THE MAYHEW-HITE REPORT

ON DISPUTE RESOLUTION AND THE COURTS

Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

VOLUME 4, ISSUE 3

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WELCOME

The *Ohio State Journal on Dispute Resolution* is pleased to bring you Volume 4, Issue 3 of *The Mayhew-Hite Report on Dispute Resolution and the Courts*. The main page of this issue can be accessed here.

LEAD ARTICLE

In *Buckeye Check Cashing Supreme Court Decision Offers Solace to Businesses Using Arbitration Agreements*, Sarah Rudolph Cole, J.D., Squire, Sanders & Dempsey Designated Professor of Law at The Moritz College of Law at The Ohio State University, provides a summary of the U.S. Supreme Court's decision in *Buckeye Check Cashing v. Cardegna*, 123 S. Ct. 1204 (2006) and describes the positive implications of the case for businesses that use arbitration to resolve disputes between other businesses, consumers and employees. The full-text of this article can be accessed here.

ARTICLE SUMMARY

The Harvard Negotiation Law Review recently published an eye-opening report by Hamline University Professors James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negotiation L. Rev. 43 (2006), stemming from their analysis of 1223 state and federal court decisions regarding mediation compiled on Westlaw databases from 1999 – 2003. Coben & Thompson's research ironically illustrated that while civil case loads generally remained steady or slightly declined during this five year span, litigation regarding mediation, a heavily-touted *alternative* to litigation, nearly doubled. After breaking down these decisions by the mediation issues presented in the cases (replete with numerous examples), the authors draw some conclusions from their data regarding the current state of mediation, provide recommendations for changing mediation statutes and rules, and suggest practice pointers for mediators, practitioners, and mediation participants on how to avoid subsequent litigation stemming from mediation. A detailed summary of this law review article can be accessed here.

CASE SUMMARY

A recent California case, *In Re Kieturakis*, 138 Cal. App. 4th 56 (CA 1st App. 2006), the court reviews California's statutes and case law which describe the broad interpretation and strict construction of the state's mediation privilege. The court's discussion of the admissibility of evidence regarding the conduct and communications which occurred during mediation illustrates the need for flexibility in mediation confidentiality statutes. A detailed summary of this case can be accessed here.

STUDENT SPOTLIGHT

In *Mediator Certification: Realizing its Potentials and Coping With its Limitations,* Michelle Robinson presents a thorough cost/benefit analysis of whether mediators should be regulated through certification. She then assesses the various

approaches to defining and evaluating “good mediators.” Robinson concludes that a well-designed certification program, not funded by application fees, would improve the quality of mediation. Robinson is currently a 2006 J.D. Candidate at The Ohio State University Moritz College of Law. In 2005, she served as a volunteer mediator for the Franklin County Municipal Court in Columbus , OH . Robinson is currently assisting Prof. Sarah Rudolph Cole in updating a mediation treatise and will begin working for Bailey Cavalieri, LLC this fall. The full-text of this paper can be accessed here.

EDITORIAL INFORMATION

The editors would like to thank Professor Ellen Deason of The Ohio State University Moritz College of Law for her special assistance on this issue of the Mayhew-Hite Report.

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Buckeye Check Cashing Supreme Court Decision Offers Solace to Businesses Using Arbitration Agreements

by Professor Sarah Rudolph Cole [1]

The U.S. Supreme Court's recent opinion in *Buckeye Check Cashing v. Cardegna*, 123 S. Ct. 1204 (2006), is a controversial pro-business decision that those who advocate a national policy favoring arbitration will welcome.

The court ruled that an agreement to arbitrate, even when contained in an illegal contract, is enforceable. This decision offers additional support and encouragement to businesses to continue using arbitration as a primary mechanism for resolving disputes with businesses, consumers and employees.

The *Buckeye Check Cashing* suit involved two consumers who entered into agreements with the company to receive cash in exchange for a check in the amount of the cash plus a finance charge. Each consumer signed an agreement that contained an arbitration clause requiring they arbitrate disputes arising out of their check-cashing relationship. The consumers sued in Florida court, contending Buckeye Check Cashing charged usurious interest rates and that the contract was illegal under Florida law.

The question for the Florida courts was whether the court or an arbitrator should decide whether a contract containing an arbitration clause is illegal on its face. The Florida Supreme Court refused to send the case to arbitration, reasoning an arbitrator might "breathe life into a contract that not only violates state law, but also is criminal in nature ... ."

The Supreme Court disagreed, saying the question whether an agreement is illegal should go to an arbitrator if the underlying agreement contained an arbitration clause. This decision affirmed the Supreme Court's commitment to its 1967 *Prima Paint* decision. [2]

In that case, the high court ruled a party that claimed it was fraudulently induced into signing a contract that contained an arbitration clause, must arbitrate the question of whether fraudulent inducement occurred. *Prima Paint* was different from *Buckeye*, however, because the contract in the *Prima Paint* case was voidable, that is, it was legal on its face but illegal means may have been used to obtain one side's agreement. The contract in *Buckeye*, however, allegedly was void, or illegal on its face.

