

Mediator Certification: Realizing its Potentials and Coping With its Limitations

Michelle Robinson
The Ohio State University
Moritz College of Law

I. INTRODUCTION

In the last twenty-five years, mediation has become an increasingly important part of the world's "cultural and legal landscape."¹ Mediation has become formalized, institutionalized, applied in many different settings and ways, and incorporated into administrative and regulatory processes.² While many jurisdictions have instituted standards and requirements for mediation, there is little overall uniformity or coherence in this regulation.³ As a result, several professional organizations, scholars, and other entities have explored the issue of mediator certification, researching and sometimes implementing certification programs.⁴

This paper explores the desirability of such programs, concludes that a well designed certification program would improve the apparent and actual quality of mediation, and then discusses the design of that program. Part II discusses various stated goals of mediator

¹ PREAMBLE TO THE MEDIATOR CERTIFICATION PROGRAM, ASSOCIATION FOR CONFLICT RESOLUTION (ACR) MEDIATOR CERTIFICATION TASK FORCE, REPORT AND RECOMMENDATIONS TO THE ACR BOARD OF DIRECTORS 6 (March 31, 2004), *available at* <http://www.acrnet.org/pdfs/certificationreport2004.pdf> (hereinafter "ACR TASK FORCE REPORT").

² *Id.*

³ *Id.*

⁴ Several professional organizations have contemplated or implemented mediator certification. *See, e.g.,* ADRWorld.com, *ABA, ACR to Explore National Mediator Certification System* (September 27, 2004), <http://adrworld.com/sp.asp?id=27679>; Justin Kelly, *Colorado Group Considers Plan for Credentialing Mediators* (Sept. 13, 2000), <http://adrworld.com/sp.asp?id=27563>; ACR TASK FORCE REPORT, *supra* note 1, at 6.

certification and engages in a cost/benefit analysis of mediator certification. Part III analyzes several potential elements of a mediator certification program, recommends a design based on the cost/benefit analysis in Part II, and determines that any effective program must be funded by sources other than application fees.

II. SHOULD MEDIATORS BE REGULATED THROUGH CERTIFICATION?

The desirability of mediator certification may be determined by answering two questions: First, should mediators be regulated? Second, if mediators should be regulated, should that regulation take the form of voluntary mediator certification? This paper assumes that the answer to the second question is yes: any mediator regulation should take the form of voluntary certification. This assumption is based on states' and professional organizations' preference for certification rather than the alternative: licensing.⁵ This Part focuses on the desirability of mediator regulation in the form of voluntary certification.

A. The Benefits of Regulation

⁵ No state has adopted a formal licensure requirement, and most regulation of alternative dispute resolution consists of certification or rostering. *Id.* at 6. Licensure is inappropriate for mediation for several reasons, according to at least one major professional organization. COMM'N ON QUALIFICATIONS, SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, REPORT NO. 2, at 18 (April 1995) [hereinafter "SPIDR REPORT NO. 2"]. Those reasons include, for example, the nascent state of knowledge concerning what qualifications are required for effective mediation, the risk of arbitrary or inflexible standards in licensing, and the danger of losing diversity in the practice of mediation. *Id.* Licensing has also been criticized as too anti-competitive for the mediation field. Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 761 (1996). Given the reasons against licensing, this paper concludes that any mandatory program is not preferable to a voluntary one.

To decide whether mediator certification is desirable, one must (1) identify its goals and (2) consider the importance of those goals and whether certification can in fact accomplish them.⁶ Accomplishment of those goals constitutes the benefits of certification.

This paper discusses eight major purposes for a voluntary national certification program. ACR lists four major purposes: (1) “a more uniform verification of a basic level of training, experience and study;” (2) increased competency; (3) increased professionalism; (4) valid criterion of qualifications for consumers’ benefit; and (5) increased practitioner influence on the development and direction of the field of mediation.⁷ According to one scholar, other potential reasons for mediator certification include (6) consumer protection against incompetent or unethical mediators; (7) reduction of court congestion; and (8) the promotion of mediation by increasing mediator credibility.⁸ This is not an exhaustive list of goals, and they are not all independently important, as discussed below. This paper will address each goal because it is a commonly asserted objective of mediator certification. Are these goals important, and can they be accomplished through mediator certification? This Section will discuss each objective’s importance and attainability.

~

(1) Uniform verification of basic training, experience and study. The first goal, verification of training, experience, and study, is important only to the extent that those three factors correlate to the presumably underlying goal of ensuring that a mediator “has the

⁶ Sarah Rudolph Cole, *Mediator Certification: Has the Time Come?*, 11 DISP. RESOL. MAG. 7, 7 (2005).

⁷ ACR TASK FORCE REPORT, *supra* note 1, at 7.

⁸ Weckstein, *supra* note 5, at 767–68.

necessary skill set.”⁹ Thus, those factors are not independently important, but merely point to another stated goal of mediation: competency.

Presumably, training, experience and study lead to increased competency. According to the National Conflict Resolution Center (NCRC), “comprehensive *training is essential* to the development of demonstrable mediator competency.”¹⁰ However, while training, study, and experience are valuable, that value is not independent, but depends on the result of better mediation skills. Thus, the important measure should be a mediator’s skills (competency), not whether the mediator has certain characteristics (of training, experience, and study) that may lead to competency.

Some mediation consumers may prefer that a mediator has a certain level of training, experience, and study. However, a need for credibility and expertise can be met by a certification which demonstrates competency rather than those factors which may lead to competency.

(2) Increased competency. Mediator competency is the most important goal of certification, as competency is key to the quality of the mediation process.¹¹ Furthermore, many other asserted goals of certification point back to the goal of competency. For example, the first goal, verification of training, experience, and study, is only relevant to the extent that it correlates to the underlying goal of competency. Increased professionalism, which is tied to

⁹ Cole, *supra* note 6, at 8. “It is not the existence of [factors such as experience, education, and training] per se, but their correlation to mediator quality that makes them relevant.” *Id.*

¹⁰ STEVEN P. DINKIN & BETTY MCMANUS, NATIONAL CONFLICT RESOLUTION CENTER, A CALL FOR A NATIONAL DIALOGUE ON THE ESTABLISHMENT OF TRAINING STANDARDS FOR MEDIATORS 4 (March 2006) (emphasis added).

¹¹ *Id.* at 7.

competency by ACR's goals statement, is related in that increased competency may be the biggest benefit of professionalism, as discussed below. Another objective is to create a market signal to tell consumers that certain mediators are desirable. This objective is also related to competency, as the signal presumably would be one of mediator competence. Likewise, the goal of protecting consumers against incompetent mediators is dependent upon ensuring competency. The goal of reduced court congestion seems unrelated to certification except on a theory that certification would lead to increased competency (or easier selection of competent mediators) and thus higher settlement rates. Finally, the goal of increasing credibility is related if credibility stems from ensured competence. In fact, the only goals that are substantially independent of competency are practitioner influence on the field and protection against unethical mediators.

