Alternative Dispute Resolution Section of the American Bar Association
Task Force on Mediator Credentialing

Final Report

In October 2011 the Council of the ABA's Alternative Dispute Resolution Section created a Task Force to recommend whether the Section should adopt a policy concerning credentialing of mediators. The Task Force offers the comments and recommendations set forth below.

Background. Mediator credentialing is an evolving and sometimes controversial field. Many private organizations and some public courts and agencies in the United States offer forms of credentialing or certification, for example by establishing requirements for membership on mediator panels. There is, however, no nationwide system of credentialing, and states and local organizations have reached different conclusions as to its desirability.

Internationally there appears to be a growing interest in credentialing. In recent years private organizations such as the International Mediation Institute of the Hague have created credentialing systems and some European governments have adopted systems to qualify and monitor court-connected and/or private mediators.

The question considered by the Task Force was whether the ADR Section should adopt a policy on this issue and if so what it should be. It should be noted that the issue is not whether the Section itself should provide credentialing services, but rather whether it should support such initiatives by others.

Task Force members reviewed literature and interviewed leaders of domestic and international organizations and experts from states and court systems with different approaches to credentialing. Due to the complexity of the issues raised by credentialing, the Task Force's recommendations are nuanced.

What does "credentialing" mean?

The Task Force agrees that at its core, mediation is a process that includes a mediator, not affiliated with any of the parties, who facilitates the parties' communication and negotiation in a procedurally just manner and helps the parties reach an entirely voluntary agreement. Beyond this general statement, however, there appears to be no common understanding of what a credential means in the context of mediation, either domestically or internationally, or what mediators should specifically be required to do or to demonstrate to obtain a credential.

Most if not all private organizations and court systems which maintain panels of mediators require that members complete a training program. Some provide a credential, or certificate, to anyone who completes training and meets other qualifications, without requiring them to demonstrate specific competencies. Other organizations require candidates to demonstrate specific skills through a testing process. Still others emphasize provision of information, requiring mediators to provide client assessments which are made available to potential users.

The most demanding credentialing programs reviewed by the Task Force require:

- Completion of a training program, typically 30 to 40 hours in duration, which includes significant roleplaying,
- Observation of one or more actual mediations,
- Experience as a co-mediator in one or more actual mediations, and
- An assessment process in which the candidate mediates a roleplayed dispute and is graded on skills by persons knowledgeable in mediation and the assessment process.

What does "competence" mean in the context of mediation?

For a credentialing organization to certify that a mediator possesses certain skills or knowledge requires that the organization define what a successful candidate must demonstrate, and be able to assess whether the candidate has done so. Most Task Force members believe that the mediation community has not reached a consensus concerning a single body of skills and knowledge that skilled mediators must possess, even within a specific subject area, making it difficult or impossible to carry out such an assessment.

Some members of the Task Force believe that while there is no consensus on a single body of mediative skills or knowledge, distinct schools or styles of mediation, for instance "commercial" and "transformative" mediation, have or could arrive at such a consensus for a particular school or style.

Is there a need for credentialing?

Does credentialing have substantive value, either for attorneys and parties who choose mediators, or for neutrals seeking to develop their competence or practice? Task Force members were divided on this issue, with no one expressing a strongly positive or negative view. Some members believe that credentialing can be helpful to users and/or mediators, while other members do not. This may reflect that, as noted, "credentialing" has no precise meaning.

Task force members agree that the need for credentialing is likely to be strongest in certain settings:

1. When a court or public or private entity requires disputants to use, or sponsors or refers disputants to, specific programs or mediators.

Some court systems and public agencies mandate that parties go to mediation through a specific program as a condition of obtaining a hearing. Others sponsor programs or refer disputants to individual mediators, for example by maintaining a panel of approved neutrals. In such situations disputants may reasonably believe that the court or agency has endorsed the competence of the program or providers. When this occurs, courts and agencies have a responsibility to ensure that the program and neutrals in question are competent. Certification is one method to accomplish this.

2. When disputants enter mediation who are not knowledgeable about the process or the qualifications of individual providers and do not have counsel capable of advising them. Examples of areas in which this may be especially true include marital, small claims, housing, community and foreclosure cases and, more generally, disputes in which one or both parties do not have access to a lawyer. Such "one-time players" often do not have the knowledge or sources of information needed to choose a competent mediator.

3. When lawyers and other professionals who choose mediators do not have a good understanding of mediation or find it difficult to identify competent mediators in a particular field or geographic area. This may be true, for instance, in regions of the world in which legal mediation is not widely used or well-known to lawyers and the public and potential users cannot evaluate the competence of mediator candidates. In such circumstances certification might be of assistance to users, as well as to mediators wishing to develop their practice.

Task Force members were divided on two points.

1. Some members believe that certification may also be helpful in disputes within the United States in which the parties are represented by lawyers, but counsel does not have sufficient knowledge or resources to identify competent mediators. Examples include smaller tort and contract cases and marital disputes. A majority of the Task Force did not express an opinion about this.

2. A majority of the Task Force believes that in large civil disputes, in which mediators are selected by experienced counsel or other professionals such as insurance adjusters, there is no significant need for credentialing. Such situations, the majority believes, involve repeat users who typically have access to substantial information about candidates and would not find credentialing helpful. A minority believes that even experienced lawyers and other professionals are often not familiar with individual candidates or with the different qualities needed to mediate effectively in different circumstances, and as a result also sees a useful role for credentialing in such disputes.

What should an effective credentialing program include?