The Supreme Court rejected a distinction between void and voidable contracts. According to the court, the Federal Arbitration Act applies to all contracts that involve interstate commerce and includes within its purview even contracts that may be illegal and unenforceable.

Thus, a dispute over whether the contract is enforceable is a question for the arbitrator, not the court. Interestingly, the court also rejected the consumers' concern that the *Prima Paint* rule allows a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void, stating that plaintiffs approach allows a court to deny enforcement of a valid arbitration agreement in a contract that the court later finds enforceable.

What the court fails to see, however, is that the former result leaves the case with an arbitrator who may be somewhat self-interested (he is paid only if he hears the case) in finding the contract valid. Moreover, a dispute that goes to arbitration is

virtually unreviewable even when the arbitrator draws an erroneous legal conclusion.

By contrast, if the latter rule was followed, all that is lost is time – the court, if it decides the contract is illegal, never sends the case to arbitration. If it finds the contract legal, arbitration ultimately occurs, but has simply been delayed a short time. The first result seems unjust, the second only mildly unfair.

While *Buckeye Check Cashing vs. Cardegna* is likely in for the same heavy academic criticism *Prima Paint* has received for 40 years, the confirmation that arbitration agreements will be enforced even if the contract containing the arbitration clause is invalid or illegal, should give solace to businesses that use arbitration agreements.

What is more remarkable about *Buckeye* is that it concerns an arguably more problematic situation than was at issue in *Prima Paint*. In that case, two businesses with relatively equal bargaining power entered into a contract that was legal. The only issue was whether one side tricked the other into signing the contract.

In *Buckeye*, by contrast, the parties involved are a business and two consumers who have virtually no bargaining power. It would be fiction to imagine the consumers either knew about the arbitration clause or intended to agree to it. Moreover, the contract is allegedly illegal on its face.

Still, the Supreme Court didn't hesitate to enforce the arbitration agreement. In so doing, it reaffirmed a strong federal policy favoring enforcement of arbitration agreements that should allow businesses to sleep peacefully for years to come.

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[1] Sarah Rudolph Cole is the Squire, Sanders & Dempsey Designated Professor of Law at the Moritz College of Law. This article was previously published as an op-ed in Business First of Columbus on April 21, 2006.

[2] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

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Article Summary: Disputing Irony: A Systematic Look at Litigation About Mediation [1]

The most recent edition of the Harvard Negotiation Law Review includes an innovative study of reported state and federal decisions about mediation from 1999-2003 by Hamline University Professors James R. Coben and Peter N. Thompson. The article, entitled *Disputing Irony, A Systematic Look at Litigation About Mediation*, provides a basic status report of mediation today—including how mediation statutes are being interpreted by the courts and how effective current statutes and rules are in creating and maintaining a fair and effective mediation process. The data also illustrates the extent to which the mediation process, frequently lauded as an *alternative* to litigation, has actually *created* additional litigation.

As the authors intended, their study of the cases in the database provides unique insight into the extent to which mediation has resulted in subsequent litigation, the mediation issues being litigated in the courts, and how judges are balancing the "need for confidentiality in the mediation process" against "the need for evidence when mediation conduct [and communications] become an issue in subsequent litigation." [2] Their research also revealed some surprising results. For example, there was some evidence that scholarly concerns regarding the mediation process, such as mediator malpractice and the need for the confidentiality of mediation communications, did not appear to align with practitioner and mediation consumer concerns.

The first substantive analysis of the database discusses issues surrounding confidential mediation disclosures. This section includes several examples where a party or mediator contested the disclosure of confidential mediation communications. The authors surprisingly note that few of the decisions in which confidentiality was not upheld involved balancing between "the pros and cons of compromising the mediation process." [3] The many different contexts in which confidentiality disclosure issues have arisen are also discussed in this section. For example, their statistics demonstrated mediation communications are frequently used in court to prove or rebut contractual defenses such as fraud, mistake, or duress.

However, despite a considerable amount of litigation about confidentiality, the data revealed a surprising lack of concern by parties regarding such confidentiality. In fact, the article reports that 30% of all of the decisions in the database included uncontested mediation disclosures by mediators and others. As the authors note, this data is particularly notable given the amount of scholarly research on the critical importance of confidentiality to the mediation process.

