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Certifying ADR Providers

By David A. Hoffman[1]

The emergence in recent years of alternative dispute resolution (ADR) as an integral part of our public justice system has brought with it considerable debate about whether ADR providers should be certified.[2] Many providers are wary of certification because they do not believe that there is sufficient consensus on the relevant standards and qualifications. They fear that certification will stifle the creativity and flexibility of ADR processes. Many are also concerned that regulation of the ADR field -- the pioneers of which have included people from many walks of life -- will turn it into the exclusive realm of attorneys or others with advanced degrees.

I share those fears and concerns. And, given the costs of establishing a system of certification (and they could be substantial), the uncertainties (who will do the certifying? will experienced ADR providers have to be "re-trained"?), and the psychological disincentives (neither the evaluators nor the evaluatees look forward to the process), it is not surprising that there has been no headlong rush toward certification.

Yet there are many reasons to consider the adoption of certification for ADR providers. Proponents of certification point, first and foremost, to protection of the public as the rationale for certification. Individuals who are not represented by counsel may be particularly at risk when they submit a dispute to mediation or arbitration; they may not realize that a mediated agreement or an arbitration award will be binding on them, and they may lose important rights in the process. Even individuals who are represented by counsel may find that their lawyers know little about ADR, a subject which, until recently, was taught in few law schools and even today is not included in any bar exam. Certification standards can help insure that ADR practitioners have sufficient training, explain ADR processes to the participants, and adhere to ethical standards.

A second advantage is that certification may increase the public's confidence in alternatives to litigation. In order to see why this might be so, consider that, notwithstanding the derision hurled at lawyers and judges, the public still turns to litigation -- more than to mediation or arbitration -- for resolution of their disputes. The grudging respect for judges and lawyers stems in part from the training and selection process by which they are certified for work in the public justice system. Requiring all ADR providers to have specified forms of training and selecting them on the basis of demonstrated ability to mediate, arbitrate, etc., would likely increase the willingness of the public to entrust their disputes to ADR processes.

Finally, certification standards would likely increase the legislature's level of confidence in ADR as an important adjunct to the courts. Lack of funding has been one of the major problems standing in the way of greater use of ADR. In Massachusetts, we are fortunate in having a well established network of community mediation programs, coordinated by the Massachusetts Association of Mediation Programs and Practitioners (MAMPP), and several outstanding court-connected programs, such as those offered by the Massachusetts Office of Dispute Resolution (MODR)[3] and the Middlesex and Worcester Multi-Door Courthouses. However, these programs are woefully underfunded. Without uniform, enforceable certification standards, legislators may be reluctant to fund ADR programs in a manner that enables them to continue and grow.

Opponents of certification often say that there is nothing wrong with our current system, so why fix it? The marketplace has worked for more than fifty years in the labor-management field, where arbitrators and mediators survive only if they are selected on a regular basis by the parties. Community mediation programs have operated successfully for more than twenty years without external regulation. Opponents of certification point to these successful systems as proof that local communities and the commercial marketplace can be trusted to determine who is qualified to arbitrate or mediate.

However, allegations of cronyism in the referral of cases to ADR providers -- charges which led to the orders issued in 1992 by former Chief Justice Fenton of the

Trial Court, prohibiting court referrals to specific private ADR providers -- suggest that uniform ethical and certification standards are needed to increase the confidence of all participants (the public, the courts, and the ADR providers themselves) in the integrity and fairness of ADR services. In addition, the lack of funds available for ADR options -- as opposed to the hundreds of millions of dollars of public funds that support our litigation system -- suggest that change is needed.

Indeed, the question at this point is not whether there should be certification of ADR providers, but rather what kind of certification and who should do it. In 1993, the Massachusetts Supreme Judicial Court and the Trial Court issued a policy statement declaring that qualification standards must be promulgated for ADR practitioners who provide court-connected ADR services. This is a significant step. Currently there are few qualification requirements for ADR providers in Massachusetts. The state confidentiality statute[4] sets 30 hours as the minimum number of hours of training for mediators who wish to have the benefit of the statute, but anyone who wishes to mediate without the benefit of the statute is free to do so.[5] Likewise, qualification standards have been established by private organizations, such as American Arbitration Association (AAA) and the Academy of Family Mediators (AFM), and public entities, such as MODR, for people who wish to belong to those organizations or serve on their panels, but many ADR providers are not affiliated with those organizations and therefore do not have to meet those standards.

