

QUALIFYING NEUTRALS:

THE BASIC PRINCIPLES

April 1989

REPORT OF THE SPIDR COMMISSION ON QUALIFICATIONS

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SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION

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EXECUTIVE SUMMARY

The role of the SPIDR Commission on Qualifications is to examine the question of qualifications of mediators and arbitrators. Established by the Board of the Society of Professionals in Dispute Resolution, the Commission is composed of individuals representing a broad variety of backgrounds and experience. While the recommendations may have general applicability, the primary focus of the Commission's inquiry has been on those areas of alternative dispute resolution in which legislatures and other public bodies are now seeking to establish criteria that define who can serve as a mediator or arbitrator. The Commission's recommendations have been approved by the SPIDR Board.

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns also have been raised, particularly about mandatory standards or certification, including: 1) creating inappropriate barriers to entry into the field, thus, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society. Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies. As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies can draw.

In determining how best to promote competence and quality in the practice of dispute resolution, the Commission considered several policy options. These included reliance on the free market, disclosure requirements, public and consumer education, "after the fact" controls such as malpractice actions, rosters, ethical codes, mandatory standards for neutrals and for programs, and improvements in training, including enhanced opportunities for apprenticeships.

The members of the Commission wish to thank the National Institute for Dispute Resolution for its generous support, which made the work of the Commission possible, and the many members of SPIDR and representatives of other organizations who contributed their ideas in writing, through discussions at chapter and other meetings, and through direct communication with Commission members.

After weighing these options, the Commission adopted three central principles, which recognize the need to strike an appropriate balance between competing concerns:

- A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;
- B. that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be; and
- C. that qualification criteria should be based on performance, rather than paper credentials.

No Single Entity.

This principle recognizes that the knowledge and techniques needed to practice competently may vary by context, process, issue, or institutional setting and that the establishment of uniform criteria for all neutrals could restrict the development of different approaches to dispute resolution and narrow entry into the field. Therefore, no single entity should be relied on to certify general dispute resolution competence. Moreover, entities seeking to establish criteria should be guided by groups that include representatives of consumers and experts in the field.

Degree of Choice.

This principle rests on the assumption that the need for protection against incompetence rises as the parties' ability to protect themselves by freely choosing or rejecting particular dispute resolution processes, programs or neutrals diminishes. As a consequence, SPIDR recommends:

1. When parties have free choice of the process, program and neutral no standards or qualifications should be established that would prevent any person from providing dispute resolution services, as long as there is full disclosure of the neutral's relevant training and experience, the fees and expenses to be charged, and any financial or personal interest or prior relationship with the parties that might affect the neutral's impartiality.
2. Where public or private entities operate programs that offer no choice of process, program or neutral, an appropriate public entity should set standards or qualifications for such programs and for neutrals, in accordance with the principles set forth in this Report and make such standards and qualifications available to the parties.
3. When parties have some, but not a complete, choice of process, program or neutral, each program offering such services should establish clear

selection and evaluation criteria and make such information available to the parties, together with its rules governing confidentiality, the means by which complaints may be lodged, and all relevant "full disclosure" information concerning the neutral selected for the particular case.

Performance-Based Qualifications.

The Commission has found no evidence that formal academic degrees, which obviously limit entry into the dispute resolution field, are necessary to competent performance as a neutral. There is impressive evidence that individuals lacking such credentials make excellent dispute resolvers and that well designed training programs, which stress the specific skills and techniques of mediation and arbitration, are of critical importance in attaining competence. As a consequence, SPIDR recommends:

1. Qualifications based on performance.

Academic degrees should not be a prerequisite for service as a neutral. Rather, qualification criteria, whether mandated by public bodies or adopted voluntarily by private agencies, should be based on performance, emphasizing the knowledge and particular skills necessary for competent practice.

2. Performance-based testing.

Policy makers should adopt mediation and arbitration performance criteria, such as those set forth in the body of this Report, and, to the maximum extent possible, incorporate performance-based testing into training and apprenticeship programs.

