A Call for a National Dialogue on the Establishment of Training Standards for Mediators

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The entire legal profession – lawyers, judges, law teachers – has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflicts. For many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Chief Justice Warren Burger, 1981, State of the Judiciary Address

Chief Justice Burger’s famous quote of 25 years ago has inspired a whole generation of thinking and activity in the alternative dispute resolution (ADR) field. A paradigm shift is by now well underway, and mediation is considered today to be a viable and accessible alternative to litigation.

While mediation is no longer in its infancy, it is safe to say that troubled adolescence has arrived. On the verge of full-professionhood, so to speak, it is time to take a thoughtful look at what the profession is, and what it means to be “a professional mediator.” As mediation is established niche by niche across the country in courts and in the private sector, legitimate questions are being raised about standards and competency of mediators. Who should mediate? Who should not? Who decides? What consequences should there be for incompetence?

The critical need for this discussion among those who practice is accentuated by the legitimate fear that if we don’t decide these things for ourselves (in the spirit of mediation, the empowering process that requires accountability and responsibility on the part of our clients), someone else will. We cannot afford another ‘surrogate’ profession to set the standards and inform the consumers. For years, national groups have discussed and come to consensus on many elements of mediation. The Uniform Mediation Act is wending its way through state legislative bodies and it is time to grow up.

“Growing up” means accepting the responsibilities of adulthood. In our profession, it means clarifying who we are and what we do – distinguishing mediation from other honorable and important processes in a way that makes clear to users and funders what they are “buying” when they choose mediation: that when they pay for an apple they are not getting a pear.

We believe that mediators should be the ones to establish mediator standards and enforce the guidelines that are essential to practice.

Why Standards?

First, consumers of mediation need protection. They have a right to know how to find a qualified mediator, and they deserve some assurance that mediator qualifications have been established by those who understand mediation both in theory and in practice. Just as consumers want plumbers and surgeons who know what they are doing – not just plumbers or surgeons who may have read about their fields – consumers need some assurance that mediators know

what they are doing. Moreover, if there is dissatisfaction with a mediator's performance, the consumer has the right to seek redress. Most professions have a self-policing mechanism in place to address these concerns. Mediation does not.

Second, mediators themselves need protection– assurance that they have the right to represent themselves as qualified practitioners, and that they will continue to be protected by the rule of confidentiality. The reality is, though, that if mediators do not protect themselves by establishing credible and defensible standards of performance, they can expect outside regulation to do what they have failed to do. 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.

California State Senator Joseph Dunn, Senate Judiciary Chair, addressed these issues in comments made to a meeting on May 16, 2005 in Sacramento of the Board of Directors of the California Dispute Resolution Council (CDRC). The Senator cautioned CDRC that consumer complaints could lead the state legislature to look at current oversight mechanisms in place. If none existed, the legislature would most likely feel compelled to draft legislation regulating the practice of ADR.

The First Step: Training Standards

Issues similar to those cited by Senator Dunn have been on the table for the National Conflict Resolution Center (NCRC) for many years and were the core reasons for the establishment of NCRC's well-received mediator credential in 1993. It is heartening that today our best ADR thinkers and leaders are intensifying their attention to these issues as well. For example, the American Bar Association Section on Dispute Resolution is currently encouraging the development of model standards for the training of mediators nationwide. NCRC supports this logical, feasible step towards establishing quality assurance in the practice of mediation. We call for a national dialogue among mediators to establish training standards.

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We believe that the following principles should underlie any discussion of establishing training standards:

1. The discussion process should mirror mediation. It should be inclusionary and involve representation from all sectors of the community of mediators – those who work informally in community centers, those who work in the commercial sector, and those who work within the justice system.

2. The training curriculum recommended should include both theory and practice tips as well as opportunities for being observed and critiqued. In other words, academic courses alone do not guarantee the development of mediator skills. The courts of California officially recognized this twenty years ago when California's Dispute Resolution Programs Act of 1986 was enacted. At that time, 10 hours of standard classroom time was a minimum recommended in a 25-hour course that was also expected to include roleplays and other opportunities for skill development.

3. Trainers, themselves, should have significant experience as mediators. In other words, they should be individuals who have actually conducted mediation sessions and dealt with "real" people with "real" conflicts.