Because they lead and control the entire mediation process and have the potential to influence its outcome,¹² it is important that mediators be competent. The relative importance of this goal is illustrated by the direct relationship between competence and many other goals of certification. Certification has the potential to increase competency by requiring a certain level of skill-building activities (such as training and experience) and by "weeding out" some incompetent mediators. According to the NCRC, that organization's experience is clear evidence that "competency CAN be trained and evaluated."¹³ In furtherance of this goal, scholars have created training and evaluative methods to teach and measure competency.¹⁴

¹² See Russell, *infra* note 32, at 613.

¹³ DINKIN, *supra* note 11, at 4.

¹⁴ For example, some scholars advocate a system that measures how well a mediator accomplishes tasks such as "supporting the parties' decisionmaking process," measured by objective evidence such as the mediator's use of "reflections or summaries to highlight available decision-points." Dorothy J. Della

The question remains: Is there a competency problem, or are we trying to solve a nonexistent problem?¹⁵ There are very few complaints about mediation services, but this may not indicate high quality, but only the fact that parties often are unaware of their rights or unable to evaluate mediator quality due to a lack of relevant knowledge.¹⁶ Because of these potential reasons for the under-reporting of problems, it is difficult to assess the level of quality in mediation services and how much harm may have been done.¹⁷ As discussed in Part III, certification can ensure competency only to a certain extent; however, it has the potential to raise the standard, thus decreasing the level of uncertainty.

(3) Increased professionalism. Mediator professionalism is a trickier subject than competency due to “significant confusion and ambivalence” about the meaning of “professionalism.”¹⁸ Most mediators believe that professionalism would be enhanced by a certification program,¹⁹ and many mediators believe that increased professionalism is an important goal.²⁰ However, one scholar, Craig McEwen, points out that the term is subject to a

Noce, James R. Antes, and Judith A. Saul, Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model, 19 OHIO ST. J. ON DISP. RESOL. 1005, 1033 (2004).

¹⁵ See Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 191 (1999).

¹⁶ *Id.* at 192.

¹⁷ *Id.* at 193.

¹⁸ Craig McEwen, *Giving Meaning to Mediator Professionalism*, 11 No. 3 DISP. RESOL. MAG. 3 (Spring 2005).

¹⁹ ACR/ABA Mediator Certification Feasibility Study at 4 (2005), available at <http://www.acrnet.org/pdfs/certificationresults2005.pdf> (results of an online survey of over 3100 mediators conducted by the ACR and the Dispute Resolution Section of the ABA as part of a study on the feasibility of mediator certification) [hereinafter “Feasibility Study”].

²⁰ See Survey of Students in the Mediation Practicum and Multiparty Mediation Practicum, The Ohio State University Moritz College of Law (Nov. 2005) (on file with author) [hereinafter “Student Survey”]

number of meanings. Historically, the professionalization of occupations commonly was rooted in a desire to control an occupation, often with the apparent goals of self-interest and self-protection.²¹ Professionalization may also seek to avoid external control by either the government or the market;²² in fact, ACR's interest in certification is based partly on the goal of avoiding control by other existing professions.²³ This goal may be based on the desire for regulations established by mediators, or "those who understand mediation both in theory and in practice."²⁴ Such self-regulation protects mediators from potential rules contrary to or inconsistent with mediators' shared values; for example, self-regulation would almost certainly protect mediator confidentiality, while outside regulation may not protect confidentiality.²⁵

Some of the above goals, such as self-interest and the avoidance of external regulation, may give professionalism a negative connotation, but there are potential benefits of such self-regulation, even aside from the benefit of knowledgeable rule-makers. McEwen points to the collaborative educational benefits of professionalization, suggesting that certification be focused on collegial networking, learning, and problem-solving.²⁶ If a certification program requires

(In a survey of twenty-two students finishing a mediation class, eighteen students believed it is important to increase the "professionalism" of mediators, aside from mediator competence.).

²¹ *Id.* at 3–4. Such goals could be served, for example, by erecting barriers to entry, such as licensure or (to a lesser extent) certification. *Id.*

²² *Id.* at 4.

²³ ACR TASK FORCE REPORT, *supra* note 1, at 6. DINKIN, *supra* note 11, at 1 ("[The mediation profession] cannot afford another 'surrogate' profession to set the standards.").

²⁴ *See* DINKIN, *supra* note ?, at 1. The enactment of legislation covering mediator standards is more likely in the absence of self regulation. *Id.*

²⁵ Dinkin & McManus, *supra* note ?, at 2 ("Even the sacred cow of mediator confidentiality may be eroded in the future should the profession fail to develop a realistic means of quality assurance.").

²⁶ McEwen, *supra* note 15, at 5.

ongoing participation, it could lead to “attentiveness to the shared goals, values and unresolved challenges” of mediation.²⁷ If increased professionalism can achieve the benefits suggested by Craig McEwen, it may lead to more competent mediators—thus aiding accomplishment of the first half of this goal as stated by ACR.

(4) Criterion of qualifications for consumers. The third goal, to provide a market signal of quality for consumers, is important in that it would lower consumers’ search costs, allowing consumers to choose mediators more easily and effectively.²⁸ Steven P. Dinkin and Betty McManus of the National Conflict Resolution Center have asserted that mediation consumers “have a right to know how to find a qualified mediator” and “deserve some assurance that mediator qualifications have been established by those who understand mediation both in theory and in practice.”²⁹ If a successful mediator certification program is implemented, certification could serve as such a quality indicator. Mediators seem to be optimistic about certification’s value to consumers; of mediators surveyed by ACR/ABA Joint Task Force, 63% believed that a national certification program would be valuable to consumers of mediation services, and only 12% of respondents did not think that such a program would be valuable to mediation consumers.³⁰

²⁷ *Id.* at 5. See also Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 U. MO. J. DISP. RESOL. 303, 306 (advocating a system that “provides encouragement, incentives, and a support structure that allows mediators . . . to target developmental needs, work collaboratively . . . give systematic attention to ‘reflective practice,’ and deal with shortcomings”). Pou suggests that a support-based approach would advance mediator competence and credibility far more than a credentialing approach, whatever the latter’s psychological benefit. *Id.*

²⁸ Cole, *supra* note 6, at 8.

²⁹ Dinkin & McManus, *supra* note ?, at 1.

³⁰ Feasibility Study, *supra* note 16, at 2.

The effectiveness of certification as a market signal, however, depends on the accuracy of certification as a measure of mediator quality, as discussed in Part III. If certification accurately identifies competent mediators, it may act as a beneficial market signal, facilitating and possibly expanding consumer use of mediators. On the other hand, if it does not accurately identify competency, it could be a hindrance rather than helpful to both consumers and mediators, providing faulty recommendations for poor-quality mediators and failing to lead consumers to qualified providers. Because of this risk, it is supremely important that any certification program be able to identify competence with great accuracy.

(5) Practitioner influence on the development and direction of the field. This goal may be strongly correlated to the goal of professionalism, discussed above, depending on how that term is interpreted. The importance of practitioners' influence on mediation development and direction depends on the extent to which one believes in effective self-regulation. If self-regulation is the best way to increase mediation quality, considering both its benefits and costs, then the goal of practitioner influence on the field seems proper.