3. Qualifications for trainers.

To enhance the quality of training for neutrals, those offering such training should establish qualifications for their trainers, which emphasize knowledge of and competency to practice in the area for which the training is offered, the ability to teach others, and the ability to evaluate the performance of others in simulated settings.

4. Continuing education.

To ensure continued competency in this new and changing field, dispute resolution programs, entities that sponsor neutrals, and the neutrals themselves have a continuing obligation to maintain and improve acquired knowledge and skills through additional training, practice, and study.

IMPLEMENTATION

Although a good deal of work in this area remains to be done, much is now known. That knowledge and experience is more than sufficient for the Commission and SPIDR to recommend firmly that legislatures, judicial systems,

administrative agencies and other public bodies use the principles of this Report to guide their development of qualifications and standards for neutrals. SPIDR similarly urges that public and private organizations employing or listing neutrals use the principles to guide and shape their policies and practice.

SPIDR also asks that other organizations, both public and private, join in a continuing national effort to: (1) implement these recommendations, while (2) fostering further development of practical performance-based criteria in different sectors and (3) ensuring adherence to agreed-upon standards through the design of appropriate enforcement mechanisms.

PRINCIPLES WITH DISCUSSION

I. INTRODUCTION

At the annual conference in New York in October 1987 of the Society of Professionals in Dispute Resolution, George Nicolau, then President of SPIDR, proposed the formation of a Commission on Qualifications. The SPIDR Board of Directors charged the Commission with examining the question of qualifications of neutrals (including mediators, arbitrators, and ombudspeople) and approved the following mission statement:

The Commission's role is to examine the question of qualifications of [neutrals]. Established by the Board of the Society of Professionals in Dispute Resolution, the Commission is composed of individuals representing a broad variety of backgrounds and experience.

In that examination, the Commission intends to solicit the broadest cross-section of views on this subject, including those of SPIDR's membership, other organizations involved with or interested in dispute resolution and the users of dispute resolution services.

The Commission's recommendations will be subject to approval by the SPIDR Board. While the recommendations may have general applicability, the primary focus of the Commission's inquiry will be on those areas of alternative dispute resolution in which legislatures and other public bodies are now seeking to establish criteria that define who can serve as a mediator or arbitrator.

Linda R. Singer, Executive Director of the Center for Dispute Settlement in Washington, D.C., serves as Chair of the Commission. The members of the Commission are: Gail Bingham, Vice-President, Program on Environmental Dispute Resolution, The Conservation Foundation; Daniel P. Dozier III, Clean Sites, Inc., and former Legal Counsel, Federal Mediation and Conciliation Service; William Hartgering, Vice-President, Endispute Inc.; Patrick Phear, President, Family Mediation Associates; Frank E. A. Sander, Professor, Harvard Law School; Margaret L. Shaw, Director, Institute of Judicial Administration, Inc.; Lamont E. Stallworth, Labor Arbitrator and Professor, Institute of Industrial Relations, Loyola University of Chicago; and Paul Wahrhaftig, President, Conflict Resolution Center, Inc. Michael K. Lewis, Senior Advisor to the National Institute for Dispute Resolution, and George Nicolau, former President of SPIDR, serve as ex officio members of the Commission.

This report summarizes information about current public policy developments shaping the dispute resolution field and presents a set of principles that SPIDR recommends for the consideration of policy makers as guidance in making their decisions.

II. RATIONALE

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Many policy makers and professionals in the field are concerned about individuals with little information about or skill in dispute resolution simply "hanging out a shingle" and offering to mediate or arbitrate anyone's dispute. Further, concerns are being raised about poorly trained and inexperienced neutrals offering training to others. The risks are several — the interests of parties may be harmed by incompetent practice and the public's understanding of what it means to request specific dispute resolution services may become confused, leading to public dissatisfaction with the field and claims that mediation and arbitration are merely a form of second class justice.