The research also demonstrated that the most commonly litigated mediation issue is the enforcement of mediated settlement agreements. Through reference to multiple cases involving claims of fraud, misrepresentation, undue influence, mistake, unconscionability, and other defenses, Coben and Thompson document the general lack of success parties have had in using traditional contract defenses to avoid the enforcement of mediated settlement agreements. To avoid such litigation and honor self-determination, the authors recommend that mediators and counsel take steps to ensure that all parties are fully aware of the binding and final nature of mediation settlement agreements before entering into them. They also suggest further consideration of a previous recommendation to provide parties with a specified period of time following mediation settlement agreements in which parties can exercise a right to rescind the contract. [4]

Another section of the article discusses litigation regarding the conduct of participants, including attorney misconduct and actions against the mediator. As with the other parts of the article, the authors group the cases into sub-categories to help glean useful information, render practical advice, and encourage further research. For example, the database contained ten

claims in which the parties complaint focused on the mediator's attempts to "coerce the parties to settlement" by focusing on the negative consequences of a failure to settle during mediation, a practice known in the field as "reality testing." As Coben and Thompson note, "[i]t is clear that the perspectives of the judges and mediators about the propriety of this settlement technique may be different from the perspectives of the parties." [5] It is this kind of insight into prior mediation problems, provided in each section and subsection of the study which makes this article particularly useful to practitioners. By allowing mediators and counsel to learn from the misperceptions of previous mediation participants, they can be more cognizant of how their actions may be perceived by parties and perhaps modify their own conduct to avoid the risk of subsequent litigation.

At the conclusion of the article, the authors discuss "lessons learned" from their research, including a list of suggestions for the 10 best practices for mediators, lawyers, and consumers to avoid future litigation about mediation. For example, because of the frequency of third-party impact cases in the database, Coben and Thompson recommend that mediation participants consider the impact their agreements will have on third-parties. Additionally, given the plethora of cases on the duty to mediate and sanction opinions regarding attendance and authority, the article reminds mediators and lawyers to be diligent in ensuring that the decision-makers with authority are in attendance throughout the entire mediation process.

However, this summary only provides a *small* glimpse into the various types of cases, trends in mediation decisions, and Coben & Thompson's "lessons to be learned" from these "failed mediations." To gain the full insight this study has to offer, readers are strongly encouraged to read the full text of this article in the most recent issue of the Harvard Negotiation Law Review. The full citation for the article is: James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negotiation L. Rev. 43 (2006).

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[1] The full text of this article can be found in the latest edition of the Harvard Negotiation Law Review: James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negotiation L. Rev. 43 (2006).

[2] Id. at 47. After discussing the different ways courts have approached this issue, the authors recommend, at a minimum, that states and the federal government codify the actions that courts have taken anyway—"allowing third parties to get access mediation evidence…when the mediation defines their legal rights." Id. at 136.

[3] Id. at 66.

[4] Coben & Thompson, *supra* note 1, at 136 (*citing* Nancy L. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1, 5 (2000)).

[5] Id. at 96.

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Case Summary: *In Re Kieturakis*, 138 Cal. App. 4 th 56 (Cal. Ct. App. 2006)

Issue: Whether mediation communications could be introduced as evidence where the party challenging the settlement agreement on the basis of fraud, duress, and lack of disclosure refuses to waive the privilege.

Rule: The mediation privilege is strictly construed; unless *all* parties expressly agree to waive the privilege, mediation communications are generally not to be disclosed. It is a "'super privilege'—impenetrable by public policies favoring disclosure" to which there are no applicable good faith or implied exceptions. [1] Thus, where the disadvantaged party to a mediated settlement agreement claims to have acted under duress, thereby invoking a presumption of undue influence, and refuses to waive the confidentiality privilege, she can "prevent the other party from introducing evidence required to carry the burden of proving that no duress occurred." [2]

Facts: In 1999, as a part of the dissolution of their marriage, Anna Kieturakis and Marciej Kieturakis chose to mediate issues regarding the distribution of their marital assets. At the conclusion of the mediation sessions, the parties entered into a marital settlement agreement. Two years later, claiming duress, fraud, and undue influence, Anna sought to overturn the settlement agreement. During the trial, the court found the settlement agreement was more favorable to Marciej than to Anna. Under California family law, in certain circumstances, where an agreement is more favorable to one party than another, there is a presumption of undue influence and the favored party bears the burden of proving that he did not exercise influence to obtain such an advantage. To bear his burden of proof, Marciej sought to introduce evidence regarding Anna and Marciej's conduct during the mediation, communications from a third party regarding an appraisal which took place as part of the mediation, and e-mails from the mediator to Anna and Marciej which summarized the discussions which took place during the mediation sessions and highlighted the effects and significance of certain provisions of the mediation settlement agreement. Anna refused to waive the mediation privilege in order to prevent the mediation communications from being admitted. However, the trial court did admit the evidence reasoning that, "[t]o hold uphold the mediation privilege here would merely thwart this Court's ability and obligation to do justice in this particular case and undermine confidence in our judicial system." At the conclusion of the trial, the court, considering both the evidence the mediation communications and other testimony, denied Anna's motion to set aside the marital settlement agreement. Anna appealed this decision, including the trial court's decision to admit the privileged mediation communications over her objection.

