CERTIFICATION: Designer Label or Home Grown

by Allen Church and Sheri Dawn Bryce

It has been said, and appears to be true, that one pays significantly more for a designer label in goods and service. Conversely, home-grown products and services function in the same manner. Certification is a designer label and is not necessarily determinative that a "certified" mediator is superior to one without certification. The above statement has lead to lengthy discussion and extensive work regarding the certification of mediators by SPIDR.

In 25 years will the ADR historians say: "It is a tragedy of mediation history that the expansion of the mediation community has been gained by the sacrifice of the intensity of professional bonds among mediators."

Certification carries both positive and negative baggage. The essence of certification is to assure reasonable competency of mediators to public and private users. This suggests the performance of mediators must be regulated and standardized through some form of certification process. All emphasizing the number one rule for **every** mediator, "do not harm" regardless of settlement or non-settlement of the case."

ADR may be the most meaningful, long-awaited bridge between law and other professionals"[1] ...and among other different professionals. But, beneath the surface of this certification dialogue in the ADR community, there is something destructive simmering. For example, the differences between trained and untrained mediators, between lawyers and non-lawyers, caucus and non-caucus methods, profit and non-profit organizations, binding and non-binding processes, and litigation versus community-based subject matters.

In 25 years will the ADR historians say: "It is a tragedy of mediation history that the expansion of the mediation community has been gained by the sacrifice of the intensity of professional bonds among mediators." The answer depends on one painful question that directly impacts certification: DO WE MAKE ROOM?

As a community, we certainly have the intellectual horsepower and physical energy to change the rules, or even the game, to make room. This is evident with the recent passage of principles for a Joint Code of Conduct for mediators between the American Bar Association, American Arbitration Association, and SPIDR. Nonetheless, the certification problem is reminiscent of a snake swallowing its own tail. What you get is a very confused snake! We do have a right to figure out what is confusing us by going through the healthy process of experimenting with what we are not.

One specific area which has received much criticism, pertains to the ethical rules and conduct of the mediator. Without certification, it is argued that there is no guarantee of a clear set of ethical standards and rules by which the mediator must conduct the mediation and themselves. This results in "bad" mediations done without a grievance procedure available to the users of the ADR processes. That poses a problem and a disparity between the non-lawyer and lawyer mediators because the lawyer mediator is bound by the Code of Ethics and Conduct of the respective State and Federal Bar Associations. Lawyer-Mediators must respond to a grievance before a sanctioning body when a complaint is filed. A grievance committee that can yank his ticket! Conversely, many non-lawyer mediators are not subject to any certification or grievance process at the present time. A non-lawyer who conducts a "bad" mediation may not be prevented from further mediating cases. While a disbarred lawyer would be at a distinct disadvantage in the "market," and would certainly lose all court or agency-referred mediations.

The question is what constitutes a qualified mediator? Who sets the standards that determines how they should be trained? "Forty hours of training" carries with it the question of **what** kind of training. "Table experience in 25 mediations with a 90% success rate," raises more questions than it answers. Just how are the public and professionals to know **what** to look for in a mediator?

The Society of Professionals in Dispute Resolution ("SPIDR") formed a Commission on Qualifications to review the **principles** which might influence policy determinations for setting the qualifications for alternate dispute professionals. In the 1989 Report three major conclusions were established:

A. Standards should be set where selection of the mediator is **other than market based.**[2]

B. Standards should be predominantly **performance based.**[3]

C. A **variety of organizations** should set the standards.[4]

These principles are quietly being filled.

Today, specific **standards** are now in working draft form within the Commercial and Qualifications Committee of SPIDR which should be finalized this year.

With all that said, a lawyer or non-lawyer must be able to communicate and process legal culture and

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terminology in order to be effective with lawyers who represent disputants. A mediator who approaches the context of the case as an outsider may be more creative and productive, because they are able to bring ideas and thoughts to the mediation from areas other than the laws. Conversely, a non-lawyer may be lost in complex evidentiary and procedural aspects that control a particular dispute, or the interpretation of a complex or novel substantive issue. For example, if a dispute turned on whether a critical document was admissible in trial, not only would a lawyer-mediator be desirable, but one that clearly knew how to brief and understand the practical application of the local and jurisdictional Rules of Evidence.

Certification of commercial mediators appears on its face to be unnecessary for there are many people who are competent, knowledgeable and highly-skilled in the business arena that can mediate effectively. In the commercial field, mediation deals primarily with business, mostly with some form of underlying insurance coverage. The boundaries of the mediation are geared to these subjects and generally focus around business - insurance - legal issues. Someone with a business background may be better suited to handle a commercial mediation than someone with a certificate naming them a "certified mediator," if and only if that person is acceptable to both disputants and their lawyers.

Commercially, business and insurance companies are looking for effective Sultans of Swap that have a nose for business, whether designer label or home grown, lawyer or non-lawyer.