As a starting point for considering what kinds of certification standards are appropriate, it may be worthwhile to divide the discussion into the three areas where standards have been established or proposed: (1) private organizations which establish standards for their members or panelists (e.g., AAA or AFM); (2) court programs which set standards for ADR providers handling court-referred cases (e.g., MODR's Superior Court programs and the Middlesex and Worcester Multi-Door Courthouses); and (3) state-wide licensure, applicable to all ADR practitioners, regardless of whether they practice in the courts, private marketplace or community programs.

(1) Private Organizations

A wide variety of qualification standards have been established by private organizations. Some organizations, such as SPIDR, AFM, and the Massachusetts Council on Family Mediation (MCFM), create separate tiers or levels of membership based on specific amounts of training and experience.[6] The National Academy of Arbitrators (NAA) requires its members to be full-time neutrals, to provide letters of recommendation from four management and four union representatives, and to have arbitrated at least 50 union-management cases in a five-year period. The AAA requires ten years of experience in a particular area (such as construction, commercial, or labor matters), as well as basic training as an arbitrator. To be listed on the AAA's blue-ribbon panel for large, complex cases requires fifteen years of experience.

These privately promulgated standards are relatively uncontroversial because no one is required to belong to any of these organizations. However, such standards are likely to remain important in the ADR field, even if there is continued growth in court-based or state-wide certification, as a means of differentiating ADR providers with special qualifications. These private organizations operate in much the same way as medical organizations which offer board certification to specialists who pass specific tests. In the ADR field, meeting the standards of the AAA, NAA, or AFM gives practitioners a method of demonstrating that their expertise in a particular area has been recognized by a professional organization in the field.

One area of controversy arises when bar associations -- and other organizations not primarily devoted to ADR -- seek to "certify" ADR providers. The recent decision by the Massachusetts Bar Association (MBA) to establish an ADR referral service is an example of that phenomenon. Describing the program as the "first state bar operated ADR referral service in the country," the MBA has announced that it will offer "ADR certification" to practitioners who meet its 30-hour training requirements. When the plan was announced, the acting executive director of the MBA described this service as one that ADR providers would want to join because calling themselves "MBA-certified" practitioners would give them a competitive advantage. The MBA has also decided to exclude non-lawyers from membership in its ADR referral service, even

though many of the most experienced and capable mediators and arbitrators in Massachusetts and around the country are not lawyers. The Massachusetts Council on Family Mediation (MCFM), MAMPP, and the New England Chapter of SPIDR have announced their opposition to the MBA proposal.[7]

(2) Court-Connected ADR Programs

More than 40 states require ADR providers to meet training and/or experience standards in order to participate in court-connected ADR programs. Such standards are necessary for the courts to make appropriate and responsible referrals to ADR providers who bear the implicit, if not explicit, imprimatur of court approval.[8] Under the SJC's 1993 policy statement, certification standards will soon be in place in Massachusetts on a statewide basis. The statement calls for the following:

1. Courts should make ADR options available to all litigants, regardless of their ability to pay for those services.
2. ADR services provided by the courts must conform to uniform statewide standards, including standards for the selection and qualification of providers, to be developed by the SJC and the Trial Court departments, with assistance from a standing committee on dispute resolution.
3. Referrals by the courts to ADR providers must be in accordance with those standards.[9]

It is noteworthy that the policy statement limits the reach of these standards: "the responsibility to regulate dispute resolution services provided by the courts does not extend to dispute resolution services provided in the private marketplace and independent of the courts." (emphasis added) This limitation should allay the fears of those who are concerned that certification of ADR providers in court-connected programs will curtail the freedom that disputants now have in selecting a mediator, arbitrator, or case evaluator in the private marketplace.