Discussion: The appellate court affirmed the outcome of the decision on the grounds that Marciej should not have born the burden of proving that he did not exercise undue influence in obtaining an advantage in the mediated settlement agreement. Although the court did not rule directly as to whether the admission of the mediation evidence was proper (instead any error in admitting privileged evidence was harmless), the decision highlights the need for flexibility to be built into mediation confidentiality statutes. To prevent a disincentive to use mediation and to render fair results, courts should have the authority to balance the need for confidentiality in mediation against a party's need for evidence when conduct and communications occurring during the mediation process become an issue in subsequent litigation. As the deciding court notes in the opinion, the strict interpretation of the mediation statute renders all unequal mediated agreements as invalid where the party invoking a defense of duress or undue influence refuses to waive the privilege and creates a significant disincentive for parties to mediate marital property settlements. [3]

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[1] *In re Kieturakis*, 138 Cal. App. 4 th 56, 63 (Cal. Ct. App. 2006).

[2] Id. at 63-64.

[3] Id. at 64-65.

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Mediator Certification: Realizing its Potentials and Coping With its Limitations

by Michelle Robinson

I. Introduction

In the last twenty-five years, mediation has become an increasingly important part of the world's "cultural and legal landscape." [1] Mediation has become formalized, institutionalized, applied in many different settings and ways, and incorporated into administrative and regulatory processes. [2] While many jurisdictions have instituted standards and requirements for mediation, there is little overall uniformity or coherence in this regulation. [3] As a result, several professional organizations, scholars, and other entities have explored the issue of mediator certification, researching and sometimes implementing certification programs. [4] This paper engages in a cost/benefit analysis of mediator certification, concludes that a well designed certification program would improve the apparent and actual quality of mediation, and determines that any effective program must be funded by sources other than application fees.

II. Should Mediators Be Regulated Through Certification?

This paper assumes that if mediators should be regulated, such regulation should take the form of voluntary certification. This assumption is based on states' and professional organizations' preference for voluntary certification rather than licensing. [5] This Part discusses the desirability of voluntary certification by engaging in a cost/benefit analysis.

A. *The Benefits of Regulation*

To decide whether mediator certification is desirable, one must (1) identify its goals and (2) consider the importance of those goals and whether certification can in fact accomplish them. [6] Accomplishment of those goals constitutes the benefits of certification.

This paper discusses eight major purposes that have been asserted for a voluntary national certification program. [7] Are these goals important, and can they be accomplished through mediator certification? This Section discusses each goal's importance and attainability.

(1) Increased competency. Mediator competency is the most important goal of certification, as competency is key to the quality of the mediation process. [8] Because mediators lead and control the entire mediation process and have the potential to influence its outcome, [9] it is important that they be competent. The relative importance of this goal is illustrated by the direct relationship between competence and many other goals of certification, which largely point back to the goal of competency. For example, the first goal, verification of training, experience, and study, is only relevant to the extent that it correlates to the underlying goal of competency. In fact, the only goals that are substantially independent of competency are practitioner influence on the field and protection against unethical mediators.

Certification has the potential to increase competency by requiring a certain level of skill-building activities (such as training and experience) and by "weeding out" some incompetent mediators. There are very few complaints about mediation

services, but this may not indicate high quality, but only the fact that parties often are unaware of their rights or unable to evaluate mediator quality due to a lack of relevant knowledge. [10] Because of these potential reasons for the under-reporting of problems, it is difficult to assess the level of quality in mediation services and how much harm may have been done. [11] As discussed in Part III, certification can ensure competency only to a certain extent; however, it has the potential to raise the standard, thus decreasing the level of uncertainty.

(2) Uniform verification of basic training, experience and study. This goal is important only to the extent that it correlates to the underlying goal of ensuring that a mediator "has the necessary skill set" [12] —thus, this goal merely points back to the goal of mediator competency.

(3) Increased professionalism. Many mediators believe that increased professionalism is an important goal, [13] and most mediators believe it would be enhanced by a certification program. [14] However, there is "significant confusion and ambivalence" about the meaning of "professionalism." [15] Historically, professionalization commonly was rooted in a desire to control an occupation, often with the apparent goals of self-interest, self-protection, and avoidance of external control by either the government or the market. [16] Some of these goals may give professionalism a negative connotation, but there are potential benefits of such self-regulation: knowledgeable rule-makers, collegial networking, and the potential for "attentiveness to the shared goals, values and unresolved challenges" of mediation. [17] If increased professionalism can achieve these benefits, it may lead to more competent mediators.

(4) Criterion of qualifications for consumers. The third goal, to provide a market signal of quality for consumers, is important in that it would lower consumers' search costs, allowing consumers to choose mediators more easily and effectively. [18] The effectiveness of certification as a market signal, however, depends on the accuracy of certification as a measure of mediator quality, as discussed in Part III. If certification accurately identifies competent mediators, it may act as a beneficial market signal, facilitating and possibly expanding consumer use of mediators.