Proposals to establish qualifications for neutrals also raise considerable controversy, however. Some of the reaction appears to be anxiety among members of a profession newly faced with regulation. Many substantive concerns also have been raised, particularly about mandatory standards or certification, including: 1) creating inappropriate barriers to entry into the field, thus, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society. Even many of those who are persuaded that there is a need for some mandatory standards are concerned that it may not be possible yet to define and measure competence.

Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies.¹ As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies can draw.

Although current developments in legislating qualifications most frequently apply to disputes referred by courts, these developments are likely to shape the practice of dispute resolution in all sectors. With so many

¹ As of the end of 1988, at least 35 states and the District of Columbia had adopted some type of statutory authority for mediation. At least nine states had adopted comprehensive statutes to define and to encourage the development of "alternative" dispute resolution methods. At least 21 states provide for mediation of labor disputes, usually by state boards of mediation. At least ten states have statutes specifically addressing mediation of family disputes, including issues of divorce, separation, child custody, and visitation rights. Individual states authorize or require the use of mediation in other specific types of dispute — for example, foreclosure by lenders against farm property and the siting of hazardous waste facilities.

Among the states that have legislated, by statute or court rule, qualifications for practice as a neutral are California, Florida, Iowa, Michigan, Minnesota, New York, Oklahoma, Texas, Virginia, and Wisconsin.

statutory or court-ordered requirements in place, avoidance of the issue is no longer an option. Rather, the question is what are the most appropriate and useful ways to achieve the objectives of policy makers who are concerned about ensuring qualified practice, without the negative consequences of limiting the field.

III. POLICY OPTIONS

There is no single way to promote quality in any professional practice. Among the options are:

- A. free market
- B. disclosure requirements
- C. public/consumer education
- D. "after the fact" controls, such as malpractice lawsuits
- E. rosters
- F. voluntary standards
- G. codes of professional ethics
- H. mandatory standards for neutrals
- I. mandatory standards for programs
- J. improvements in training for neutrals, including apprenticeship programs

A. Free market.

Classically, in the "free market" consumers of a service select any provider they wish, with no regulation of consumer or provider. This situation can be found in much labor arbitration practice and in the mediation of some family, commercial, and environmental disputes. Based on this experience, some assert that the free market is sufficient to ensure quality of practice because the parties will continue to select only those who have provided competent service.

B. Disclosure requirements.

A concern raised about the "free market" approach is that many parties, particularly those who do not use dispute resolution services on a regular basis, do not have access to complete information about practicing neutrals. Thus, these parties cannot make the informed choice on which the advantages of the free market depend. Consequently, some suggest that disclosure requirements would make a significant contribution to consumer protection.

Decisions about what information should be disclosed, however, unavoidably depend on one's views about what attributes are relevant to competent practice.

An example of mandatory disclosure is Minnesota's Civil Mediation Act, which provides that any person performing mediation services pursuant to the act must provide potential parties with a written statement of qualifications, education, and training before commencing mediation. Failure to do so is a petty misdemeanor.

C. Public/consumer education.

Reliance on informed choice also assumes that parties will consider what characteristics of a neutral will serve their best interests. Although some parties are experienced in how dispute resolution processes and neutrals function, others are not. Some public and private agencies consider it their responsibility to conduct educational programs for potential parties or to raise questions to help them think through the implications of a variety of options. For example, the Massachusetts Council on Family Mediation provides potential clients with a list of useful questions and a range of possible answers.

D. "After the fact" controls, e.g. malpractice lawsuits.

The threat of malpractice lawsuits is one method of increasing the likelihood that individuals in any profession will practice in a competent manner. Few malpractice cases have been filed against neutrals to date and few professional standards exist against which to judge whether a particular individual has been guilty of malpractice in a given situation. The increasing tendency to formulate standards of practice may have growing implications for malpractice actions.

The collection of information about consumer dissatisfaction (such as the system used by Better Business Bureaus) also may provide incentives that promote quality.