There is considerable controversy, however, over the type of certification standards that should be adopted for court programs. Debate has centered on such questions as:

- Should panels be highly selective -- i.e., including only the people who meet the highest standards -- or instead include everyone who meets certain minimum standards?

- Should ADR providers be required to have substantive knowledge of the fields in which they serve (e.g., construction industry experience in order to mediate construction cases) or are process skills sufficient?
- Should ADR providers in court-connected cases have legal training -- either a law degree or some experience in the legal system? Is such knowledge more important for some ADR processes (such as case evaluation or arbitration) than others (such as mediation)?
- What standards should be uniform throughout the state and which should be tailored to particular courts or programs?

As it tries to answer these questions, the SJC Standing Committee on Dispute Resolution has several useful models on which to build. Standards for mediation training have been developed by MAMPP, based on the experience of community mediation programs. Many hundreds (perhaps thousands) of people have been trained as mediators by these programs, which have, in the process, developed training curricula which are now widely accepted throughout Massachusetts. In addition, MODR has developed selection criteria that are among the most rigorous and sophisticated in the country.[1011]

The Standing Committee can also look to the experience gleaned by SPIDR, whose national Commission on Qualifications has studied the issue of certification for nearly ten years. Reports issued by the Commission in 1989 and 1995 offer several conclusions.

First, qualification standards must be tailored to the context in which the services will be provided. For example, knowledge about tort law may be an essential qualification for a case evaluator in a Superior Court motor vehicle case program, but completely useless for someone who mediates multi-party neighborhood disputes in community mediation program.

Second, standards should be based, to the extent possible, on performance rather than paper credentials. Although it may be difficult and time-consuming to measure performance, neither academic degrees nor ADR training alone suffice to assure that a practitioner can successfully mediate, arbitrate, or perform other ADR services.

Finally, establishing highly specific, rigorously enforced qualifications standards may be less essential where the parties have a high degree of choice in selecting a dispute resolution process, program, or provider. Likewise, where participation in ADR is mandatory or where the parties have limited choices with respect to providers, the need for careful selection of ADR providers is far greater.[12]

As I see it, the job that lies before the SJC Standing Committee with respect to qualifications is to propose a system of standards that (a) integrates the conclusions of the SPIDR commission and the experience of MAMPP, MODR, the Multi-Door Courthouse and other programs, (b) increases the inclusiveness, quality, and diversity of ADR panels, (c) permits flexibility so that courts and programs can innovate and adapt to needs as they develop, (d) strengthens existing community mediation and court-based programs, and (e) can be implemented without enormous cost. This is, to say the least, no easy task.

However, there is a model which, in my view, satisfies these objectives.[13] The components of this model are fairly simple:

- A list of court-approved ADR trainers;
- A statewide roster of ADR providers (i.e., individuals who have satisfactorily completed the court-approved training);
- An administrator or director of ADR services in the Trial Court who would maintain the roster and disseminate information about the system; and
- A committee (perhaps the SJC Standing Committee on Dispute Resolution) to approve training programs and establish criteria for waiving training requirements for people who have already been trained or have the equivalent of such training.[14]

The theory behind this model is that it may not be feasible -- or desirable -- for the courts to test and "certify" individual providers. However, certifying trainers (perhaps on the basis of their demonstrated ability to provide training in accordance with MAMPP's standards) may be less costly, less burdensome administratively, and more likely to foster diversity and inclusiveness because it is a more decentralized system. Approved trainers throughout the state could (and presumably would) offer their services for a fee, but would be required to accept a certain percentage of applicants on a reduced- or no-fee basis if the applicant could not afford the fee.

Individuals who wished to be approved trainers could get the necessary experience by working as assistant trainers in approved training programs, or by showing that they have the equivalent of such experience.