(5) Practitioner influence on the development and direction of the field. This goal may be strongly correlated to the goal of professionalism, depending on how that term is interpreted. The importance of practitioners' influence on mediation development and direction may depend on point of view and the extent to which one believes in effective self-regulation. Assuming that mediation practitioners have superior knowledge about how to improve the practice and field of mediation, this goal seems proper. To the extent that practitioners control the certification process, such a program would serve this goal and improve the field of mediation.

(6) Consumer protection against incompetent or unethical mediators. "There is little empirical evidence that the public needs protection from... incompetent or unethical mediation services." [19] However, this may be due to the possible under-reporting of problems discussed above. Even if there is not currently a competency or ethics problem, if potential consumers of mediation fear incompetent or unethical mediators, then certification may ease those fears by ensuring competency and increasing credibility. The extent to which certification would ensure ethical practices may depend on ongoing supervision or de-certification procedures. [20]

(7) Reducing court congestion. Reduction in court congestion is an admirable goal, but the extent to which mediation itself reduces court congestion may be overestimated—because the vast majority of cases settle, it is likely that mediation influences the timing more often than the rate of settlements. [21] Nonetheless, early settlements reduce court congestion to some extent, and mediation may be particularly effective in settings with lower settlement rates, where there are more unsettled cases to be "converted" to settled cases. Certification may slightly increase settlement rates if it increases mediator competency.

(8) Promoting mediation by increasing credibility. Mediator certification promotes mediation by serving the previously stated goals, including providing a market signal of credibility, [22] thereby reassuring those who know little about mediation and may otherwise try to avoid it. [23] Thus, certification may increase the use of mediation as an alternative to less cost effective, flexible, and satisfying alternatives. [24]

In summary, scholars and professional organizations have asserted several goals of certification. Most of those goals point to or depend on achievement of the goal of mediator competency. Taken together, it appears that the potential benefits of certification would be great—but would they overcome the costs of such a program?

B. *The Costs of Regulation*

Costs are also crucial to consider, both in making the decision to regulate and in designing a regulatory system. Scholars and professional organizations have identified several potential costs of a national certification program.

Most obvious are the financial costs. ACR Mediation Certification Task Force ("ACR Task Force") recommends that a certification program be self-financed through application fees. [25] However, according to one survey, only 57% of

mediators would be willing to pay up to $200 for certification, and only 18% of mediators would be willing to pay $300. [26] While market pressure may change these numbers, it is unclear whether such a system is sustainable. One must also consider the danger of excluding mediators through such a fee; as even "voluntary" certification may become a practical market necessity. [27]

Other costs of mediator certification include various non-economic risks in implementing such a program. Some of these risks are avoidable, and all should be considered in the design of any certification program.

Perhaps the biggest concern expressed by many in the field is the potential for certification to damage the diversity of mediation practice, including diversity of mediator backgrounds and practice styles. [28] Mediation is enriched by diversity and creativity in uses and styles of mediation, [29] and certification has the potential to inhibit that diversity and creativity through the imposition of educational and other requirements. For example, requiring certain educational qualifications may disproportionately affect qualified mediators from minority groups while accomplishing very little. [30] In fact, studies have found "little or no correlation between educational background or professional licenses and successful mediation practice." [31] Even training and experiential requirements may endanger diversity, as training can be expensive and a new mediator's ability to gain experience may rely on the ability to network, a factor that may decline with minority status. [32]

As discussed below, some certification programs use written examinations to evaluate applicants. If the test is not designed with the utmost care, it may exclude many competent mediators, especially those applicants who are unable to pay for test preparation. Indeed, whether any certification process should include a knowledge-based test is questionable. Only 40% of surveyed mediators believed that mediation "covers a unique body of knowledge that could be evaluated using a national certification process." [33] This leads to another risk: an inaccurate evaluation process could exclude qualified mediators while including (thus providing misleading credentials to) unqualified mediators.

The danger of "pricing out" some applicants, either through application fees or through practical preparation requirements, could be a huge cost to the mediation field in terms of lost diversity. On the other end of the spectrum, volunteer mediators and those with special expertise may not want to "jump through the hoops" if the certification requirements are burdensome, resulting in further exclusion of competent mediators. [34] This is especially problematic for courts that rely on volunteers, as ensuring competence is especially important in the court context.

C. *Certification Is Recommended if Carefully Implemented.*

While further research is necessary to determine the cost of implementing and maintaining a certification process, it appears that the benefits of a carefully designed program could outweigh the costs. Mediator competency is key to the field and practice of mediation, and mediators can have a significant positive or negative impact on parties who mediate—or even on those who do not, if mediator quality or apparent quality influenced the decision to avoid mediation. Given the apparent potential to further the goal of competency, to provide a market signal of that competency, and thereby to promote mediation, the benefits of certification seem worth the costs, *if* those costs can be kept to a minimum.

The high cost of losing mediator diversity or excluding many competent mediators, for example, does not seem justified by the benefits of certification—so the program must be designed in a way to avoid such high risk. In sum, it is important for any certification program to keep its goals, costs, and public concerns at the forefront of all activities, in order to avoid or minimize the risks discussed above.

