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MEDIATOR CERTIFICATION: SHOULD IT BE REQUIRED IN MONTANA?

Michelle Vanisko*

“You are certified by the community you serve.”

*Bunker Roy***

I. INTRODUCTION

Alternative Dispute Resolution (“ADR”) is a general phrase often used to describe the legally permitted processes of resolving disputes outside of litigation.¹ Mediation is just one of the many forms of ADR. While these processes are referred to as “alternatives,” most disputes are resolved by ADR without ever going to trial. With ADR resolving more and more disputes, it is increasingly important to select qualified mediators.

Selecting a mediator can be confusing and frustrating. How does one decide who is best qualified, experienced, or successful? Is there a licensing or certification process that ensures a mediator has met at least minimum standards? Nationally, professional organizations are forming policy proposals on mediator certification requirements.² In California, the state’s legislature has even considered the issue of mediator certification requirements.³ While no state requires all mediators to be certified, many states, including Montana, have specific requirements for mediators in particular fields.⁴ Many more encourage the use of de facto certified mediators by making specific training a requirement to be on a court referral panel.⁵

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** *Bunker Roy: Learning from a Barefoot Movement* (TED July 14, 2011) (Video File, transcript available at http://www.ted.com/talks/bunker_roy/transcript#t-327000).

1. *Black’s Law Dictionary* 91 (Bryan A. Garner ed., 9th ed., West 2009).

2. See e.g. Assn. for Conflict Res., *Model Standards for Mediator Certification Programs* (2011) (available at <http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsCertification.pdf>). The Association for Conflict Resolution (ACR) gives credit to all unnamed organizations whose work was the basis for its program. In particular, ACR identifies the National Institute for Dispute Resolution and the National Commission for Certifying Agencies as organizations whose work was particularly helpful.

3. Cal. Sen. 1428, 1995–1996 Legis. Sess. (Jan. 24, 1996). In 1996, California State Senator Newton Russell sponsored SB 1428, which would have amended the California Business and Professional Code to include voluntary certification requirements for mediators. SB 1428 was held in committee and never voted on by the legislature. Cal. Sen. 1428 Complete Bill History, 1995–1996 Leg. Sess. (Nov. 30, 1996) (available at ftp://www.lhc.ca.gov/pub/95-96/bill/sen/sb_1401-1450/sb_1428_bill_history.html).

4. See e.g. Mont. Code Ann. § 40–4–307 (2013); Cal. Fam. Code §§ 3160–3185 (2013).

5. See e.g. Mont. R. of App. P. 7(4)(d); Md. R. Civ. P. 17-107.

Determining whether certification, generally, is valuable and then developing standards for mediator certification requirements are just the first steps in a much longer process. In a 1999 law review article, Stephanie Henning highlighted some of the inherent questions that should be answered prior to implementing a certification program: Who will oversee the mediator certification process? Should there be one state-sponsored certifying board or a variety of organizations certifying mediators? If there are a variety of programs, how does one determine which programs are eligible to certify mediators?⁶ Section III addresses these questions.

Despite the widespread use of mediation, mediator certification invokes concerns about the growth and diversity of the field, mediators' obligations to participants, and whether professionalization of the field will make it too formal, and thus too costly, for those intended to benefit. This essay evaluates the advantages and disadvantages of initiating a certification program in Montana. Section II analyzes certification by defining what certification means in Section IIA, reviewing certification programs from two other jurisdictions in Section IIB, and providing the pros and cons of certifying mediators in Section IIC. Section III recommends that Montana complete certain preliminary work before implementing a certification program. The essay concludes that once preliminary work is complete, the state should implement a uniform certification program.

II. CERTIFICATION

To understand if certification requirements are valuable, the state must first decide what certification means and then weigh the costs and benefits of that process. To explore state responses to these issues, this essay discusses at length certification programs in Florida and Virginia.