E. Rosters.

An increasingly common means for encouraging the use of dispute resolution services is to establish "rosters" through which parties can obtain the services of a neutral. A roster differs from a dispute resolution program in that the neutrals listed on a roster provide services independently of the organization maintaining the roster. Although organizations that compile rosters vary in the amount of screening that they do, most stand behind the competence of the individuals included on their rosters. Examples of rosters are the lists maintained by the Federal Mediation and Conciliation Service and the American Arbitration Association.

Typically, the parties are given some choice in the selection of names from a roster. The initial choice to use a roster to obtain a neutral also is usually voluntary. Some suggest that a roster approach can make it easier for

parties to find qualified neutrals by drawing on the expertise of the organization that compiled the roster.

Whether consciously or not, organizations putting together rosters use a set of criteria to screen who is qualified, because someone must decide (and therefore limit) who gets on the roster in the first place. Obviously, some rosters apply less restrictive criteria than others; but usually the less restrictive the roster the longer the list; and the longer the list the more likely that the effective screening in any particular case will be done by an administrator who selects from the roster a panel of names from which the parties actually choose. An exception is that the FMCS asks the parties in each case for their screening choices from a set of standard criteria, then uses a computerized system with a random number generator to select the panel of names from those who meet the parties' criteria.

F. Voluntary standards.

Various professional organizations, such as the National Academy of Arbitrators, have adopted their own form of standards through their membership criteria. Another example is the Academy of Family Mediators, which has established detailed membership requirements and criteria to accredit mediators and trainers. Neutrals participate in these organizations voluntarily; if they choose not to do so they are not barred from practice. If the standards of the organization are explicit, well publicized, and seen as desirable by consumers, however, the consumers' preference for neutrals possessing the "credential" of membership in that organization may serve to increase the use of neutrals with those qualifications.

G. Codes of professional ethics.

One form of voluntary standards is a code of ethics, such as the code developed by the Society of Professionals in Dispute Resolution. Parties have the opportunity to know more about, and possibly value the qualities of, neutrals subscribing to a code of ethics.

H. Mandatory standards for neutrals.

Some suggest that specific standards should be set for who should be allowed to practice as a neutral, in part because parties often do not have a free choice of the neutral providing a dispute resolution service. Among those who hold this view there are differences about what criteria are good measures of competent practice. The most common pattern to date is for states to require degrees earned in related professions, such as law, social work or counseling. The specific degrees required vary. Recent regulations promulgated by the Florida Supreme Court, for example, limit court-referred family mediators to those with one of the following credentials: a master's degree in social work, mental health, behavioral or social sciences; psychiatrists; attorneys; and certified public accountants.

Some states include training requirements; one incorporates experience. In some states, such as Florida, a minimum number of hours of court-approved

dispute resolution training is combined with academic degree requirements. In other states, such as Texas, dispute resolution training is the only requirement, but the training program must be certified by the court. The Texas statute explicitly rules out occupational status or degrees as requirements. Oklahoma combines training requirements with observation by an experienced mediator, independent case experience, and continuing education.²

There are different ways of setting standards for neutrals. The least restrictive is some form of certification, which may be performed by a private organization or a public agency. Lack of certification does not bar an individual from practicing. Licensing is more restrictive, performed by a public agency as a condition of practice.

I. Mandatory standards for programs.

Arguably, many public and private dispute resolution programs have de facto standards of practice. Mediation agencies such as the Federal Mediation and Conciliation Service, state mediation agencies, court-run dispute resolution programs, and private arbitration programs such as the Better Business Bureau all set standards for people they hire or use as volunteers.

A few state statutes establish mandatory standards for programs. Under New York's Community Dispute Resolution Centers program, for example, a Chief Administrator of the Courts provides supervision of approved centers. To be eligible, a center must follow prescribed guidelines, which include providing services at nominal or no cost, not accepting specified criminal disputes for resolution, and providing mediators who have received at least 25 hours of training in conflict resolution techniques.