III. A Look at Evaluative Methods

The challenge of identifying mediators worthy of certification is twofold. First is the difficulty of defining a "good mediator." Second is the challenge of evaluating a mediator to determine whether she fits that definition.

A. *Defining a "Good Mediator"*

The main problem with defining a good mediator is that there is little or no consensus on what makes one. [35] Many asserted characteristics of a good mediator are subjective and difficult to test consistently and fairly, [36] for example, listening skills, empathy, [37] interpersonal skills, information-gathering ability, and creativity. [38] Probably because these skills are so subjective, little research has been done on what characteristics lead to effective mediation.

In fact, possibly the only characteristic that has been empirically shown to affect mediation is experience. According to a study by Roselle L. Wissler, mediator experience alone increases the likelihood of settlement. [39] Thus, to the extent that increased settlement rates are the goal of mediator certification, the only empirically relevant qualification is experience. Factors that were shown to be irrelevant to settlement rates included hours of advanced training, role play training, familiarity with relevant law, and number of years in legal practice. [40]

The problem remains, however, that no single set of qualities can be accepted universally because mediators have different styles and approaches. While it is important to protect that diversity of practice, it also makes it difficult to identify what makes a good mediator. [41] Perhaps this is because there is no single definition of a "good mediator," but a variety of characteristics which, in varying combinations, lead to effective mediation. If a certification program is to be inclusive of all competent mediators, then, it must be either (1) flexible enough to identify competency without relying on a rigid list of characteristics or (2) over-inclusive, relying on a list of only the most core requirements for mediators in order to protect diversity among mediation approaches. An over-inclusive program would not serve the most important goal of certification, ensuring competency. *Therefore, an effective certification program must be flexible enough to identify competency without relying on a rigid list of mediator characteristics.*

B. *Evaluating Mediators*

As discussed above, it is extremely difficult to pin down a universal definition of a "good mediator" in terms of objective or even subjective characteristics. Therefore, evaluation of mediators must be flexible and effective without a conclusive and complete list of mediator qualities. Several evaluative methods have been proposed or implemented: counting hours of training and experience, written examination, performance evaluation, and holistic review.

(1) Counting Hours of Training and Experience ACR's recent proposal [42] is the primary example of evaluation through counting hours of training and experience. The ACR proposal requires specific amounts of training and experience, measured in hours and presented in a portfolio submitted with each application. Each applicant must have 100 hours of training, including at least 80 in mediation process skills, [43] and 100 hours of experience as a mediator or co-mediator in the last five years or 500 hours total during the applicant's lifetime. [44]

Hour requirements for training are problematic if they do not correlate to mediator competency. The ACR requirement seems excessive and pointless, given the results of Roselle L. Wissler's study [45] which suggest that ACR's required eighty hours of general mediation process training is no more beneficial to mediator competency than seven hours of such training. [46] According to Art Hinshaw and Roselle Wissler, studies are likely "to find that no relationship exists between mediator training and mediation outcomes." [47] Training requirements also increase the cost of mediator certification by benefiting those who are better able to pay for advanced training, [48] decreasing the financial diversity of the mediator pool.

Experience requirements are less problematic according to the Wissler study, which found experience to be the only mediator quality relevant to settlement rates. [49]

Another problem with hours-counting is its rigidity. While the proposal includes the possibility of exceptions "in exceptional or extraordinary circumstances," [50] it is unclear that this exception is broad enough to provide the necessary flexibility. As Professor Sarah Rudolph Cole points out, such a plan "might exclude a number of mediators who would otherwise satisfy the existing view of what constitutes a quality mediator." [51] Experience requirements also may create a "Catch-22" for inexperienced mediators if experience is hard to get without certification.

Another system, based on points-counting, is a variation on the hours-counting system and is exemplified by the Florida Supreme Court's recent proposal. [52] This proposal calls for a requirement of 100 points per applicant, with points coming from educational degrees, training, experience, and mentorship. [53] Depending on the type of mediator classification, the point total must include specific numbers of points from education, training, and experience. [54] Florida's point system is designed to support diversity in a way that a straight hours-counting system does not. [55] However, even with its slightly increased flexibility, the point system shares the problems of the hours-counting system, rewarding unnecessary education and training and fails to provide flexibility for those mediators who are competent but do not fit neatly into its point agenda.

(2) Examinations In addition to the hour counting described above, the ACR proposal includes a written examination of each certification applicant. [56] The exam covers topics such as conflict theory, cultural diversity, ethics, and the history of mediation, [57] reflecting ACR's conclusion that "a skilled mediator should be knowledgeable about different approaches and schools of thought, even if he or she works primarily in one." [58] The ACR proposal's examination requirement is problematic for two reasons: (1) the proposed areas of knowledge suggest that the tested material is not highly relevant to mediator competency, and (2) the examination is likely to exclude those who can not afford the extensive training necessary to pass it.