A. *What Does Certification Mean?*

In the professional context, the words "certify" and "certification" refer to the process of verifying that an individual has met specific professional standards.⁷ Although the existence of "certification" may give rise to the implication that a professional regulatory agency or a set standard of practice exists,⁸ there are no national standards for certification programs. One obstacle to setting national standards is the lack of consensus on what

6. Stephanie A. Henning, *A Framework for Developing Mediation Certification Programs*, 4 Harv. Negot. L. Rev. 189, 190 (1999).

7. Richard Bowers & Nelle Moffett, *Mediator Licensing and Certification in California* 3 (Jan. 2010) (available at http://www.mediation-consultants.com/articles/Mediator_Licensing_and_Certification.pdf).

8. *Id.*

qualities make a good mediator. The result is certification programs requiring varying degrees of education or training. These programs range from merely completing a specified curriculum⁹ to requiring the aspiring professional to pass a written exam¹⁰ to requiring the participant to conduct an actual mediation.¹¹

Certification generally does not preclude uncertified mediators from offering the service; it only stops them from indicating that they are certified to do so. Certification is an authentication of competency, and courts can require certification as a condition for preferential listing or third-party payment. However, certification is not the same as licensure. Licensure precludes unlicensed parties from providing a specific service by imposing sanctions (sometimes criminal). To highlight the difference, for example, an unlicensed person practicing law can be sanctioned for doing so, but a lawyer does not have to be certified in bankruptcy to provide legal advice in that field of expertise.¹² Although “certification” and “licensing” are often confused, and sometimes employed interchangeably, in this essay certification means a form of regulation that does not meet the more stringent requirements of licensing.

B. Existing Certification Programs

An examination of other state models can provide a basis for qualifying mediators in Montana. Some states, like Virginia, have mediator certification programs or require mediators to possess certain qualifications.¹³ These standards were initiated to protect consumers and retain mediation integrity. Qualification methods include receiving academic degrees, completing training courses, or combinations of both. Two states that have codified mediator qualifications and skills are Florida and Virginia. Florida’s statutory scheme culminated in mediator certification requirements established by the Florida Supreme Court.¹⁴ Virginia’s certification requirements only apply to mediators who wish to provide court-referred mediation ser-

9. See e.g. Med. Training Inst. Intl., *Workplace Mediator Certification*, <http://www.mediationworks.com/medcert3/agenda.htm> (accessed Feb. 8, 2014).

10. W. Lee Dobbins, *The Debate over Mediator Qualifications: Can they Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. Fla. J.L. & Pub. Policy 95, 102 (1995).

11. Off. of the Exec. Sec. S. Ct. of Va., *Guidelines for the Training and Certification of Court-Referred Mediators*, § D (July 1, 2011) [hereinafter *Virginia Guidelines*].

12. Michael Moffit, *Suing Mediators*, 83 B.U. L. Rev. 147, 150 n. 9 (2003); see also *Werle v. Rhode Island B. Assn.*, 755 F.2d 195 (1st Cir. 1985).

13. Bobby Marzine Harges, *Mediator Qualifications: The Trend toward Professionalization*, 1997 BYU L. Rev. 687, 687 (1997).

14. See e.g. Fla. R. Civ. P. 1.720(b)–(f); Fla. Small Claims R. 7.090; Fla. R. Juv. P. 8.290(1)(1)–(5); Fla. R. App. P. 9.720(a)–(b); Fla. Fam. L. R. P. 12.740(d); Fla. R. Certified & Ct. Appointed Meds.

vices,¹⁵ but those mediators must be certified pursuant to extensive guidelines established by the Judicial Council of Virginia.¹⁶

1. Florida

Florida's Rules for Certified and Court Appointed Mediators were first enacted in 1992,¹⁷ and are still in effect today. Florida was the first jurisdiction to implement mediator standards that included enforcement provisions.¹⁸ The Florida Supreme Court Standing Committee on Mediation and Arbitration Rules ("Committee") developed the rules to present "a comprehensive set of ethical standards for Florida mediators and procedural rules for their enforcement."¹⁹ Before assembling the Rules, the Committee divided into subcommittees and simultaneously researched ethical standards and grievance procedures.²⁰