The following chart suggests the types of training that would be offered in such a system:

(A) Basic ADR Training (Overview of the trial court, types of ADR, ethical standards applicable to ADR providers, and rules relating to referral of cases to ADR)	(B) Process Training (Process skills, with role plays, apprenticeship, and evaluation of performance by trainers)	(C) Court Department Orientation (Rules and procedures of each court and how they relate to ADR referrals)
This would be a 6-hour program required for all ADR providers	Separate courses for each process: Mediation (32 hours)[15] Arbitration (16 hours)[16] Case Evaluation (8 hours) Conciliation (8 hours)	Separate 2-hour courses for each court department: Superior Probate and Family Housing Land District BMC Juvenile

In this model, all ADR providers on the roster would have to take the basic ADR training (column A) and at least one training program in each of the other two columns. Referrals could then be made by the courts to anyone on the roster with appropriate training. For example, a Juvenile Court case could be referred for mediation to anyone on the roster who had taken (a) basic ADR training, (b) mediation training, and (c) the Juvenile Court orientation program (a total of 40 hours of training).

A state-wide roster would create a floor -- not a ceiling -- for training and qualification purposes. For example, any of the Trial Court departments could require additional training for particular types of cases. For example, the Probate and Family Court could require (as many states do) specialized training in family law (or substantial experience in family law matters) for ADR providers handling divorce

cases.[17] In addition, programs should be encouraged to adopt standards appropriate for the context in which services will be provided. For example, in multiracial or multiethnic communities, diversity training might be essential.

A system of this kind could be implemented without significant governmental expenditure and would enable those who are currently providing ADR services in the courts and community mediation programs to continue doing that work. Flexibility with respect to the cost of training would facilitate efforts to increase the diversity of ADR panels. One of the problems in this system -- the solution to which will require some ingenuity -- is that opportunities for apprenticeship (a vital component of training) are scarce; trainees may be required to find their own opportunities to serve as co-mediators or observers of ADR processes.

One advantage of this type of system is that the courts would not "certify" providers -- in the way that physicians, for example, are certified by professional licensing boards.[18] Instead, the courts would merely ensure satisfactory completion of basic training, the starting point for effective practice. Other elements of the system -- including effective case screening and matching, providing the parties with sufficient information about individual ADR providers so that they can make informed choices, and on-going training, mentoring, and evaluation of ADR providers -- will be needed to make court-annexed ADR programs successful as they are implemented throughout the state.[19]

(3) Licensure of All ADR Providers

The most controversial form of certification is state licensure -- i.e., limiting access to the practice of mediation, arbitration, case evaluation, etc., to those who meet standards set by a court or governmental agency. Only a few states license mediators and no state licenses arbitrators or case evaluators. One of the reasons that licensure is controversial is that ADR providers have been reluctant to give such broad regulatory authority over the field to a governmental entity -- a step which is antithetical to the community empowerment principles which brought many of ADR's pioneers to the field.[20]

Yet from the standpoint of the public interest, it is surprising that mediators and arbitrators work in an unregulated setting -- perhaps one of the last unregulated areas in our economy. Under Massachusetts law, licensure or registration is required for people in virtually every kind of work in which people's health, welfare, or rights are at stake, and then some. Putting to one side some of the obvious examples (such as doctors, nurses, mental health professionals, engineers, realtors, and lawyers), our state government licenses:

- operators of employment agencies, massage parlors, pet shops, riding academies, and bowling alleys;
- innkeepers;
- fertilizer manufacturers;
- dealers in "bovine and porcine animals";
- taxidermists, embalmers, and funeral directors;
- those who rent bathing suits to the public;
- barbers, electrologists, cosmetologists, and manicurists.

It seems astonishing that mediators and arbitrators, who assist in the resolution of matters of great importance, are less regulated than the operators of bowling alleys. On the other hand, there has been no public outcry for the regulation of ADR providers. Indeed, there probably will be none until some scandalously incompetent mediator, arbitrator, or case evaluator causes mischief of the kind that results in headlines and remedial legislation.

Although licensure may, in the abstract, be desirable to protect the public from incompetent ADR providers, I agree with those ADR providers who believe that we do not yet have enough experience with ADR to make the leap from no public regulation of the field to comprehensive regulation. By starting with the regulation of court-connected services, we may acquire the kind of insight into the qualification process that will enable us to make intelligent decisions about broader regulation.

