflect meaningless standards. It is for this reason that apprenticeship programs and graduated levels of training were recommended as a better means of meeting program needs for high quality mediation services.

There were many questions the panel could not address. For example, the panel did not explore whether there should be additional or different qualifications for those who will be called upon to arbitrate and what the content of an elementary mediation training program should be. Likewise, the panel did not address whether the program should select the mediator, whether the parties should have the right of rejection, whether the parties should select the mediator or whether the choice between these options should depend upon the type of case, involved or whether the mediation is mandatory. In refining and answering these and other relevant questions, continued input should be sought from the larger dispute resolution community. The issue of mediator qualifications is an important one and the views of experienced practitioners can be a valuable resource in addressing that issue thoughtfully.