Some dispute resolution programs maintain a working relationship with a list of neutrals not in their direct employ. When parties come to such a program for dispute resolution services, the program provides the services through a neutral on its list. These services may be offered on either a paid or volunteer basis. These programs have either explicit or de facto standards for the neutrals with whom they work.

Some suggest that setting criteria for programs offering dispute resolution services, rather than criteria for individual neutrals, might be an effective way to ensure quality of dispute resolution services without limiting the entry of individual neutrals into the field. Rule 703 under the Magnusen Moss Consumer Product Warranty Act, for example, regulates the scope of issues that a program can decide, the timetable of decisions, the training of neutrals, funding of services, and recordkeeping.

² A statutorily authorized scheme recently adopted in New South Wales relies on a similar competence-based scheme for certifying mediators and programs. (Community Justice Centres Act, 1983, No. 127, assented to 20th September 1983, New South Wales Legislative Council and Legislative Assembly.)

J. Improvements in training for neutrals.

Regardless of whether any limitations on entry are established, a strong case can be made for requiring continuing training and evaluation of dispute resolution skills. One good way of achieving that objective is to apprentice new practitioners to more experienced ones. Both court-based and community mediation services use such schemes routinely.

IV. PRINCIPLES

There is no single answer to what constitutes a qualified neutral or which of the policy options described is appropriate to ensure that those who practice are qualified to do so. SPIDR recommends the following central principles:

- A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;
- B. that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and
- C. that qualification criteria should be based on performance, rather than paper credentials.

A. No single entity.

1-2. Clearly, the dispute resolution field is a diverse one. Even though there are some skills that are basic, the knowledge and techniques required to practice competently may vary by context, by process, by issue, or by institutional setting. Different criteria also may be relevant to binding arbitration, non-binding arbitration, mediation (where neutrals do not give opinions), and ombudsmanship.

Skills may need to differ in situations with differing dynamics. Some disputes are between individuals; others are between organizations; still others are within an institution or agency. Some disputes involve two parties; others involve many. Some disputes may be more polarized than others; in some cases there may be the threat of violence. In some disputes the parties have never met before and are not likely to meet again; in others the parties have an ongoing relationship. Some disputes involve parties who are knowledgeable, experienced negotiators; others do not; still others involve amateurs negotiating with professional advocates. Some disputes are private matters; others must be resolved in the limelight of politics or litigation.

It may be important to avoid policies that would allow any one public or private body to establish uniform criteria for all neutrals, even for a single sector. Such uniformity could restrict the development of different dispute

resolution approaches and, if misused, could close the ranks of the profession to particular social or ethnic groups.

Thus, SPIDR recommends:

- Pl. Where criteria for determining minimum competence in different contexts are warranted, they should be established by a variety of agencies working in those contexts. No single entity should be relied on to certify general dispute resolution competence.

Public and private entities making judgments about appropriate qualifications should be guided by groups that include representatives of consumers of the services and individuals with expertise in alternative dispute resolution processes, as well as representatives of the sponsoring body.

B. Degree of choice.

3. In some cases parties voluntarily agree on a dispute resolution process and a mutually acceptable neutral. Although SPIDR encourages public and private dispute resolution programs to provide parties with the greatest possible choice of both process and neutral, the actual degree of choice afforded in different circumstances varies considerably. The Commission has identified three categories of relative choice by the parties:

- a. independent neutrals offering services to the public through a free market, or public or private institutions in which parties have full choice of process, program and neutral;
- b. public or private institutions in which parties have a choice of some, but not all, of the following: process, program and neutral; and
- c. public or private institutions in which parties have no choice of process, program or neutral.

If one of the purposes of efforts to ensure competent practice is to protect the consumer, different approaches may be appropriate depending on the degree of freedom or ability that the parties have to choose and thus to protect themselves. Thus, SPIDR recommends:

The extent to which qualifications for neutrals are mandated should vary by the degree of choice the parties have over the dispute resolution process, the program offering dispute resolution services, and the neutral. The greater the degree of choice, the less mandatory should be the requirements.