We submit that at this stage of the dialogue, it is wise to separate a discussion of mediation training standards from a larger discussion of mediator certification. With the wide variety of subject matters addressed in mediation and the broad range of processes and types of cases that fit under the umbrella term "mediation," it is not difficult to understand that practitioners are afraid of any method of certification that would purport to apply to mediators practicing all types of mediation. How can the standards for a parent/teen mediator in a community setting be the same as a retired judge working as a mediator to help parties understand the complex risks and consequences of pursuing a specific legal direction in a particular case? A "one-size fits-all" approach is threatening to many. Clearly, any attempts at certification of mediators would have to allow for different models, styles, and approaches that are well accepted within the field.

Before the dispute resolution field attempts to certify or license mediators, the field would be well served by ensuring that those who are going to call themselves "mediators" have had training that would include all of the required

ethical and professional standards for any approach to mediation. Practitioners should be able to agree on certain ethical requirements and standards of practice that are applicable to any type of mediator or mediation approach. Such standards have been defined already by the Society of Professionals in Dispute Resolution (SPIDR) (now the Association of Conflict Resolution), the American Bar Association, and various other dispute resolution organizations. For example, neutrality, demonstrating respect for the parties, balance, maintaining an environment in which parties don't feel personally attacked, etc., are all generally accepted standards of practice for mediators, no matter who the parties are, or what specific issues are being mediated or mediation model utilized.

Developing a Training-Focused Mediation Credential

We have not made the points above in a vacuum. Our context is the accumulated experience from thirteen years of administering the NCRC mediator credential which leads us to conclude that comprehensive training is essential to the development of demonstrable mediator competency.

In 1993, NCRC, known then as the San Diego Mediation Center, went out on a limb by designing and marketing an elective mediator credential. At that time there was widespread debate in the ADR field about standards for mediator competency, who should define those standards, and how mediator competency could be realistically assessed. There was particular debate around the feasibility of using a performance-based skills evaluation. That debate continues today, but NCRC's experience is clear evidence that competency CAN be trained and evaluated.

Over a period of six months, an 11-member working group representing the spectrum of San Diego's ADR community (law professors, private practitioners, associations of mediators and agencies such as the AAA and NCRC) met weekly to develop by consensus a model credentialing program. The group reviewed the best research and information on mediator competency produced in the preceding ten years by academics and mediators across the United States (including the work of the SPIDR Commission on Qualifications) as well as the substantial empirical date produced during the first decade of NCRC's existence.

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Although members of the working group represented different mediation styles and training backgrounds, they were able to reach consensus on certain core decisions used to design a new mediator credential model:

- a particular educational background or experience in other professional fields would not be used as a measurement of mediator competency;
- it is possible to identify the distinct generic strategies, techniques and skills that competent mediators use no matter what their model or style of mediation; and,
- live performance evaluation is an essential indicator of mediator competence.

Once designed, the new credential model was circulated in early 1993 to the academic community across the country during a six-month pilot program. It was also presented that year at the National Committee on Peacekeeping and Conflict Resolution (NCPCR) workshop in Portland, Oregon. Minor revisions and refinements were made, and NCRC's Credentialing Program and Implementation Guide was launched officially in the fall of 1993.

We Designed it But Did They Come?

When we first offered the credential in 1993, we had no idea how much interest there might be in this new measurement of mediator competence. It was voluntary. It was new. It was difficult. It cost money. Now, thirteen years later, we can report that interest in the credential has been surprisingly steady from the beginning. In fact, the program stays full, and there is usually a waiting list.

Here are the enrollment numbers: a total of 320 mediators have enrolled in the program with 220 successfully completing all requirements of the curriculum, or roughly two-thirds of those enrolled. Of the remaining 100 candidates, approximately 50 withdrew before successfully completing the requirements. Reasons for withdrawal include scheduling conflicts, lack of progress in skill development, and financial issues. Twenty were unsuccessful in passing the final performance evaluation. Thirty candidates are currently completing the curriculum.

Who are the Candidates?

Most of the San Diego enrollees have been residents of the greater San Diego metropolitan area. A handful of candidates have commuted from other parts of

the state or from other states. Another handful has come from Europe for a concentrated San Diego stay to fulfill curriculum requirements.

Candidates have come from a variety of backgrounds and disciplines. Most have college degrees. About one third are lawyers. Other professions represented include human resource professionals, educators, law enforcement, engineers, and therapists. In addition to seeking the credential as a means of gaining mediation experience, other motivations include desire for credibility, preparation for a career change, and passion for anything related to mediation.

Many candidates become active mediators on various NCRC mediator panels after they have successfully completed the credential, although the credential is not a pre-requisite for mediating for NCRC. On balance, our credentialed mediators are the best trained and most confident mediators that we have, and they have greatly enriched the quality of our client services.