Florida's Committee first reviewed similar research completed by other organizations. After gleaning what they could from outside Florida, the subcommittees "turned to Florida's own core group of certified mediators for more direct and firsthand data."²¹ With the help of the mediators, the subcommittee launched a series of statewide public hearings and meetings. Of particular import was gathering information concerning the ethical concerns Florida's practicing certified mediators had based upon their collective experiences.²² The sessions provided information for the Committee's first set of rules for certified and court appointed mediators.²³

The Committee's Rules provide a comprehensive plan of minimum standards for mediator training, qualification, and certification. Florida statutes impose mediator certificate requirements and qualification standards.²⁴ The certification process divides mediators into five competency areas: county court mediators, family mediators, circuit court mediators, dependency mediators, and appellate mediators.²⁵ As of August 2012, Florida had

15. Va. Code Ann. § 8.01–576.8 (2013).

16. *Id.*

17. Fla. Dispute Res. Ctr., *ADR Resource Handbook: Selected Florida ADR Statutes & Court Rules* 94 (2013 ed., Jan. 2013) (available at http://www.flcourts.org/gen_public/adr/bin/ResourceHandbook2013.pdf) [hereinafter *ADR Resource Handbook*].

18. Fran L. Tetunic, *Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly*, 32 *Nova L. Rev.* 205, 207 (2007).

19. *ADR Resource Handbook*, *supra* n. 17, at 94.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Fla. Stat. § 44.106 (2013).

25. Fla. R. Certified & Ct. Appointed Meds. 10.100(a).

certified approximately 6,360 mediators in the five areas.²⁶ To be certified, the prospective mediator must be of good moral character and earn the required number of points for the type of certification sought.²⁷ Additional requirements for each competency area differ slightly.²⁸ For example, a county court certified mediator must have a minimum of 30 certified county mediator training points, ten education points, and 60 mentorship points, while a family law mediator must have 30 mediator training points, 25 education points, 30 mentorship points and 15 miscellaneous points.²⁹ The difference in educational requirements is the difference between having a high school diploma (ten education points) and a master's degree (25 education points).³⁰ Thus, it is clear Florida considers education an important part of the certification process. The point-requirement breakdown for each discipline and a summary of how those points may be achieved is attached as Appendix A.

Florida also requires continued education to maintain mediator certification. Every two years, mediators must apply for certification renewal.³¹ In order to maintain the certification, mediators must take 16 hours of continuing education every two years, including specific training in mediator ethics, domestic violence, and diversity/cultural awareness.³² As with the initial certification process, required hours depend on the mediator's chosen competency area.³³ Mediators can earn credits in many ways, for example: live lectures and seminars, live interactive webinars, listening to pre-recorded audio or video presentations, serving as a mentor under rule 10.100 of the Florida Rules for Certified and Court Appointed Mediators, lecturing in or teaching CME courses, writing or editing materials for publication, or completing a self-directed program approved for CME by a governmental licensing board.³⁴

Florida's Rules encourage compliance by providing a disciplinary process for mediators who neglect the minimum standards or otherwise disappoint their clients. Specifically, the Rules provide procedures for sanctioning these mediators.³⁵ Generally, members of the Mediator Qualifications

26. Fla. St. Cts., *About ADR & Mediation*, <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/about-adr-mediation.shtml> (accessed Feb. 24, 2014).

27. Fla. Dispute Res. Ctr., *How to become a Florida Supreme Court Certified Mediator 1* (Oct. 22, 2013) (available at <http://www.flcourts.org/core/fileparse.php/283/urlt/HowToBecomeMediator.pdf>) [hereinafter *Florida Certification Qualifications*].