The one thing setting standards for certification would do for commercial users is to help them find a good mediator; "for it does not help to have a highly competent commercial mediator if an uninformed user cannot identify them."[5]

Although certification is questionable, we can say that "SPIDR membership is a credential"[6] known throughout the world.

But, we will all die if we keep pulling up the flowers to see how the roots are doing.

End Notes

1. Professor Marty Leewright, M.A., J.D. University of North Texas.

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Family Mediators Moving Toward Competency Based Certification

by Zena D. Zumeta

Currently no national certification exists in the family mediation field. Many states certify family or divorce mediators for court referrals. However, most "certifications" focus on training hours, professional degrees, and sometimes hours of mediation experience. None has used any means of assessing the competency of a mediator in order to certify them either at the entry or master level.

For approximately the past five years, the family mediation field has been considering the idea of a voluntary national certification program. The Academy of Family Mediators spearheaded the effort after a survey revealed that establishing a national certification program was one of its membership's highest priorities. The interest in such a certification exam comes from a variety of groups, including private entrepreneurial mediators interested in a way to market themselves to the public, court services interested in a method of hiring mediators, and state court systems interested in measuring the competency of mediators with whom they contract or refer cases to.

Following the publication of the report of the SPIDR Commission on Qualifications, the Academy began to focus on a competency-based examination rather than just a paper and pencil "knowledge" examination. The SPIDR Commission began the work of looking at what "competencies" mediators need in order to be effective. A certification exam would need a clear basis in these competencies. It is unclear whether a test would evaluate minimum qualifications to practice, which would interest many courts and organizations, or whether the test would be set at a "master mediator" level.

A competency-based examination could be very expensive to administer since the examiner(s) would need to observe actual mediation scenarios. In addition, it could be very examiner-intensive and subjective if the "clients" play their parts differently with different mediators. Therefore, one possibility being considered is using clear scenarios on videotape with different outcomes based on mediator responses to the videotaped client behavior and client responses to mediator interventions.

In 1992, a Consortium was formed to work with HumRRo, a research and testing organization to look

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Time for Flak Jackets

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What do we do when counsel for one of the parties says they want to continue alone? Sometimes we may agree and compliment the lawyer on his or her sensitivity to the situation. But, if we feel that this would be a disastrous course, we must put forward our views no matter how uncomfortable the situation, because we owe the parties our best service. Our feedback must occur in a way that is not manipulative and leaves the listener free choice, unweighted by guilt, to do what he or she pleases. Perhaps we know that further discussions might not take place at all without us. Perhaps we are aware of a power struggle on one or another side that would be adversely affected by our absence. Perhaps we are more aware of the client's feelings than the lawyer is. Here's an example.

Two older women executives, both long-term employees, sued a company in Chicago for sex and age discrimination. Both the women and the company seemed agreeable to their remaining with the firm. In the first day of mediation, efforts to re-establish viable terms for this continued employment failed, and it appeared that the settlement must include their departure despite their highly valuable contributions to the company. By the end of that day, they insisted to their young lawyer that the situation was now intolerable and that they wanted out of there as quickly as possible. They said their relationship with the manager of their facility, one of the negotiators from the company, had been destroyed.

The women lashed out at the mediator, complaining about the lateness of the hour and stating it was a company ploy the mediator had fallen for. The first session ended on this note. The women's lawyer believed further mediation would be unproductive, so he telephoned the mediator a few days later to advise him that they would continue alone.

The mediator knew the company was unlikely to be willing to negotiate outside of mediation. He also knew that the facility manager had been the one most resistant to moving into settlement territory. He was able to convey to the women's lawyer his opinion that abandoning mediation would strengthen that executive's hand. The lawyer talked again with his clients, whose wrath had softened in the few days since the first session. The mediation was allowed to continue for a second day, resulting in a settlement which satisfied all parties. At the end, the women told the mediator, "You're really okay."

Minimizing dissatisfaction during the mediation heads off much of the opportunity to displace anger onto the mediator. Techniques include:

- being considerate but not solicitous;
- keeping people apprised of what's going on when they are not participating;
- assuring that food and drink are provided at appropriate times;
- anticipating when additional inputs from documents or witnesses will be needed so people have time to assemble them;
- acknowledging feelings of frustration and anger as they are detected; and
- giving the parties a chance to deal directly with problems and, where appropriate, rein forcing problem-solving attitudes.

If the mediator is able to walk with the clients without accepting their baggage, a high likelihood exists that the parties will reach their goals. ❑

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2. The authors read this to mean, that if the parties are not free to select a mediator, a "market place" check on quality control is removed and should be replaced by other safe guards. As the ultimate sanction for a bad mediator in the market is **no further use in the future**.

3. The SPIDR Consortium is presently developing a performance-based test for family mediators.

4. See Joint Code of Conduct by ABA, AAA, and SPIDR.

5. Professor Mary Leewright, M.A., J.D., University of North Texas..

6. W. Richard Evarts, President of SPIDR ❑

Allen Church is a member of the SPIDR Editorial Board and co-chair of the Commercial Committee; Sheri Dawn Bryce contributed substantially to research.