Elements of the NCRC Credentialing Curriculum

The NCRC Mediator Credential offers a practical, methodical approach to acquiring entry level mediator skills. There are three consecutive components in the curriculum: 1) training, 2) experience, and 3) a final performance evaluation. Most credentialing candidates enroll with the NCRC Training Institute for all three components, although the training and experience components can be acquired elsewhere. While we describe the entire curriculum below, it is only to provide a "big picture" perspective that training does not end with a particular seminar or course of a prescribed number of hours; rather it continues for many months as new mediators learn their craft. However, the goal of this paper is to highlight the importance of reaching consensus as professionals on the fundamentals of the foundational piece of training—the introductory course.

1) Training: 32 Hours

Why do mediators need training? The answer is not obvious to those outside of our profession. Many think that surrogate professional experience equals training and that reasonably intelligent people can automatically mediate disputes in their field of expertise. What generally happens, however, is that untrained mediators wind up being benevolent arbitrators. They think, for example, that because they are "nice," that they are mediating, or that because they know the law in a given area, that they are mediating. Only mediation training teaches the often subtle distinctions between skillful mediating and other problem solving approaches.

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The training component of the NCRC credential was originally set at 25 hours of introductory mediation skills training taken within two years of applying for the credential. This training threshold met the standards established by the California Dispute Resolution Programs Act of 1986 as the minimum required for persons conducting mediations funded under that Act. In addition to a minimum number of training hours, the Act prescribes a very general curriculum that includes skills and conflict resolution theories to be taught in both classroom lectures and role plays. These standards are set out in Section 3622, Title 16, California Code of Regulations, Orientation and Training of Neutral Persons.

In 2001, we increased the minimum training requirement to 32 hours as a more realistic, though still modest, training threshold. NCRC's standard introductory mediation skills training (which is offered to the public four times a year), or an equivalent interactive mediation training elsewhere can fulfill this component. There is no other educational requirement, and the credential is open to practitioners from all backgrounds. Candidates who enroll in NCRC's introductory mediation skills training receive an intensive four-day skill building course that teaches NCRC's classic six-stage facilitative mediation process through a combination of lectures, simulations, and participatory exercises. This training fully complies with, in fact exceeds, the standards for training required by the California Dispute Resolution Programs Act. The curriculum includes conflict theory, stages of mediated problem solving, issue analysis, balancing power, managing the negotiation, strategic communication skills, handling emotions and impasse, mediator ethics, drafting agreements, the role of attorneys and advisors, mediation models, and barriers in negotiation.

2) Experience: 2 Observations, 8 Mediations

As mentioned earlier, a training class alone does not guarantee competence as a mediator. Experience in mediating actual cases is essential to practicing and developing skills and acquiring confidence. The original credentialing model established an experience requirement of two observations and six mediations (either solo or co-mediations). A simulation may be substituted for one of the mediations, but the rest must be actual cases. In 2001 the mediation requirement

was increased to eight mediations, bringing the credentialing curriculum in line with the experience standards required by the San Diego Superior Court's pilot mediation program.

The majority of candidates enroll with NCRC for their full mediation training experience, although candidates who have already completed the threshold amount of experience on their own may apply for the evaluation component only. Candidates who have completed the NCRC introductory skills training must receive a recommendation from an NCRC trainer to apply for the experience component. Candidates trained elsewhere are screened for compatibility with the NCRC mediation process, because during the experience phase they work with senior NCRC mediators and actual NCRC clients.

NCRC's large community mediation division supplies a steady stream of cases where a credentialing candidate can be assigned to a "student seat" as observer or co-mediator with a more experienced mentor mediator. Maximum exposure to a variety of mentor mediators and case types is the goal. Cases assigned include landlord-tenant, neighbor-neighbor, consumer-merchant, Small Claims Court, interpersonal, and parent-teen. The experiential component usually takes six to twelve months to complete. It includes not only observations and co-mediations but also consultations, feedback, and ongoing monthly roundtables – an average of at least thirty hours of supervised mediation experience.

For many candidates, the experiential component is the most compelling reason to enroll in the NCRC credential program. First of all, finding cases to mediate is a daunting prospect for most new mediators who literally cannot fulfill the experiential requirements on their own; they do not yet have reputations or referral sources to create a stream of business. Additionally, new mediators need the skill building and confidence building benefits of the intense mentoring and supervision that NCRC provides. Guidance and support can range from how to deal with parties who show up unexpectedly at a mediation to holding an impromptu strategy session regarding how to break an impasse in a mediation session underway in the next room.