Based on this general principle, SPIDR suggests three basic strategies corresponding to the degree of choice by the parties:

4. First, SPIDR suggests that, despite its limitations, a free market should be relied on where parties have the opportunity to choose the process and neutrals themselves, so long as they are provided with complete and accurate information. Thus, for situations in which parties have free choice, SPIDR recommends:

- P4. No standards or qualifications should be required that would prevent any person from providing dispute resolution services, when parties have free choice of the process, program, and individual neutral, provided that the parties are given access to the following information about the neutral:
- a. prior training and experience relevant to the dispute resolution services to be provided;
 - b. personal and/or previous business relationships with the parties;
 - c. all financial interests that may have any bearing on the case;
 - d. all fees and expenses charged;
 - e. any code of ethics, such as SPIDR's Ethical Standards of Professional Responsibility, to which the neutral adheres;
 - f. personal bias which, if judged by an objective standard, would affect the individual's performance as a neutral; and
 - g. prior disciplinary action by any profession.

5. In practice, SPIDR recognizes that the parties have varying degrees of freedom to choose among dispute resolution processes, programs, and neutrals. Numerous circumstances exist in which parties are required to participate in mediation or arbitration. Even where the parties come voluntarily to a particular program, such as a neighborhood justice center they may be assigned a particular mediator or arbitrator or limited in the scope of issues to be negotiated or decided. Without intending to imply that such assignment necessarily leads to more poorly qualified neutrals, SPIDR believes that lack of choice by the parties creates a greater reason for concern about consumer protection and, therefore, a greater need for public scrutiny of the criteria used to select these neutrals.

Where parties have no choice of process, program or neutral, they have more difficulty protecting themselves against incompetent neutrals. This situation exists where parties are required to go to mediation or arbitration

prior to going to court, as is true under some state statutes involving disputed child custody, under typical court annexed arbitration schemes, and under some consumer warranty programs established pursuant to Rule 703 of the Magnusen Moss Consumer Product Warranty Act. The problem is particularly acute in the case of mandatory arbitration proceedings, in view of their binding effect. A somewhat comparable issue arises where brokers and their clients have "voluntarily" agreed to arbitrate any disputes in accordance with the standard provision of their form contract. Not surprisingly it is in these types of situations that legislatures and regulators have already taken the most active role to mandate specific qualifications.

Consequently, when the parties have no choice of process, program or neutral, SPIDR recommends:

Where courts, public agencies, or private organizations operate programs that do not offer the parties a choice of the dispute resolution process, program, or neutral to which the parties must go to engage in that process, standards or qualifications for such programs and neutrals should be set by an appropriate public entity (typically the legislature or its delegee), in accordance with the principles set forth in this document. Information about such standards or qualifications should be made available to the parties.

6. Finally, where the parties have a choice of some — but not all — of the elements of process, program, or neutral, the elucidation of a general standard to govern qualifications is difficult. SPIDR's recommended approach is to require programs offering dispute resolution services to disclose their selection criteria but not to tell them what criteria they should use. Thus, when the parties have some, but not complete, choice of process, program, or neutral, SPIDR recommends:

It is the responsibility of public and private programs offering dispute resolution services to define clearly the services they provide, to establish clear criteria for selecting intervenors and evaluating intervenor performance, to conduct periodic performance evaluations, and to offer the following information about the program and the neutral(s) to parties:

- a. the criteria used for selecting and evaluating neutrals;
- b. rules governing confidentiality;
- c. the neutral's prior training and experience relevant to the dispute resolution services to be provided;
- d. any personal or previous business relationships the neutral may have had with the parties;

- e. any financial interest of the neutral that may have a bearing on the case;
- f. fees charged, if any;
- g. any code of ethics, such as SPIDR's Ethical Standards of Professional Responsibility, to which the neutral adheres;
- h. its complaint mechanism; and
- i. personal or programmatic bias, which, if judged by an objective standard, would affect the individual's performance as a neutral.