As discussed in Part II, Section B, it is unlikely that a knowledge-based test could accurately evaluate the competency of a mediator, [59] and such a test threatens the diversity of the certified mediator pool. However, a written exam could serve the limited purpose of testing objective knowledge critical to mediation, such as relevant law and procedure, and ability to identify sensitive cases which may require special training or other qualifications.

(3) Performance Evaluation by Parties or Observers A third way to evaluate mediators is by observing them in action; this can be done by formal evaluators or by parties in real mediations. A study has shown that evaluation by experienced mediation parties can distinguish between more and less skilled mediators and provide feedback on particular skills and areas that need improvement. [60] The biggest drawback of performance evaluation is its costly and time-consuming nature. [61] It also may also be inconsistent due to its subjectivity.

(4) Holistic Review Sarah Rudolph Cole suggests adding a holistic review to the existing point or hour requirements of the ACR or Florida proposals in order to ensure that qualified mediators are not excluded. [62] The reviewing entity could protect diversity and avoid over-exclusivity by applying a more flexible approach to certify those applicants who are qualified but do not fit into the rigid requirements of a point or hours system. [63] This process is more costly and inconsistent than hour- and point-counting; however, the need to provide flexibility outweighs the added costs inherent in a properly administered holistic review process.

IV. Recommendation

There is a clear trade-off between accuracy and cost-effectiveness in the evaluative methods described above. While hours-counting and written examinations have the advantages of being objective and inexpensive, performance evaluations and holistic review are more accurate. In order to maintain flexibility and diversity, some amount of performance evaluation and holistic review is essential.

The benefits of certification are not worth a large loss in diversity of mediator backgrounds and approaches, and the benefits of certification would be compromised if granted to unqualified mediators. Therefore, it is crucial to any certification program have an accurate evaluation system. But what about the financial costs? As noted in Part II, 57% of mediators would be willing to pay only $200 for certification, and only 18% of mediators would be willing to pay $300. [64] These numbers do not bode well for an expensive application process, which may be economically unavailable or undesirable for many mediators, thus threatening mediator diversity—an unacceptable cost, as discussed above.

While more research is necessary to determine the exact cost of a program including the accurate but expensive methods of performance evaluations and holistic review, it appears that such a program would be too expensive to be funded solely by application fees. Furthermore, although the court system would benefit greatly from a certification program, the courts are an unlikely source of sufficient funding. The solution must come from some other source, perhaps from a federal grant for a national system or state funding for implementing the program on a smaller scale. Without such funding, a certification program appears to be too expensive to be both effective and inclusive.

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[1] Preamble to the Mediator Certification Program, Association for Conflict Resolution (ACR) Mediator Certification Task Force, Report and Recommendations to the ACR Board of Directors 6 (March 31, 2004), *available at*http://www.acrnet.org/pdfs/certificationreport2004.pdf (hereinafter "ACR Task Force Report").

[2] *Id* .

[3] *Id* .

[4] Several professional organizations have contemplated or implemented mediator certification. *See* , *e.g.*, ADRWorld.com, *ABA, ACR to Explore National Mediator Certification System* (September 27, 2004), http://adrworld.com/sp.asp?id=27679; Justin Kelly, *Colorado Group Considers Plan for Credentialing Mediators* (Sept. 13, 2000), http://adrworld.com/sp.asp?id=27563; ACR Task Force Report, *supra* note 1, at 6.

[5] No state has adopted a formal licensure requirement, and most regulation of alternative dispute resolution consists of certification or rostering. *Id*. at 6. Licensure is inappropriate for mediation for several reasons including, for example, the nascent state of knowledge concerning what qualifications are required for effective mediation, the risk of arbitrary or inflexible standards in licensing, and the danger of losing diversity in the practice of mediation. Comm'n on Qualifications, Society for Professionals in Dispute Resolution, Report No. 2, at 18 (April 1995) [hereinafter " SPIDR Report No. 2"]. Licensing has also been criticized as too anti-competitive for the mediation field. Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. Rev. 757, 761 (1996).

[6] Sarah Rudolph Cole, *Mediator Certification: Has the Time Come?*, 11 Disp. Resol. Mag. 7, 7 (2005).

[7] ACR Task Force Report, *supra* note 1, at 7; Weckstein, *supra* note 5, at 767–68.

[8] *Id*. at 7.

[9] *See* Russell, *infra* note 23, at 613.

[10] *Id*. at 192.

[11] *Id*. at 193.

[12] Cole, *supra* note 6, at 8.

[13] *See* Survey of Students in the Mediation Practicum and Multiparty Mediation Practicum, The Ohio State University Moritz College of Law (Nov. 2005) (on file with author) [hereinafter "Student Survey"].