Self-regulation may be the most effective way to increase quality if mediation practitioners have superior knowledge about how to improve the practice and field of mediation. This is likely the case, as mediators are more familiar with the mediation process than other potential regulators, such as legislators. Thus, regulator expertise and experience in the field are benefits of self-regulation. On the other hand, a cost of self-regulation may be mediators' unwillingness to impose any obligations on mediators which are beneficial to consumer but may be costly or undesirable from a mediator's point of view. For example, practitioners may not want to impose substantial fees on mediators to obtain certification. However, large fees would be undesirable and costly in terms of both financial impact and a loss of diversity, so this may

not be a problem of self-regulation. Overall, it seems that the benefits would outweigh the costs of self-regulation versus outside regulation.

Would certification serve the goal of self-regulation? The obvious answer, but one that can not be overlooked, is that it would serve this goal *to the extent that practitioners control the certification process*. Thus, those who implement and maintain a certification program, including those who manage any related activities such as training and evaluation, should be mediation practitioners.

(6) Consumer protection against incompetent or unethical mediators. Some believe that consumers need protection against incompetent or unethical mediators.³¹ Others disagree: “There is little empirical evidence that the public needs protection from . . . incompetent or unethical mediation services.”³² This, however, may be due to possible under-reporting of problems, as discussed above.³³ Because of such under-reporting, it may be impossible, without further study, to determine the current level of ethics and competency.

³¹ See Weckstein, *supra* note 5, at 767–68 (listing such protection as a goal of mediator certification); James J. Alfini and Martha Norman, The New Local Mediation & Evaluation Program: Mediation Quality Assurance Issues Raised, DCBA BRIEF ONLINE, *available at* <http://www.dcba.org/brief/febissue/1998/art50298.htm> (citing Weckstein, *supra* note 5).

³² Weckstein, *supra* note 5, at 768 (citing JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 262–63 (1984)).

³³ As discussed above, under-reporting of problems may be caused by the fact that parties often are unaware of their rights or unable to evaluate mediator quality due to a lack of relevant knowledge. See Henning, *supra* note 15, at 189, 191.

It has been argued that incompetent or unethical mediators would receive little or no repeat business,³⁴ so that the market would eliminate (albeit imperfectly and not without cost) those mediators whose services are inadequate or ethically lacking. However, this assumes, like any other effective free market theory, that mediation customers have perfect information. A certification program hopefully would provide information about ethical and competent mediators (the goal of a market signal). Other signals exist without certification; for example, parties may hear “through the grapevine” whether certain mediators are competent or ethical. However, many potential mediation customers may not be sufficiently in touch with the mediation system to know which mediators have good (or bad) reputations.

The extent to which certification would ensure ethical practices may depend on the certification program’s ongoing supervision or de-certification procedures. Although ethics training and other preventive programs may reduce unethical behavior, such behavior may continue in the absence of supervision and the threat of de-certification or other consequences. Unfortunately, a certification program probably could not avoid all unscrupulous practices,³⁵ but it is likely to increase the level of competency, as discussed above.

³⁴ Amended Final Report, Response of the Family Law Rules Committee To Senior Judges as Mediators, In re: Report of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (Fla. 2005) (No. SC04-2482), *available at* <http://www.law.fsu.edu/library/flsupct/sc04-2482/04-2482resp2.pdf>.

³⁵ Formal complaint systems are limited by the fact that complaints are likely to be infrequent; such a complaint process may “only give the illusion of a complete system of discipline and peer control.” McEwen, *supra* note 15, at 6. These processes are beyond the scope of this paper, which focuses on the design of evaluative methods.

Finally, even without a competency or ethics problem, if potential consumers of mediation fear incompetent or unethical mediators, then certification may ease those false fears by ensuring competency and increasing credibility.

(7) Reducing court congestion. Reduction in court congestion is an admirable goal, but the extent to which mediation itself reduces court congestion may be overestimated: Because the vast majority of cases settle, it is likely that mediation influences the timing more often than the rate of settlements.³⁶ In other words, because a case is very likely to settle regardless of mediation, a settlement often would have happened without the help of mediation. Thus, when mediation causes settlement, it is likely that the alternative would have been a later settlement rather than trial.

Nonetheless, early settlements do reduce court congestion to some extent,³⁷ and mediators who increase the early settlement rate contribute somewhat to that reduction in congestion. Such mediators may be particularly effective in settings with lower settlement rates, as if initial settlement rates are lower, there are more unsettled cases to be “converted” to settled cases by mediation. Certification may slightly increase settlement rates if it increases mediator competency, so this goal may be accomplished at least to some degree.

This result is supported, at least indirectly, by a study by Roselle L. Wissler which suggests that experienced mediators reach settlements more often than less experienced mediators.³⁸ If experience is positively correlated with competency as measured by a

³⁶ Weckstein, *supra* note 5, at 771.

³⁷ Pamela L. Airey, Comment, *It's A Natural Fit: Expanding Mediation To Alleviate Congestion In The Troubled Juvenile Court System*, 16 J. AM. ACAD. MATRIM. LAW. 275 (1999), available at http://www.aaml.org/files/public/Journal_vol_16-1-7_Mediation_to_Alleviate_Juivy_Court_Congestion.pdf.

³⁸ Wissler, *Court-Connected Mediation*, *infra* note 60 and accompanying text.

certification program, then certified mediators may improve settlement rates, thus achieving the goal of reduced court congestion.

(8) Promoting mediation by increasing credibility. Mediation is an attractive process for many reasons including cost efficiencies, the flexibility of mediated settlements, and the evidence that parties are more satisfied with mediated outcomes.³⁹ However, not all potential mediation consumers are educated about mediation, and many do not know how mediation could help them.⁴⁰ Because the use of mediation is so beneficial and because not all potential consumers know of its benefits, the promotion of mediation is an appropriate goal.

Mediator certification promotes mediation by serving the previously stated goals, including providing a market signal of credibility,⁴¹ thereby reassuring those who know little about mediation and may otherwise try to avoid it.⁴² Senator Newton R. Russell shared the goal of increasing mediator credibility when he sponsored a mediator certification bill in 1995.⁴³ According to Senator Russell, one purpose of the certification program was to “give the public a

³⁹ Weckstein, *supra* note 5, at 772. For other advantages of mediation, see AMERICAN BAR ASSOCIATION, HOW COURTS WORK: MEDIATION, http://www.abanet.org/publiced/courts/mediation_advantages.html.

⁴⁰ Public knowledge about mediation is somewhat limited. See Kathryn L. Fuger and Elizabeth K. Schurman, Institute for Human Development, University of Missouri - Kansas City, *Alternative Dispute Resolution (ADR) Project: Summary Of Pilot Program In The Tri-Circuit Area* (March 10, 2005), available at www.positech.net/~dcourt/Dena/Summary%20Tri-Circuit%20%20with%20Cover.doc.