The Task Force believes that to be effective, a credentialing program should satisfy the following guidelines. It should:

1. Clearly define the skills, knowledge and values which persons it credentials must possess. Without a clear definition of the skills, knowledge and values a credentialed mediator must possess, credentialing organizations cannot assess whether a candidate possesses them and disputants cannot know what weight to place on a credential. Such definitions should be tailored to a specific form of mediation (family, large commercial, small claims, transformative, etc.) for which the credential is issued.

2. *Ensure that candidates have training adequate to instill those skills, knowledge and values.* To acquire mediative skills, most if not all candidates require a training program. A task force of the Association for Conflict Resolution recently issued a report on this topic. Such training should include:

a. Substantial instruction, including experience acting as mediator in roleplayed disputes of the kind for which the candidate seeks credentials.
b. Observation of one or more actual mediations.
c. Experience mediating one or more actual cases as co-mediator with a credentialed mediator.

3. *Be administered by an organization distinct from the organization which trains the candidate.* It is problematic for the same organization both to charge for training and to assess whether its training has been successful. Such dual roles produce a potential conflict of interest. For the same reason that law schools are not permitted to decide whether their graduates will be admitted to the bar, training programs should not be in the position of judging whether their services are effective.

4. Have an assessment process capable of determining with consistency whether or not candidates possess the defined skills, knowledge and values.

The Task Force believes that for credentialing to be credible it must be based on a determination whether a candidate has acquired the skills, knowledge and values that comprise the credential. This requires a testing process based on specific criteria and a consistent method of evaluation.

5. *Explain clearly to persons likely to rely on its credential what is being certified.* Credentialing is justified in large measure by the difficulty that some users have in choosing a competent mediator. For this reason a credentialing program should explain in a clear and understandable manner, to the persons expected to rely on its credential, the skills, knowledge and values its mediators possess. Organizations should make clear in particular whether a credential signifies that a mediator has attained a given level of competence and experience, or simply confirms their attendance at a program, and should describe the form, school or style of mediation the organization is certifying.

6. Provide an accessible, transparent system to register complaints against credentialed mediators. Promptly and fairly investigate complaints and, if appropriate, de-credential a mediator who fails to comply with standards.

Not all credentialed mediators can be expected to display in practice or retain over a career the skills and values required by their credential. Credentialing organizations must have an accessible and transparent mechanism to receive complaints about their mediators. A majority of the Task Force believes organizations should have a process to monitor the performance of credentialed mediators, such as periodic requests for feedback. A minority believes such monitoring is not feasible.

A majority of the Task Force believes that when a complaint is received the organization should have a process to promptly investigate and fairly assess it and, if appropriate, de-credential mediators. A minority believes that at least when users of mediation are "repeat players" such as multi-national corporations, it is sufficient that the substance of any complaints is made available for consideration by potential users.

What should a credentialing system not do?

Credentialing can serve a useful purpose by helping users, especially those who lack experience with mediation, to identify neutrals with basic skills and competence in a particular style of mediation. However, it is also true that a key strength of mediation as a process and a field is its openness to new techniques and approaches, and its commitment to self-determination for disputants.

The Task Force is concerned that credentialing not operate to exclude new methods of resolving disputes or persons with non-traditional backgrounds, or more generally to constrain the evolution and growth of mediation as a method of dispute resolution. Nor should credentialing have the effect of preventing informed disputants from selecting a mediator of their choice. The Section should therefore not support credentialing systems that:

1. Operate as mandatory licensing. Credentialing should provide information about prospective mediators and/or a signal of quality, and organizations should be able to require members of their panels to satisfy requirements. Credentialing should not, however, operate as a de facto licensing system that bars non-credentialed persons from practicing as mediators generally.

2. Bar non-lawyers from becoming credentialed. Effective mediators possess a variety of qualities, some of which are not taught in traditional legal education. Disputants benefit from the opportunity to select mediators with training and experience in fields other than law. Credentialing programs may place value on legal and other academic training, but should not bar non-lawyers from obtaining credentials on *de jure* or *de facto* basis.

3. Bar disputants from selecting a non-credentialed mediator. Self-determination is the first principle of the ABA's Model Standards of Conduct for Mediators and the essence of the process of mediation. It follows that if disputants knowingly decide to select a non-credentialed person to mediate their dispute, they should be able to do so. Thus if courts or other organizations require mediation and/or provide the names of approved mediators to disputants, they should also allow disputants to select non-credentialed mediators by informed, arms-length agreement.

Is there sufficient demand to support an effective credentialing system?

A strong credentialing system as outlined above requires substantial resources to operate. As one example, the National Conflict Resolution Center based in San Diego currently charges candidates $3,500 to $4,000 for participation in its certification program.

If the parties and attorneys who select mediators strongly desired strong credentialing programs, they could demand public funding to pay the cost. Alternatively, if mediators believed credentials were sufficiently valuable, either for personal growth or marketing purposes, they could fund such programs through user fees.

At present, however, neither users nor neutrals in the United States show sufficient demand for mediator credentials to fund a strong credentialing system. The Task Force does not express an opinion about whether sufficient support for such programs exists outside the United States.

Should the Section support mediator credentialing?

The Section should support local initiatives and innovations in the field of credentialing, provided they meet the guidelines set forth in this report. Given, however, the lack of a consensus at this time about the attributes of the mediation process or a process for determining competency, the Section should not support creation of a single nationwide credentialing system.

The ADR Section Task Force on Mediator Credentialing

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Note: Affiliations are provided for identification only; they do not indicate endorsement of the findings or conclusions of this report by the listed organizations.

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