28. Fla. R. Certified & Ct. Appointed Meds. 10.100(b)–(e).

29. *Florida Certification Qualifications*, *supra* n. 27, at 3.

30. *Id.*

31. *About ADR & Mediation*, *supra* n. 26.

32. *Florida Certification Qualifications*, *supra* n. 27, at 9.

33. *Id.*

34. *Id.* at 9–10.

35. Fla. R. Certified & Ct. Appointed Meds. 10.700–10.900.

Board review the initial complaint (which may be brought by anyone with knowledge of the alleged violation) to determine if the allegations, if true, would amount to a breach of the Rules.³⁶ If there is a potential violation, the complaint becomes subject to a hearing, and the Board determines if there is an actual violation of the Florida qualifications.³⁷ If the Board determines the mediator violated a rule, the Board may sanction him by imposing costs, administering an oral or written reprimand, requiring additional training, restricting the mediator's services, suspending or decertifying the mediator, or any other sanction as agreed to between the mediator and the Board.³⁸ Despite the process being available, written complaints against mediators are rare;³⁹ the state of Florida has decertified only three mediators.⁴⁰

2. Virginia

Virginia's certification process is also extensive, but only applies to court-referred mediators. Virginia's court-referred mediators must be certified according to the *Guidelines for the Training and Certification of Court-Referred Mediators* adopted in 2011,⁴¹ which provides for training in four distinct types of mediations.⁴² Each type of mediation has its own qualifications and training for certification,⁴³ including an extensive mentorship requirement.⁴⁴ While Virginia's process is facially similar to the process used in Florida, it is applied differently and far more stringently. At a minimum, Virginia's mediators must have a bachelor's degree from an accredited college or university, or a formal waiver of that requirement.⁴⁵ Additionally, mediators must complete appropriate training for their chosen mediation area, complete a mentorship program, and be evaluated by established trainers and mentors.⁴⁶ And even though the mentorship and evaluations generally need to be completed within 24 months of completing the training,⁴⁷ if the certification board believes additional training is required to certify a mediator, the board is more likely to extend the completion deadline and

36. *Id.* at 10.800–10.810.

37. *Id.* at 10.820.

38. *Id.* at 10.830(a)(1)–(8).

39. Tel. Interview with Janice M. Fleischer, Dir., Fla. Dispute Res. Ctr. (May 23, 2013).

40. Fla. St. Cts., *Dispute Resolution Center Mediator Reporting System*, http://199.242.69.70/pls/drc/drc_main_screen; select Decertified Mediators (accessed Feb. 8, 2014).

41. *Virginia Guidelines*, *supra* n. 11.

42. *Id.* at § C2.

43. *Id.*

44. *Id.* at § C3.

45. *Id.* at § C1c.

46. *Id.* at § C1d.

47. *Virginia Guidelines*, *supra* n. 11, at § C1d.

require the additional training than certify someone they believe may not be qualified.⁴⁸

Virginia mediators can train in four disciplines: general district court mediation, circuit court-civil mediation, juvenile and domestic relations district court mediation, and circuit court-family mediation.⁴⁹ Each discipline requires 20 hours of training in basic mediation skills and four hours of certified training in Virginia's judicial system.⁵⁰ General district court mediators require no additional training. Circuit court mediators require an additional 20 hours of advanced training for procedurally complex matters.⁵¹ Juvenile and domestic relations district court mediators require an additional 20 hours of training in family mediation and eight hours in screening for and handling domestic abuse.⁵² And circuit court-family mediators require an additional 20 hours of family law training—12 hours of advanced training in family finance and economic issues encountered in family law matters, and eight hours of training in screening and handling domestic abuse matters.⁵³ Certified trainers must conduct the training, and while some of these requirements may be waived, that can only be done upon a showing of sufficient hands-on experience in the specific field.⁵⁴