⁴¹ Most mediators believe that a national certification process would enhance the public image of mediators. Feasibility Study, *supra* note 16, at 3.

⁴² Weckstein, *supra* note 5, at 773.

⁴³ Newton R. Russell, *Mediation: The Need and a Plan for Voluntary Certification*, 30 USF L. REV. 613 (1996).

modicum of comfort when they employ an officially credentialed mediator.”⁴⁴ A national voluntary certification program would serve the same goal, promoting mediation and hopefully increasing its use.

~

In summary, scholars and professional organizations have asserted several goals of certification, varying in importance and in potential for improvement through certification. Most of those goals, and all of the most important ones, either point to or depend on achievement of the goal of mediator competency.

Taken together, it appears that the potential benefits of certification would be great—but would they overcome the costs of such a program?

B. The Costs of Regulation

While the benefits of regulation are important, the costs are also crucial to consider, as they may outweigh the benefits. Even after the decision to regulate has been made, costs are important to consider in regulatory design, as a program should be designed to maximize benefits while minimizing costs. This section discusses several potential costs of a national certification program that have been identified by various scholars and professional organizations.

Most obvious are the financial costs. ACR Mediation Certification Task Force (“ACR Task Force”) recommends that a certification program be self-financed through application fees from mediators.⁴⁵ According to one survey, barely more than half (57%) of mediators would be willing to pay up to \$200 for certification, and only 18% of mediators would be willing to pay

⁴⁴ *Id.* at 614.

⁴⁵ ACR TASK FORCE REPORT, *supra* note 1, at 1.

\$300.⁴⁶ While mediators' willingness to pay for certification may change due to market pressure, it is unclear whether such a system is sustainable. The cost of an effective regulatory program must be estimated to determine whether a reasonable fee could cover a certification program.

The financial costs of a certification program may directly lead to noneconomic costs if not all qualified mediators can afford certification. We must consider the danger of excluding mediators through such a fee; as even "voluntary" certification may become a practical market necessity.⁴⁷

Other costs of mediator certification include various non-economic risks in implementing such a program. Although a traditional cost/benefit analysis may only consider economic costs, certain non-economic costs are significant and should not be ignored. Some of these risks are avoidable, and all should be considered and minimized in the design of any certification program.

Perhaps the biggest concern expressed by many in the field is the potential for certification to damage the diversity of mediation practice. Diversity in mediation has many forms; mediators can be diverse in terms of color, national origin, religion, culture, ethnic background, gender, sexual orientation, socioeconomic status, disability, professional background, and education.⁴⁸ Mediation is also enriched by diversity and creativity in uses and styles of mediation.⁴⁹

⁴⁶ Feasibility Study, *supra* note 16, at 5.

⁴⁷ See *supra* note 46 and accompanying text.

⁴⁸ Weckstein, *supra* note 5, at 769–71; ACR TASK FORCE REPORT, *supra* note 1, at 8.

⁴⁹ Weckstein, *supra* note 5, at 775. It is important that any system of regulation recognize the variety of approaches and to "embrace[] them in their appropriate contexts." See Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV.

Certification has the potential to inhibit that diversity and creativity through the imposition of educational and other requirements. For example, requiring certain educational qualifications may disproportionately affect qualified mediators from minority groups. The requirement of a law degree or professional license, which is more exclusionary than most proposed educational requirements, limits the diversity of professional background and perspective while accomplishing very little.⁵⁰ In fact, studies have found “little or no correlation between educational background or professional licenses and successful mediation practice.”⁵¹

723, 756–57 (1996). Even controversial approaches, such a lack of mediator neutrality, have their place. For example, mediators employ a “norm-advocating model” in hospital ethics disputes, divorce, and civil rights mediations where the “waiver of the legal norm . . . would result in a serious miscarriage of justice.” *Id.* at 741. A certification program should recognize that different approaches work in different situations. *See also* ACR TASK FORCE REPORT, *supra* note 1, at 6 (noting that “different schools and styles of mediation practice . . . have found acceptance in different settings, in different areas of application, and for different purposes”).

⁵⁰ *See* Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499 (2005).

⁵¹ Weckstein, *supra* note 5, at 770 (citing COMM’N ON QUALIFICATIONS, SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES 15–16 (1989), and several other sources). Educational degrees may be useful in special circumstances, however. For example, Professor Bobby Marzine Harges argues that child custody and visitation mediators should be required to have certain academic degrees and special training. Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687, 700–07. Harges argues that degrees in law or in mental health, behavioral, or social sciences should be required in order to “ensure a minimum basis of knowledge” that would be helpful in resolving the complex issues that arise in such cases. She also argues that such requirements would “legitimize mediation” and ensure competency. *Id.* at 700–01. While custody mediation cases do raise special and complex issues, it makes little sense to require legal *or* other relevant training. It seems that special training should be required so that mediators know how to handle delicate and important issues in family dynamics, but such training is hardly standard in law schools. However, although educational degree requirements have been largely rejected by scholars and

The NCRC supports this finding by asserting that a particular educational background should not be used as an indicator of mediator competency.⁵² Even training and experiential requirements may endanger diversity, as training can be expensive and a new mediator’s ability to gain experience may rely on the ability to network, a factor that may decline with minority status.⁵³

As discussed below, some certification programs use written examinations to evaluate applicants. If the test is not designed with the utmost care, it may exclude significant numbers of competent mediators, especially those applicants who are unable to pay for test preparation. Indeed, whether any certification process should include a knowledge-based test is questionable. Only 40% of surveyed mediators believed that mediation “covers a unique body of knowledge that could be evaluated using a national certification process.”⁵⁴ This leads to another risk: an inaccurate evaluation process could exclude qualified mediators while including (thus providing misleading credentials to) unqualified mediators. Any certification program must be designed with this danger in mind.

Furthermore, the danger of “pricing out” some applicants, either through application fees or through practical preparation requirements, could be a huge cost to the mediation field in terms of lost diversity. “Pricing out” certain mediators with inadequate financial resources would decrease the diversity of the certified mediator pool, reduce the accuracy of certification as a market signal of quality, and thus harm both mediators and consumers. If certification were to be aimed at a very basic, low level of competence, would the only excluded mediators be

professional organizations, *see supra* notes 39–40 and accompanying text, they may be particularly helpful in special cases such as family mediations.

⁵² DINKIN, *supra* note 11, at 5.

⁵³ Cole, *supra* note 6, at 9–10.

⁵⁴ Feasibility Study, *supra* note 16, at 3.

those who could not afford it?⁵⁵ On the other end of the spectrum, volunteer mediators and those with special expertise may not want to “jump through the hoops” if the certification requirements are burdensome, resulting in further exclusion of competent mediators.⁵⁶ This is especially problematic for courts that rely on volunteers, as ensuring competence is especially important in the court context.⁵⁷

C. Certification Is Recommended if Carefully Implemented .

While further research is necessary to determine the cost of implementing and maintaining a certification process, it appears that the benefits of a carefully designed program could outweigh the costs. Mediator competency is key to the field and practice of mediation, and mediators can have a significant positive or negative impact on parties who mediate—or even on those who do not, if mediator quality or apparent quality influenced the decision to avoid mediation. Given the apparent potential to further the goal of competency, to provide a market signal of that competency, and thereby to promote mediation, the benefits of certification seem worth the costs, *if* those costs can be kept to a minimum.