Needless to say, from an administrative standpoint, the experiential component is by far the most labor intensive aspect of the NCRC credential. Increased emphasis on the importance of mentoring has expanded this phase well beyond the goals envisioned in the original credential model.

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We recognize that not all programs are in a position to offer large numbers of cases but we encourage the mediation community to think creatively about ways to make real conflicts and mentoring available as part of the training experience after an initial intensive introduction.

3) Performance Evaluations: Live Simulation

The final component of the credentialing process is a live performance evaluation. The credentialing candidate mediates solo in a simulated mediation session with professional actors playing disputant roles. Two evaluators, both credentialed mediators themselves, observe the demonstration and complete an evaluation instrument that results in a final grade with written comments. Candidates who fail to receive a passing grade may sit for the evaluation again after an opportunity for remedial experience and coaching. A formal coaching session mid-way through the course gives candidates an opportunity for early feed-back and preparation for the final performance.

The final performance evaluation instrument was designed to reflect the best scholarship available in 1991 on the subject of mediator standards. Particular weight was given to the research and writings of noted social scientist Christopher Honeyman who had identified seven "parameters of effectiveness" of court mediators in his article "On Evaluating Mediators," 6 Negotiation Journal 23, 27 (1990). Honeyman's seven criteria were investigation, empathy, inventiveness and problem-solving, persuasion and presentation skills, distraction, managing the interaction, and substantive knowledge. He also made the case that mediation skills could be defined and tested.

The Credentialing Consensus Group concluded 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 evaluation instrument in a live performance. An evaluation instrument was developed to grade these universal characteristics of competent mediators.

There are three categories of skills designated in the evaluation instrument. Eighteen distinct skill sets or behaviors are noted under process skills or communication skills. Process skills measure a mediator's ability to conduct a complete mediation process in a limited period of time. Communication skills

measure a mediator's competence in handling the "human" interaction. The third and final category, agreement writing, was added to the evaluation instrument in 2001.

As the mediation community moves forward in establishing national norms and standards, we urge a creative dialogue on ways to provide evaluation opportunities that benefit both practitioners and clients. Through years of offering the NCRC credential program, it is also apparent that while the performance evaluation component is of great importance, individuals who scored highest during the evaluation had the best foundation and the best foundation is training. The NCRC performance evaluation was designed on the premise that skill sets can be taught. Minimum proficiency should be expected of students emerging from training programs. The training programs, themselves, should be organized to include specific opportunities for developing the skills, because we owe our students standards by which to measure improvement.

Conclusion

When the NCRC Mediator Credential was developed in the early 1990's, the mediation field then was likened by many to the "wild west" in terms of uncertainty, change, and lack of regulation. Nearly a decade of debate at gatherings across the country convened by SPIDR, the National Institute for Dispute Resolution (NIDR), and NCPCR and others had not yet produced a definitive national initiative for the credentialing of mediators. Against this backdrop, market realities were beginning to demand practical standards for measuring mediator competence. Similar concerns exist today as Senator Dunn's comments cited above make clear.

It is interesting to note that many of the concerns that motivated us in 1993 to launch this mediator credential were political in nature. We needed to strengthen our position in a shifting political landscape. We were concerned that the new field of ADR might be shaped by outside influences if we, the insiders, did not step up to the plate and define ourselves

Though still a concern, the political landscape is clearer now, and ADR has found an increasingly stronger voice throughout the country. Our focus now should be squarely on quality assurance and bringing the best practices of the past decade to bear on defining standards for ourselves.

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We are the second generation of ADR professionals. We need to come together and establish mediation training standards that meet the needs of our increasingly sophisticated and diverse world. We need to demonstrate that, as a field, we have grown up, we can take care of ourselves, and we can meet today's challenges. If we don't, the consequences are real: loss of legal protections; loss of public confidence; and, a poorer choice of available options for people in dispute.

NCRC welcomes others to join us in this critical national dialogue.

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The National Conflict Resolution Center (NCRC) is a not-for-profit corporation that provides mediation, arbitration, facilitation and training for community, business and legal clients. Using a wide range of alternative dispute resolution techniques, NCRC works with individuals and corporations to resolve disputes through non-adversarial means. With more than 20 years of experience and over ten thousand cases resolved, NCRC has come to be recognized as an international leader in mediation instruction and conflict resolution. For more information, visit www.ncrconline.com.

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