In addition to certified training, aspiring mediators in Virginia are required to complete an extensive mentorship program. The mentorship must include observation and co-mediation, and be overseen by at least two mediator-mentors certified in the applicant's desired discipline.⁵⁵ In addition, the applicant must observe at least two complete cases conducted by mentors certified in the applicant's desired discipline.⁵⁶ Moreover, each discipline has specific requirements for the mentorship, some of which have training prerequisites.⁵⁷ The general district court discipline requires that at least one of those cases be a general case; the juvenile and domestic relations discipline requires that both are family law cases; the circuit court-civil discipline has no specific discipline requirements for the observed cases; and the circuit court-family discipline requires that both cases are circuit court-family cases.⁵⁸ Additionally, the general district court requires the mentees to co-mediate at least five hours of supervised mediations, in-

48. Tel. Interview with Mandy R. Sarkissian, ADR Analyst, Dept. of Jud. Serv. (May 24, 2013).

49. *Virginia Guidelines*, *supra* n. 11, at § C2.

50. *Id.*

51. *Id.* at § C2c.

52. *Id.* at §§ C2; C2f.

53. *Id.* at § C2.

54. *Id.*

55. *Virginia Guidelines*, *supra* n. 11, at § C3.

56. *Id.* at § C3h.

57. *Id.*

58. *Id.*

cluding three complete general cases.⁵⁹ The juvenile and domestic relations discipline requires the mentee to co-mediate at least ten hours of supervised mediations, including at least five complete family cases.⁶⁰ The circuit court discipline requires supervised co-mediation of at least ten hours, including five complete circuit (non-family) cases or 20 hours of mediation, including at least two complete cases.⁶¹ And the circuit court-family requires ten hours of supervised co-mediation, including five complete circuit court-family cases.⁶² In all disciplines, the supervising mentor must evaluate the mentee's co-mediation.⁶³

Virginia also requires continued education to maintain certified mediator status. Mediators must apply for certification renewal every two years.⁶⁴ In order to maintain their certification, all mediators must conduct at least five complete case mediations or 15 hours of mediation in their chosen discipline. General and circuit court-civil mediators must complete an additional eight hours of approved general training/education. And general and domestic relations and circuit court-family mediators must complete an additional eight hours of family law training/education.⁶⁵ Finally, in each of the disciplines at least two of the eight training/education hours must be completed in mediation ethics.⁶⁶

Virginia also provides for disciplinary action against mediators who fail to comply with the minimum standards.⁶⁷ If the Virginia Dispute Resolution Service ("DRS") determines that a mediator has violated the standards set by the Judicial Council, DRS can sanction the mediator by: providing written notice identifying the corrective action necessary; requiring additional training or consultations with a mentor; restricting the certification; suspending or revoking certification or mentor status; notifying the entity with which the mediator is affiliated of a suspended certification status or decertification; disgorging fees or expenses received by the respondent; or reimbursing any out-of-pocket expenses incurred by third parties arising from the Complaint Hearing Committee.⁶⁸ Since Virginia implemented its certification program more than ten years ago, few complaints

59. *Id.* at § C3h(1)(c).

60. *Id.* at § C3h(2)(c).

61. *Virginia Guidelines*, *supra* n. 11, at § C3h(3)(c).

62. *Id.* at § C3h(4)(c).

63. *Id.* at § C3h.

64. *Id.* at § D1.

65. *Id.* at § D4–D5.

66. *Id.* at § D3.

67. Off. of the Exec. Sec. S. Ct. of Va., *Procedures for Complaints Against Certified Mediators, Mediator Trainers, and Mediator Mentors* § 1(c), § 8(b) (July 1, 2011).