The high cost of losing mediator diversity or excluding many competent mediators, for example, does not seem justified by the benefits of certification—so the program must be designed in a way to avoid such high risk and high cost. In sum, it is important for any certification program to keep its goals, costs, and public concerns at the forefront of all activities, in order to avoid or minimize the risks discussed above. The following Part suggests a way to accomplish this difficult but important goal.

⁵⁵ Based on class discussion.

⁵⁶ *Id.* Only twelve of twenty-two mediation students surveyed responded that their willingness to volunteer as an in-court mediator would continue if it required a \$200 certification. Student Survey, *supra* note 17.

⁵⁷ *See supra* note 88.

III. IF CERTIFICATION IS ADOPTED, WHAT FORM SHOULD IT TAKE?: A LOOK AT EVALUATIVE METHODS

If mediation certification is adopted, it must be designed with attainment of its goals in mind and with utmost care to minimize the costs and dangers of the program. This Part discusses the challenges of identifying those mediators who should receive certification, describes and analyzes proposed methods of evaluation, and makes recommendations for mediator evaluation in order to minimize the risks discussed in Part II.

The challenge of identifying mediators worthy of certification is twofold. First is the difficulty of defining a “good mediator.” Second is the challenge of evaluating a mediator to determine whether she fits that definition.

A. Defining a “Good Mediator”

The main problem with defining a good mediator is that there is little or no consensus on what makes one.⁵⁸ Indeed, in explaining why licensure is inappropriate for mediators, the SPIDR Commission on Qualifications reasoned in 1995 that it was too early in the development of knowledge concerning what qualifications are necessary in an effective mediator.⁵⁹ Moreover, many asserted characteristics of a good mediator are subjective and difficult to test consistently and fairly.⁶⁰ For example, listening skills and empathy are understood to be key qualities of a good mediator.⁶¹ Other recognized mediator qualities are interpersonal skills, information-gathering ability, and creativity.⁶² According to the National Conflict Resolution Center, there are certain ethical and practice standards that all practitioners “should be able to agree on,” such as neutrality, respect for parties, balance, and maintaining a non-threatening mediation environment.⁶³ However, probably because these skills are so subjective, little research has been done on what characteristics lead to effective mediation.

In fact, possibly the only mediator characteristic that has been empirically shown to affect mediation is experience. According to a study by Roselle L. Wissler, mediator experience

⁵⁸ Cole, *supra* note 6, at 7 (“[I]t is not wholly clear that there is . . . a widely shared consensus on exactly which attributes, and in what proportions, lead to mediator quality.”).

⁵⁹ SPIDR REPORT NO. 2, *supra* note 5, at 18.

⁶⁰ See Cole, *supra* note 6, at 7.

⁶¹ See NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT’S GUIDE TO MEDIATION AND THE LAW 12–13 (1987).

⁶² Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What we Know from Empirical Research*, 17 OHIO ST. J. DISP. RESOL. 641, 699–700 (2002) [hereinafter *Court-Connected Mediation*].

⁶³ Dinkin & McManus, *supra* note ?, at 4.

increases the likelihood of settlement.⁶⁴ Thus, to the extent that increased settlement rates are the goal of mediator certification, the only empirically relevant qualification is experience. Factors that were shown to be irrelevant to settlement rates included hours of training, role play training, familiarity with relevant law, and number of years in legal practice.⁶⁵ No mediator qualification, including experience, was shown to affect the participants' perceptions of the fairness of the mediation.⁶⁶

However, Wissler's study can not lead one to conclude that mediator training is wholly irrelevant. Her sample of mediators, while large and varied, included only mediators who had at least a bare minimum of mediation training.⁶⁷ Therefore, Wissler's study suggests that abundant training does not offer an increase in settlement rates compared to minimal training.⁶⁸ However, the study does not indicate anything about the effectiveness of minimal training versus no training.

The problem remains, however, that no single set of qualities can be accepted universally because mediators have different styles and approaches.⁶⁹ While it is important to protect that

⁶⁴ *Id.* at 678–79.

⁶⁵ *Id.* *But see also* Dinkin & McManus, *supra* note ?, at 4 (asserting that “comprehensive training is essential to the development of [competency]”).

⁶⁶ *Id.* at 683.

⁶⁷ Wissler, *Court-Connected Mediation*, *supra* note 60 at 654, 655 n.52.

⁶⁸ Many of the mediators in the study had less than seven hours of training; some had over eighty hours (forty hours of general training plus forty hours of specific training). *Id.* at 654–55.

⁶⁹ Sarah Rudolph Cole has suggested that more work needs to be done on determining how to identify a good mediator, suggesting that the ACR and ABA jointly could hire a consultant to determine what qualities mediation consumers look for in a mediator. Cole, *supra* note 6, at 7–8.

diversity of practice, it also makes it difficult to identify what makes a good mediator.⁷⁰ Perhaps this is because there is no single definition of a “good mediator,” but a variety of characteristics which, in varying combinations, lead to effective mediation. If a certification program is to be inclusive of all competent mediators, then, it must be either (1) flexible enough to identify competency without relying on a rigid list of characteristics or (2) over-inclusive, relying on a list of only the most core requirements for mediators in order to protect diversity among mediation approaches. An over-inclusive program would not serve the most important goal of certification, ensuring competency. *Therefore, an effective certification program must be flexible enough to identify competency without relying on a rigid list of mediator characteristics.* The following Section discusses ways to do this.

B. Evaluating Mediators

As discussed above, it is extremely difficult to pin down a universal definition of a “good mediator” in terms of objective or even subjective characteristics. Therefore, evaluation of mediators must be flexible and effective without a conclusive and complete list of mediator qualities. This Section describes and analyzes various methods of evaluation that have been proposed or implemented and then proposes a solution to this thorny problem.

⁷⁰ Dinkin & McManus, *supra* note ?, at 3 (“A ‘one-size-fits-all’ approach is threatening to many. Clearly, any attempts at certification . . . would have to allow for different models, styles, and approaches that are well accepted within the field.”). *See also* Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965 (2004) (discussing the challenges of evaluating mediators due to the plurality of mediation approaches, noting that “[t]he flaw is the underlying premise that there is a single set of ‘core skills’ that any mediator must possess . . . in order to be . . . competent”).