C. Performance-based qualifications.

The question of what criteria should be used for measuring competence is relevant, whether the approach to ensuring competence is disclosure of relevant information by the neutral, disclosure by programs of their criteria for selecting and evaluating neutrals, or mandated public standards regulating dispute resolution practice.

7. The most common requirement that has been imposed by state legislatures to date is the possession of an advanced degree from some related profession or discipline, such as law or mental health. The Commission knows of no evidence that formal degrees are necessary to competent performance as a neutral. Indeed, there is impressive evidence that some individuals who do not possess these credentials make excellent dispute resolvers. Furthermore, the requirement of a graduate degree in any discipline clearly creates a significant barrier to the entry of many competent individuals into the profession. Thus, SPIDR recommends:

- P7. Knowledge acquired in obtaining various degrees can be useful in the practice of dispute resolution. At this time and for the foreseeable future, however, no such degree in itself ensures competence as a neutral. Furthermore, requiring a degree would foreclose alternative avenues of demonstrating dispute resolution competence. Consequently, no degree should be considered a prerequisite for service as a neutral.

8-10. SPIDR believes that performance criteria (such as neutrality, demonstrated knowledge of relevant practices and procedures, ability to listen and understand, and ability to write a considered opinion for arbitrators) are more useful and appropriate in setting qualifications to practice than is the manner in which one achieves those criteria (such as formal degrees, training, or experience). Thus, SPIDR recommends:

Training can be extremely useful in the practice of dispute resolution. It is one important way for neutrals to acquire relevant skills.

- P9. Any requirements concerning who can practice as a neutral should be based on performance. In establishing requirements, any certifying bodies or agencies maintaining rosters or lists of "acceptable" neutrals should emphasize the knowledge and skills necessary for competent practice, not the education or other method by which an individual acquired the knowledge or skills.

One goal of establishing standards should be to encourage and increase the diversity of practicing neutrals. Consequently, standards should be scrutinized carefully to avoid the exclusion of groups based on race, sex, age, handicap, nationality, religion, or sexual preference.

11. Clearly, if performance criteria are preferred to educational degrees, it is important to identify and measure the characteristics and capabilities that determine competence. While recognizing the difficulty of the task, the Commission believes that it is possible to test for competence and well worth the effort it entails.³ If performance can be evaluated, the way in which an individual achieves the necessary level of performance need not be a barrier to practice.

Performance-based testing is relatively new to dispute resolution but not to other skills (those of athletes and pilots, for example). To do it well can be time consuming, expensive, and subject to human error. Thus, it may not currently be feasible to expect all organizations or programs to rely on actual performance measures. As an alternative, experience can be a useful screening tool to identify those who can mediate or arbitrate and those who would benefit from further training. Criteria such as the amount and diversity of prior dispute resolution experience, the complexity of previous cases handled, and the amount and diversity of experience as a negotiator in similar cases all may be useful. Well designed training and apprenticeship programs, with significant personal observation and feedback, also may be able to provide an equivalent of competency testing. In addition, neutrals may improve their performance by seeking feedback from clients.

SPIDR recognizes that the inclusion or exclusion of particular performance criteria may depend on differing theories of dispute resolution. SPIDR recommends the following criteria as a starting point, based on current knowledge and practice, but encourages further discussion within the field:

³ Although additional work clearly is needed in this area, perhaps on a sector-by-sector basis, initial experiences with performance-based testing in court and community-based mediation programs have been encouraging.