[14] ACR/ABA Mediator Certification Feasibility Study at 4 (2005), *available at* http://www.acrnet.org/pdfs/certificationresults2005.pdf (results of an online survey of over 3100 mediators conducted by the ACR and the Dispute Resolution Section of the ABA as part of a study on the feasibility of mediator certification) [hereinafter "Feasibility Study"].

[15] Craig McEwen, *Giving Meaning to Mediator Professionalism* , 11 No. 3 Disp. Resol. Mag. 3 (Spring 2005).

[16] *Id* . at 3–4.

[17] McEwen, *supra* note 15, at 5. *See also* Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality,* 2004 U. Mo. J. Disp. Resol. 303, 306.

[18] Cole, *supra* note 6, at 8. Of mediators surveyed, 63% believed that a national certification program would be valuable to consumers; only 12% thought otherwise. Feasibility Study, *supra* note 14, at 2.

[19] Weckstein, *supra* note 5, at 768 (citing Jay Folberg & Alison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation 262–63 (1984)).

[20] Unfortunately, a certification program probably could not avoid all unscrupulous practice, as formal complaints are likely to be infrequent. McEwen, *supra* note 15, at 6.

[21] Weckstein, *supra* note 5, at 771.

[22] Most mediators believe that a national certification process would enhance the public image of mediators. Feasibility Study, *supra* note 14, at 3.

[23] Weckstein, *supra* note 5, at 773. Senator Newton R. Russell shared the goal of increasing mediator credibility when he sponsored a mediator certification bill in 1995. Newton R. Russell, *Mediation: The Need and a Plan for Voluntary Certification* , 30 USF L. Rev. 613 (1996). The bill attempted to "give the public a modicum of comfort when they employ an officially credentialed mediator." *Id*. at 614.

[24] *See* Weckstein, *supra* note 5, at 772.

[25] ACR Task Force Report, *supra* note 1, at 1.

[26] Feasibility Study, *supra* note 14, at 5.

[27] *See infra* note 34 and accompanying text (discussing the risk of "pricing out" mediators).

[28] Weckstein, *supra* note 5, at 769–71; ACR Task Force Report, *supra* note 1, at 8.

[29] Weckstein, *supra* note 5, at 775. It is important that any system of regulation recognize and embrace a variety of approaches. *See* Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity* , 30 U.S.F. L. Rev. 723, 756–57 (1996).

[30] *See* Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 Rev. Litig. 499 (2005).

[31] Weckstein, *supra* note 5, at 770 (citing Comm'n on Qualifications, Society for Professionals in Dispute Resolution, Qualifying Neutrals: The Basic Principles 15–16 (1989), and several other sources). Certain educational degrees may be useful in special circumstances, however, such as in child custody and visitation mediations. *See* Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. Rev. 687, 700–07.

[32] Cole, *supra* note 6, at 9–10.

[33] Feasibility Study, *supra* note 14, at 3.

[34] *Id*. Only twelve of twenty-two mediation students surveyed responded that their willingness to volunteer as an in-court mediator would continue if it required a $200 certification. Student Survey, *supra* note 13.

[35] Cole, *supra* note 6, at 7.

[36] *See* Cole, *supra* note 6, at 7.

[37]*See* Nancy H. Rogers & Richard A. Salem, A Student's Guide to mediation and the Law 12– 13 (1987).

[38] Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What we Know from Empirical Research*, 17 Ohio St. J. Disp. Resol. 641, 699–700 (2002).

[39] *Id*. at 678–79.

[40] *Id*. Wissler's study suggests that advanced training does not offer an increase in settlement rates compared to minimal training. *Id*. at 654–55.

[41] *See* Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 Ohio St. J. on Disp. Resol. 965 (2004).

[42] ACR Task Force Report, *supra* note 1.

[43] *Id*. at 9.

[44] *Id*. at 9–10.

[45] Wissler, *supra* note 39 and accompanying text.

[46] *Id*.

[47] Art Hinshaw and Roselle L. Wissler, *How Do We Know that Mediation Training Works?*, 12 Disp. Resol. Mag. 21, 21 (2005).

[48] Cole, *supra* note 6, at 9.

[49] Wissler, *supra* note 38 and accompanying text.

[50] ACR Task Force Report, *supra* note 1, at 1.

[51] Cole, *supra* note 6, at 9.

[52] ADRWorld.com, *Florida Proposes Point System for Mediator Certification* (Aug. 18, 2004), http://adrworld.com/sp.asp.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56]ACR Task Force Report, *supra* note 1, at 10.

[57] *Id*. at 9–10.

[58] *Id*. at 4.

[59] *See* Cole, *supra* note 6, at 10.

[60] Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 Curators U. Mo. J. Disp. Resol. 229, 253–54.

[61] Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 Harv. Negot. L. Rev. 201 (1999) The ACR Task Force concluded that such assessment would be too expensive in terms of human and financial resources. ACR Task Force Report, *supra* note 1, at 4.

[62] Cole, *supra* note 6, at 9–10.

[63] *Id*.

[64] Feasibility Study, *supra* note 14, at 5.