1. *Analysis of Evaluative Methods*

The following is a description and critique of four basic approaches to evaluating mediators: counting hours of training and experience, written examination, performance evaluation, and holistic review.

a. *Counting Hours of Training and Experience*

ACR's recent proposal⁷¹ is the primary example of evaluation through counting hours of training and experience. ACR's certification is designed to be at a "low intermediate" level, certifying mediators with a "substantial foundation of training, knowledge and experience."⁷² Among other requirements, ACR proposal would require applicants to have completed specific amounts of training and experience, measured in hours and presented in a portfolio submitted with each application. Each applicant must have 100 hours of training including at least 80 in mediation process skills.⁷³ The proposal also requires 100 hours of experience as a mediator or co-mediator in the last five years or 500 hours total during the applicant's lifetime.⁷⁴

Hour requirements for training are problematic if they do not correlate to mediator competency. ACR requirement seems excessive and pointless, given the results of Roselle L. Wissler's study⁷⁵ which suggest that ACR's required eighty hours of general mediation process training is no more beneficial to mediator competency than seven hours of such training.⁷⁶

⁷¹ ACR TASK FORCE REPORT, *supra* note 1.

⁷² *Id.* at 5. The ACR Task Force welcomes the future addition of more advanced levels of certification as well. *Id.*

⁷³ *Id.* at 9.

⁷⁴ *Id.* at 9–10.

⁷⁵ Wissler, *Court-Connected Mediation*, *supra* note 60 and accompanying text (presenting empirical evidence of the irrelevance of advanced training).

⁷⁶ *Id.*

According to Art Hinshaw and Roselle Wissler, studies are likely “to find that no relationship exists between mediator training and mediation outcomes.”⁷⁷ However, “the mediation field as a whole lacks systematic empirical research evaluating the effectiveness of mediation training.”⁷⁸ Hinshaw and Wissler suggest that identification of training objectives and assessment criteria is crucial to creating a certification system.⁷⁹

A disadvantage of training requirements is that they benefit those who are better able to pay for advanced training,⁸⁰ decreasing the financial diversity of the mediator pool.

Experience requirements are less problematic according to the Wissler study, which found experience to be the only mediator quality relevant to settlement rates.⁸¹

Another problem with ACR’s proposed method of counting hours is its rigidity. While the proposal includes the possibility of exceptions to the general requirements “in exceptional or extraordinary circumstances,”⁸² it is unclear that this exception is broad enough to provide the necessary flexibility. As Cole points out, such a plan “might exclude a number of mediators who would otherwise satisfy the existing view of what constitutes a quality mediator.”⁸³ Experience requirements also may create a “Catch-22” for inexperienced mediators if basic certification requires experience and experience is hard to get without certification.

⁷⁷ Art Hinshaw and Roselle L. Wissler, *How Do We Know that Mediation Training Works?*, 12 DISP. RESOL. MAG. 21, 21 (2005).

⁷⁸ *Id.* at 22.

⁷⁹ *Id.* at 23.

⁸⁰ Cole, *supra* note 6, at 9.

⁸¹ Wissler, *Court-Connected Mediation*, *supra* note 60 and accompanying text.

⁸² ACR TASK FORCE REPORT, *supra* note 1, at 1.

⁸³ Cole, *supra* note 6, at 9.

Another system, based on points-counting, is a variation on the hours-counting system described above and is exemplified by the recent proposal of Florida's Supreme Court Committee on Alternative Dispute Resolution Rules and Policy.⁸⁴ This proposal calls for a requirement of 100 points total per applicant, with the points coming from educational degrees, training, experience, and mentorship.⁸⁵ Depending on the type of mediator classification (circuit court, county court, family, or dependency mediator), the 100 point total must include specific numbers of points from each source (education, training, and experience).⁸⁶ For example, to certify as a circuit court mediator, an applicant needs 30 points from training, 25 points from education and experience, 30 points from a mentorship, and 20 points from a bachelor's degree.⁸⁷

Florida's point system is designed to support diversity in a way that a straight hours-counting system does not.⁸⁸ However, even with its slightly increased flexibility, the point system shares the problems of the hours-counting system. By requiring certain numbers of points from educational degrees, training, experience, and mentorship, the system rewards unnecessary education and training and fails to provide flexibility for those mediators who are competent but do not fit neatly into its point agenda.⁸⁹

⁸⁴ ADRWorld.com, *Florida Proposes Point System for Mediator Certification* (Aug. 18, 2004), <http://adrworld.com/sp.asp>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Each educational degree is worth a specified number of points. *Id.*

⁸⁸ *Id.*

⁸⁹ For example, Roger Fisher and Bill Ury, the authors of *GETTING TO YES*, would not meet the circuit mediator requirements under the Florida system because they have not earned points from Florida Supreme Court mediation training or from the mentorship requirement. Cole, *supra* note 6, at n.11 (citing SHARON PRESS, *THE RESOLUTION REPORT* 13 (Oct. 2004)).

b. Examinations

In addition to the hour counting described above, ACR proposal includes a written examination of each certification applicant.⁹⁰ The examination would cover eleven knowledge areas including: Communication, Conflict Theory, Content Management and Resources, Cultural Diversity, Ethics, History of Mediation, Models, Strategies and Styles, Negotiation, Process Structure, Role of Third Party, and Systems and Group Dynamics.⁹¹

The recommended examination reflects ACR Task Force's conclusion that "a skilled mediator should be knowledgeable about different approaches and schools of thought, even if he or she works primarily in one."⁹² In fact, the Task Force concluded that mediators should be knowledgeable not only about mediation processes they do not use, but on the purely academic topic of the history of mediation.

ACR proposal's examination requirement is problematic for two reasons: (1) the proposed areas of knowledge suggest that the tested material is not highly relevant to mediator competency, and (2) the examination is likely to exclude those who can not afford the extensive training necessary to pass it. As discussed in Part II, Section B, it is unlikely that a knowledge-based test could accurately evaluate the competency of a mediator,⁹³ and such a test threatens the diversity of the certified mediator pool. As noted above, only 40% of mediators believe that

⁹⁰ ACR TASK FORCE REPORT, *supra* note 1, at 10.

⁹¹ *Id.* at 9–10.

⁹² *Id.* at 4.

⁹³ *See* Cole, *supra* note 6, at 10. As an anecdote supporting this point, Cole recalls a meeting of the ABA Section on Dispute Resolution where a sample certification test question was discussed. The audience debated the correct answer to the sample question for over 30 minutes, demonstrating the difficulty of creating a test that would be fair to test takers with various backgrounds and mediation styles. *Id.*

mediation covers a unique body of knowledge that could be evaluated using a national certification process.⁹⁴

However, a written exam could serve the limited purpose of testing objective knowledge critical to mediation, such as relevant mediation law (on confidentiality, for example) and relevant court procedure.⁹⁵ An exam could also test an applicant's ability to identify sensitive cases which may require special training or other qualifications.⁹⁶ An exam should not attempt to test subjective knowledge or technique,⁹⁷ however, as the accuracy of the results would be questionable.

⁹⁴ Feasibility Study, *supra* note 16.

⁹⁵ The Academy of Family Mediators' Voluntary Mediator Certification Project and The Mediator Skills Project presented a methodology for creating a written examination to the American Bar Association. According to this method, which is used by other professions in creating competency exams, mediators across the country create a list of tasks, skills, and knowledge by keeping journals. After a panel of experts supplements and categorizes this list, a questionnaire is used to assess the importance and frequency of listed items. The written exam is then designed to test the objective knowledge indicated as important by this process. Judith M. Filner & David Hoffman, *Exploring Voluntary Mediator Certification* (2000), available at <http://adrworld.com/sp.asp?id=25157>.