Such an approach is consistent with the conclusions published by the SPIDR Commission on Qualifications in 1995. The Commission, comprised of leaders in the

ADR field, concluded that state licensure of dispute resolution practitioners is unwarranted because:

1. The state of knowledge is nascent concerning what qualifications practitioners require to provide effective dispute resolution service;
2. Government licensure risks establishing arbitrary standards that could unnecessarily limit party choice of practitioners and limit access to the field by competent individuals;
3. Licensure could work toward domination of the field by an exclusive group;
4. Licensure could inappropriately "freeze" the standards in a fluid field; and
5. The field of dispute resolution practice is as varied and broad as the range of human relationships. Competence in one field (e.g., family disputes) does not assure competence in an unrelated field (e.g., labor disputes).[21]

SPIDR's opposition to licensure is noteworthy. Most professions begin the maturation process by seeking to establish barriers to entry. Indeed such barriers are often considered essential in order to define a profession. It is an unusual step for a profession that is seeking to come into its own to intentionally leave the doors open to all comers.

Ultimately, however, I believe that licensure will be considered desirable by those in the ADR field. Without licensure, it is impossible to enforce ethical standards. All of the leading professional organizations in the ADR field -- SPIDR, AAA, NAA, AFM, MCFM, and MAMPP among others -- have promulgated codes of ethics for ADR providers, but the codes have no teeth. Infractions are punished, if at all, by expulsion from the organization, but the ADR provider is free to continue his or her practice. As the ADR field becomes more crowded and competitive, unethical practices by some providers (such as contingent fees, undisclosed conflicts of interest, and misleading advertising, all of which are beginning to infect the ADR world) will likely motivate competent and ethical providers to support regulation. When that time comes, the experience we are beginning to derive from the creation of qualification standards for private organizations and court-connected programs will, hopefully, enable us to make wise choices.

[21]Endnotes

1. Thanks to Frank Benson, Albie Davis, Chuck Doran, Tom Elkind, David Hoffer, Fredie Kay, Meighan Matthews, Gail Perlman, Marsha Saylor, Margaret Shaw, and Karen Sontag for helpful comments on a previous draft of this article.

2. For a useful discussion of that debate, see Deborah Gentry, "The Certification Movement: Past, Present, and Future," 11 Mediation Quarterly 285 (1994), and Albie Davis, "How to Ensure High-Quality Mediation Services: The Issue of Credentialing," in Community Mediation: A Handbook for Practitioners and Researchers (Duffy, Grosch & Olczak, eds. 1991).

3. MODR, an office within the Executive Office of Administration and Finance (see G.L. ch. 7, § 51), provides dispute resolution services and case management for state agencies and municipalities, in addition to its court programs.

4. G.L. ch. 233, § 23C.

5. See, e.g., White v. Holton, 1 Mass. L. Rptr. No. 10,216 (Nov. 15, 1993).

6. SPIDR offers "affiliate" membership to anyone with an interest in the field; "associate" membership to anyone with three years of experience as a neutral; and "regular" membership to anyone with three years of "substantial" experience as a neutral and who, in addition, does not serve as an advocate. AFM permits anyone to be a general member. To be listed as a "practitioner member" requires (a) 60 hours of family mediation training, (b) 100 hours of face-to-face family mediation experience in at least ten cases, (c) submission of six sample separation agreements, case reports or other documentation from the ten cases, and (d) 20 hours of continuing education every two years. The requirements for MCFM certification are (a) an advanced degree (this requirement can be waived); (b) 90 hours of training; and (c) 100 hours of face-to-face mediation experience.

7. See "New ADR Referrals Only For Attorneys," 23 Mass. L. Weekly 2215 (July 17, 1995); "Mediation Council Objects to MBA's ADR Plan," 24 Mass. L. Weekly 418 (November 6, 1995. The MBA's failure to work collaboratively with existing organizations of ADR providers stands in marked (and unfortunate) contrast with the approach taken by the American Bar Association, which joined with SPIDR and the AAA in a three-year project which resulted in the publication last year of the AAA-ABA-SPIDR Model Standards of Conduct for Mediators.