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P11. Policy makers setting standards for those who may practice as a neutral, programs developing their own criteria for the neutrals they employ or include on rosters, and organizations determining relevant information to disclose to parties should consider the following performance criteria:

a. Skills necessary for competent performance as a neutral include:

General

- (a) ability to listen actively;
- (b) ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision making;
- (c) ability to use clear, neutral language in speaking and (if written opinions are required) in writing;
- (d) sensitivity to strongly felt values of the disputants, including gender, ethnic, and cultural differences;
- (e) ability to deal with complex factual materials;
- (f) presence and persistence, i.e., an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group of disputants;
- (g) ability to identify and to separate the neutral's personal values from issues under consideration; and
- (h) ability to understand power imbalances.

For mediation

- (a) ability to understand the negotiating process and the role of advocacy;
- (b) ability to earn trust and maintain acceptability;
- (c) ability to convert parties' positions into needs and interests;
- (d) ability to screen out non-mediabile issues;

ability to help parties to invent creative options;

- (f) ability to help the parties identify principles and criteria that will guide their decision making;
- (g) ability to help parties assess their non-settlement alternatives;

ability to help the parties make their own informed choices; and

ability to help parties assess whether their agreement can be implemented.

For arbitration

- (a) ability to make decisions;
 - (b) ability to run a hearing;
 - (c) ability to distinguish facts from opinions; and
 - (d) ability to write reasoned opinions.
- b. Knowledge of the particular dispute resolution process being used includes:
- familiarity with existing standards of practice covering the dispute resolution process; and
 - (2) familiarity with commonly encountered ethical dilemmas.
- c. Knowledge of the range of available dispute resolution processes, so that, where appropriate, cases can be referred to a more suitable process;
- d. Knowledge of the institutional context in which the dispute arose and will be settled;
- e. In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;
- f. Where parties' legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum; and
- g. Adherence to ethical standards.

12. The Commission does not believe that practice as an advocate necessarily disqualifies an individual from serving as a neutral. Indeed, such experience can be a useful way of acquiring some of the skills identified above. Consequently, SPIDR recommends:

PI2. Practice as an advocate should not, on its own, disqualify any individual from qualification to practice as a neutral. However, individuals practicing as advocates have a duty to disclose that fact to the parties.

13. Reliance on performance-based criteria for establishing competence (whether that be done through disclosure, voluntary memberships in certifying associations, mandatory standards, or other methods) implies that, once

qualified, an individual does not necessarily remain competent forever. Furthermore, criteria for qualification may change over time as the knowledge in this new field grows, thus creating a need for additional training. Thus, SPIDR recommends:

Neutrals, programs, and entities sponsoring neutrals have an obligation to continue to improve neutrals' competence through additional training, study and practice.

14-16. To the extent that training is relied on for establishing or measuring competence, the trainers themselves must be qualified. Thus, SPIDR recommends:

Programs or services offering training for neutral practitioners should establish clearly articulated qualifications for their trainers. Such qualifications should include the following criteria:

- a. the qualifications required to practice as a neutral in the area for which the training is offered;
- b. the ability to communicate clearly; and
- c. the ability to evaluate the performance of others working in simulated situations.

Trainers should provide appropriate feedback to both the trainee and the staff of the program or service for which the training program is conducted.

Where training is required as a condition of practice, programs have an obligation to ensure that there is adequate training to meet program goals and sufficient evaluation of the performance ability of each individual trained to permit screening.

V. IMPLEMENTATION

In those instances in which this report recommends actions by public bodies, the Society of Professionals in Dispute Resolution recommends that legislators, courts, and administrative agencies use these principles to guide the development of standards concerning qualifications for neutrals. SPIDR also urges that public and private organizations that employ neutrals or include them in rosters use the principles to guide their policies.

In addition, SPIDR recognizes the need for a continuing national effort to develop more detailed information on qualifications applicable to different groups of neutrals — using different processes, in disputes involving

different issues, and working in a variety of institutional settings. Further work also is needed to develop feasible methods for implementation of performance-based criteria in different sectors and to design appropriate enforcement mechanisms.

SPIDR looks forward to working with colleagues in other organizations, both public and private, toward the implementation of these recommendations.

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