⁹⁶ For example, mediations potentially involving spousal abuse or other family issues may require special training. *See supra* note 40. The ability to identify cases which a mediator may not be qualified to handle is important and possibly lacking in some new mediators. In a survey of mediation students, eleven of twenty-two students believed they were qualified to mediate cases involving at least one of the following types of special cases: spousal abuse, child custody, and special education disputes. Student Survey, *supra* note 17.

⁹⁷ *But see* Bush, *supra* note 57. Bush argues that performance testing can work, but only in a "pluralistic, multi-test regime." "[N]either single-model tests nor even multi-model tests can adequately measure mediator competence in a pluralistic world of practice." *Id.* at 1003. Thus, "[t]here must be different tests for the different models of practice;" mediators could choose which model-specific test they wanted. *Id.* at 1002–03.

c. Performance Evaluation by Parties or Observers

A third way to evaluate mediators is by observing them in action. Observation can be done by either formal evaluators hired by the certifying organization or by parties in real mediations. Given the results of performance tests created and used by a mediation center and a court, it appears that it is possible to design effective tests that accurately evaluate performance while allowing for diverse mediator backgrounds.⁹⁸

A study by Roselle L. Wissler and Robert W. Rack, Jr. shows that evaluation by experienced mediation parties can be valuable, not only distinguishing between more and less skilled mediators, but also providing feedback on each mediator's particular skills and areas that need improvement.⁹⁹ There are several issues related to implementing this kind of evaluation, however. First, inexperienced mediation parties may not provide feedback as valuable as that provided in the study, and it may be difficult to obtain the assistance of more experienced parties, who tend to be busy attorneys. Second, the study relied on randomly assigned cases, whereas mediators may tend to be assigned to cases based on skill.¹⁰⁰

The efficacy of performance testing has also been demonstrated by a pilot program by the National Conflict Resolution Center.¹⁰¹ Dinkin and McManus of the NCRC assert that “although many styles of mediation may exist, competent mediators of any stylistic approach have certain observable skills in common, and these skills can be measured through administering a generic

⁹⁸ Henning, *supra* note 12, at 195.

⁹⁹ Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 CURATORS U. MO. J. DISP. RESOL. 229, 253–54. It is important to note that these remarkably useful results were independent of mediation outcomes. *Id.* at 253.

¹⁰⁰ *Id.* at 255.

¹⁰¹ DINKIN, *supra* note 11, at 5.

evaluation instrument in a live performance.”¹⁰² Furthermore, according to an NCRC working group, “live performance evaluation is an essential indicator of mediator competence.”¹⁰³

The biggest drawback of performance evaluations is their costly and time-consuming nature.¹⁰⁴ Performance evaluations also have the disadvantage of subjectivity; clearly such evaluation results will not be as objective as a multiple-choice exam or hours-counting of training and experience, creating a risk of inconsistency.

d. *Holistic Review*

Sarah Rudolph Cole suggests adding holistic review to the existing point or hour requirements of ACR or Florida proposals in order to ensure that qualified mediators are not excluded.¹⁰⁵ In holistic review, the reviewing entity could protect diversity and avoid over-

¹⁰² DINKIN, *supra* note 11, at 9.

¹⁰³ DINKIN, *supra* note 11, at 5.

¹⁰⁴ Henning, *supra* note 12, at 201. Henning notes that while the mediation community supports performance testing, court systems and some private parties are generally more willing to use less expensive and less accurate methods. *Id.* This is especially problematic given the increased importance of mediator competence in court-mandated mediation where the parties have no choice of mediators. *See* SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING DISPUTE RESOLUTION PRACTITIONERS: GUIDELINES FOR COURT-CONNECTED PROGRAMS 2, 5 (1997) (“In court-connected dispute resolution programs, the courts ultimately are responsible for the quality of justice rendered,” and “[t]he scope of the court’s responsibility for ensuring the competence of practitioners increases as the extent to which parties may choose a practitioner decreases.”). The ACR Mediator Certification Task Force did not recommend a performance evaluation as a part of its certification program; it concluded that performance-based assessment would be too expensive in terms of human and financial resources. ACR TASK FORCE REPORT, *supra* note 1, at 4.

¹⁰⁵ Cole, *supra* note 6, at 9–10.

exclusivity by applying a more flexible approach to certify those applicants who are qualified but do not fit into the rigid requirements of a point or hours system.¹⁰⁶

Holistic review is an effective way to provide flexible evaluation that protects diversity and avoids over-exclusivity based on rigid requirements. This process is also more costly, as flexibility and exercise of discretion take the time of skilled examiners. Furthermore, holistic review is more subject to inconsistency than the alternatives of hour- and point-counting. However, the need to provide flexibility to create an effective process outweighs the added costs inherent in a properly administered holistic review process.

2. Recommendation

This section first describes the recommended method of evaluation for a certification program and then discusses the cost issues raised by such a program.

a. Recommended Method of Evaluation

The recommended evaluation would have two steps including a preliminary evaluation of training, education, experience, and knowledge; and a live performance evaluation. The alternative of holistic evaluation is also discussed below.

(1) Preliminary requirements. In order to decrease costs and increase consistency, applications first should be subject to specific but very minimal requirements in training, education, experience, and knowledge. Further research should be conducted to determine minimal effective levels of these factors, but relying on current research, this stage of certification should require only a high school diploma, experience in approximately sixteen mediations, and no more than seven hours of training. As discussed above, these are the levels

¹⁰⁶ *Id.*

of experience and training found to be effective in studies by Wissler.¹⁰⁷ This recommendation is based on inadequate research, however—a situation that should be remedied. As discussed above, the mediation field lacks crucial empirical research evaluating the effectiveness of training, as well as identification of proper training objectives and assessment criteria.¹⁰⁸

A high school diploma, but not a more advanced degree, should be required to ensure elementary reading, writing, and math skills while not decreasing diversity of practice. Mediators who lack a college degree have not, after all, been shown less effective than those with college or advanced degrees.¹⁰⁹ Because this stage of evaluation is rigid and preliminary, the requirements should not be high, but should aim at the very least that any competent mediator should possess.

Basic knowledge requirements could be tested by an objective written test. As discussed in Section 1, Subsection b, a written examination has clear limitations and should not be used to test subjective or academic knowledge or technique. The examination should test only objective knowledge that every competent mediator should possess. This may include topics such as confidentiality requirements and the limits of confidentiality, relevant court and mediation procedure, and identification of sensitive cases which require specialized qualifications.¹¹⁰ Importantly, however, this test should not be used to evaluate mediator effectiveness, but only a mediator's crucial basic knowledge.

¹⁰⁷ Wissler, *supra* note 60 and accompanying text.