8. Many mediators in court programs find that even relatively sophisticated parties consider the mediator to have an official status (notwithstanding disclaimers to the contrary by the mediator) -- something like a junior judge, the very antithesis of the mediator's role.

9. This is my paraphrase of the Policy Statement. Copies of the Policy Statement are available from the Administrative Office of the Trial Court, 2 Center Plaza, Boston, MA 02108; the text of the Statement can also be found in David Hoffman & David Matz, Massachusetts Alternative Dispute Resolution, Appendix F-18 (Michie/Butterworth 1994).

10. Prospective MODR mediators were invited, based on written applications detailing their qualifications and experience, to take part in a performance-based skills evaluation. Selected candidates were then invited to participate in one of three levels of training based on the results of this evaluation. The final training activity was the observation of actual mediation sessions conducted by experienced mediators. Candidates were then assigned their own case to mediate under the observation of program administrators. After successful completion of this program, candidates were added to MODR's Superior Court Mediation panel. Some of

these mediators received additional training in resolving environmental disputes and were named to MODR's Environmental Mediator Panel as well.

11. See Brad Honoroff, David Matz & David O'Connor, "Putting Mediation Skills to the Test," 6 Negotiation Journal 36 (1990). MODR's training and qualification program, which has been widely cited as an exemplary model, was based in part on insights gained from a study in which academic researchers observed a wide variety of successful mediators and distilled from those observations the skills which they had in common. See id. at 37-38.

12. This brief summary of some of the Commission's conclusions hardly does justice to the thoughtful treatment of the subject contained in the SPIDR reports, which are available from the national SPIDR office, 815 15th Street, N.W., Suite 530, Washington, DC 20005.

13. In the description that follows, I am borrowing heavily on ideas that have been discussed in the Standards Subcommittee of the SJC Standing Committee with advice from the Committee's consultants, Elizabeth Neumeier and Margaret Shaw. The Subcommittee has not endorsed these ideas, but I wish to acknowledge the contribution of my fellow Subcommittee members (Melissa Brodrick, Cynthia Brophy, John Dalton, Albie Davis, Susan Jeghelian (ex officio), Hector Jenkins, and Fredie Kay and Committee staffperson Ann Archer) for whatever may be of value, while at the same time absolving them of any responsibility for those ideas with which they may disagree.

14. Such a committee would also decide whether any individual should be suspended or removed from the roster (e.g., because of violation of applicable ethical rules).

15. Mediation training is currently available through several community mediation programs (information is available from MAMPP) and several private firms (e.g., JAMS/Endispute).

16. The AAA currently offers training for members of its arbitration panels.

17. In developing specialized standards for particular programs, the trial court departments will have to address the issue of whether a law degree or any other academic degree should be a requirement. Although most federal and state court ADR programs limit their rosters of ADR providers to attorneys, there is no empirical evidence that a law degree or any other degree makes an individual a better mediator or arbitrator. The SPIDR Commission on Qualifications concluded in 1989 that there is "impressive evidence that individuals lacking [formal academic degrees] make excellent dispute resolvers."

18. It may even be desirable to require ADR providers in court-connected programs to refrain from advertising themselves as "court certified," because the term would in all likelihood be misinterpreted by the public to mean that rigorous selection criteria had been employed that all unskilled practitioners had been weeded out.

19. The Standing Committee on Dispute Resolution issued an interim report in December 1995 outlining the elements of a comprehensive system of court-connected ADR services.

20. One of the ironies of this controversy is that many ADR providers believe that licensure would make it more difficult for non-lawyers and others without advanced degrees to compete with those who have such credentials. My own view is that an appropriate form of licensure, which did not rely on academic degrees or professional qualifications, would be more democratic than the system now in place, in which attorneys, retired judges, and others with professional licensure of one kind or another have a competitive advantage in the ADR marketplace.

21. SPIDR Commission on Qualifications, "Ensuring Competence and Quality in Dispute Resolution Practice," at 18 (April 1995).

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