¹⁰⁸ Wissler, *supra* note 79–80 and accompanying text

¹⁰⁹ *See supra* notes 51–53 and accompanying text.

¹¹⁰ *See supra* notes 97–98 and accompanying text. A mediator should be able to recognize and respond properly to urgent situations such as threats, violence, or evidence of domestic abuse.

(2) Performance evaluation. If an applicant meets the preliminary objective requirements, he or she should then be subject to a performance evaluation. As discussed in Section 1, Subsection c, performance evaluations are shown to be highly effective in identifying not only general competency, which could be used for certification purposes, but also in identifying specific strengths and weaknesses in each mediator, which could be provided as feedback for each mediator's self improvement.¹¹¹ It is important that the evaluators be experienced and that a common evaluation instrument is used in order to maximize consistency and objectivity in this unavoidably subjective type of evaluation, however.¹¹²

If an applicant has met the preliminary requirements and receives a passing score on the performance evaluation, he or she may be certified. What constitutes a passing score (or what is required to obtain it) should be determined by the certifying organization with input from practitioners and mediation consumers, including parties and attorneys.

(3) Holistic review as an alternative. With the use of performance evaluations and minimal objective requirements, holistic review seems unnecessary. These evaluative methods avoid the main problem that holistic review would serve to bypass: over-exclusivity based on rigid requirements. However, if live performance evaluation proves to be too expensive, holistic review may be a somewhat less costly alternative. This review should be undertaken by a panel with specified guidelines, but not requirements, to determine each applicant's basic competency. Hour and point counting may be used, but only as guidelines, to avoid the rigidity problems

¹¹¹ See *supra* notes 99–100 and accompanying text.

¹¹² Dinkin and McManus assert that common observable skills can be measured with the use of a generic evaluation instrument in a live mediation. *Supra* note 103.

discussed above. Guidelines should be based on further research and should directly correlate to mediator competency.

b. Costs

There is a clear trade-off between accuracy and cost-effectiveness in the evaluative methods described above. While hours-counting and written examinations have the advantages of being objective and inexpensive, performance evaluations and holistic review are more accurate. In order to maintain flexibility and diversity, some amount of performance evaluation or holistic review is essential.

Part II concluded that a certification program would be advisable only if the costs—including the danger of being over- or under-inclusive—could be kept low. As said earlier, the benefits of certification are not worth a large loss in diversity of mediator backgrounds and approaches, and the benefits of certification would be compromised if granted to unqualified mediators. Therefore, it is crucial to any certification program have an accurate evaluation system that recognizes both competence and its absence. Such a program would minimize the non-economic costs described in Part II, but what about the financial costs? Any program that can accurately identify mediator competency will surely not be cheap.

As noted in Part II, 57% of nationally surveyed mediators would be willing to pay only \$200 for certification, and only 18% of mediators would be willing to pay \$300.¹¹³ While these numbers may change if a certification program actually is adopted, they do not bode well for the prospect of an expensive application process. It appears that such a process may be economically unavailable or undesirable for many mediators, thus threatening mediator diversity—an unacceptable cost, as discussed above.

¹¹³ *Supra* note 35 and accompanying text.

While more research is necessary to determine the exact cost of a program including the accurate but expensive methods of performance evaluations and holistic review, it appears that such a program would be too expensive to be funded solely by application fees. Furthermore, although the court system would benefit greatly from a certification program, the courts are an unlikely source of sufficient funding. The solution must come from some other source, perhaps from a federal grant for a national system or state funding for implementing the program on a smaller scale. Without such funding, a certification program appears to be too expensive to be both effective and inclusive.

IV. CONCLUSION

Mediators are playing an increasingly important role in today's cultural and legal arenas, exercising significant influence on the resolution of countless personal and commercial disputes. Because mediators are so influential and often play an official role in the court system, the lack of a coherent system of quality assurance has raised concerns among practitioners and legislatures. It is important, however, not to be caught in a regulatory frenzy, and to keep in mind the goals of regulation and the limitations of regulatory processes.

Mediator certification has great potential to ensure that a qualified pool of mediators is available and identifiable. However, in order to avoid the non-economic costs which would negate the benefits of such a system, it is necessary to implement a relatively expensive program including live performance evaluations. While the exact financial cost of such a system is not yet known, it would likely be worth the benefits, especially in the context of court-directed and other mediations in which ensured competence and diversity are especially important. This paper recommends that further research be done to determine the cost of such a program. If that

cost is justifiable given the benefits, as this paper predicts it will be, then the mediation field should seek government funding for either a national or state certification programs.

V. APPENDIX: STUDENT SURVEY RESULTS

	<u>Totals</u>		<u>Mediation Practicum</u>		<u>Multi-party Practicum</u>							
	<u>Y</u>	<u>N</u>	<u>Yes</u>	<u>No</u>	<u>Yes</u>	<u>No</u>						
1	Is a national mediator certification program needed to ensure mediator competency?						11	11	6	6	5	5
2	Is it possible to evaluate mediator competence on paper (including hours of training and experience, a written exam, etc.)?						12	9	8	3	4	6
3	Would a mandatory national mediator certification or licensure program be beneficial to parties who choose their own mediators?						16	6	8	4	8	2
4	Would a mandatory national mediator certification or licensure program be beneficial to parties in court-directed mediation?						9	12	1	10	8	2
5	Would a voluntary national mediator certification program be beneficial to parties who choose their own mediators?						16	3	8	1	8	2
6	Would a voluntary national mediator certification program be beneficial to parties in court-directed mediation?						18	3	9	2	9	1
7	Aside from mediator competence, is it important to increase the "professionalism" of mediators?						18	3	9	2	9	1
8	After taking this class, do you believe that you should qualify for basic-level certification as a general mediator, if such a program existed?						20	2	11	1	9	1
9(a)	If the parties choose you as a mediator, you believe you are qualified to mediate: disputes similar to those in small claims court						21	1	12	0	9	1
9(b)	If the parties choose you as a mediator, you believe you are qualified to mediate: disputes potentially involving spousal abuse						3	19	0	12	3	7
9(c)	If the parties choose you as a mediator, you believe you are qualified to mediate: child custody disputes						8	14	6	6	2	8
9(d)	If the parties choose you as a mediator, you believe you are qualified to mediate: special education disputes						6	16	3	9	3	7
10(a)	In court-directed mediation, if the parties have no choice of mediators, you believe you are qualified to mediate: disputes similar to those in small claims court						20	2	11	1	9	1
10(b)	In court-directed mediation, if the parties have no choice of mediators, you believe you are qualified to mediate: disputes potentially involving spousal abuse						3	19	0	12	3	7
10(c)	In court-directed mediation, if the parties have no choice of mediators, you believe you are qualified to mediate: child custody disputes						8	14	4	8	4	6
10(d)	In court-directed mediation, if the parties have no choice of mediators, you believe you are qualified to mediate: special education disputes						5	17	2	10	3	7
11	If you would consider volunteering as a mediator outside this class, would you still consider volunteering if you were required to obtain certification for a \$200 fee?						12	10	8	4	4	6