68. *Id.* at §§ 8b(1)–(9).

have been filed and only one has resulted in decertifying a Virginia mediator.⁶⁹

B. Certification v. Non-Certification

As mediation becomes more prominent in civil disputes, the question of mediator certification requirements becomes more relevant. Mediation has expanded into almost every sphere of society over the past 30 years. It is used to resolve all types of legal disputes, even without a court order.⁷⁰ As the use of mediation increases and expands, it is appropriate for Montana to take another look at whether mediator certification should be implemented in Montana—before problems arise in the field.

People do not always know where to find qualified mediators on their own. While lists of mediators may be readily available on the internet, whether that mediator is qualified is not as easily accessible. Moreover, while that information might be available if you know where to look for it, a *pro se* party may accept the opposing side's choice of mediator because he or she does not know any better.⁷¹ Today, in addition to the states of Florida and Virginia as discussed *supra*, many groups and organizations require their mediators to meet certain qualifications or standards. For example, the United States District Court of Northern California requires all its panelists to have knowledge of civil litigation in federal court.⁷² Additionally, the court requires its attorney panelists to have at least seven years of legal experience and its non-attorney panelists to have appropriate professional credentials in another discipline.⁷³ The San Diego Superior Court requires its mediator panelists to have completed a specified course of study and experience.⁷⁴ The Indiana Supreme Court requires its registered mediators to be an attorney in good standing with the Indiana Supreme Court who has completed at least 40 hours of commission-approved mediation training specific to the type of mediation the applicant wants to do.⁷⁵ The Ohio Supreme Court has very specific guidelines for anyone mediating family law cases.⁷⁶ Finally, the Montana Supreme Court requires its panel

69. Tel. Interview with Melanie Rinehults, ADR Program Coord., Dept. of Jud. Serv. (May 24, 2013).

70. Lisa Bench Nieuwveld, *Florida Continues to Lead the Nation in Mediation*, 81 Fla. Bar J. 48, 48 (July, 2007); see also Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict 7* (Rev. ed., Jossey-Boss 2005).

71. Cf. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 2025–2026 (1999).

72. U.S.D.C. N. Cal. ADR L.R. 2–5(b)(3).

73. *Id.*

74. San Diego Sup. Ct. R. 2.3.7C.

75. Ind. R. Ct. R. Alt. Dispute Res. 2.5.

76. Ohio Sup. R. 16.

members to be licensed attorneys in good standing with the State Bar of Montana with at least five years of experience.⁷⁷

Professional organizations also have specific requirements. For example, the Montana Mediation Association requires its members to maintain specific standards of practice, with more particular standards if you want to engage in family law mediation.⁷⁸ However, a mediator does not have to be a member of the Montana Mediation Association or be a court-appointed mediator to conduct mediations in Montana. For those conducting mediations outside these circumstances, there are no minimum requirements for the mediator to meet; there is no statewide standard of basic training and experience for Montana mediators. Consequently, there is nothing in Montana that prevents a person from simply calling him or herself a mediator even if that person has no training or experience. Nor are there any minimum requirements to give the public confidence that prospective mediators understand the basic fundamentals of mediation and can do the job with some degree of skill.

1. *Benefits of Certification*

To determine if mediator certification is warranted in Montana, mediators must first establish mediation goals and then determine if certified mediators would help attain those goals. Appended to this article as Appendix B is a proposed attorney-questionnaire. The purpose of the questionnaire is to help attorneys establish goals of certifying mediators and delineate qualities of a good mediator. Multiple organizations have identified mediation goals as: (1) protecting consumers from incompetent mediators; (2) reducing court congestion; (3) promoting mediation by increasing mediator credibility;⁷⁹ (4) creating a consistent system of verifying basic training, experience and study; (5) assisting consumers in selecting a mediator; (6) enhancing a mediator's competency and professionalism; and (7) enabling certified mediators to influence development within their field.⁸⁰ These goals strive to improve the quality of mediation services and enhance respect and legitimacy of the field.⁸¹ Certifying mediators would promote each of these goals.

77. Mont. R. App. P. 7(4)(e).

78. Mont. Med. Assn., *Certified Mediator Qualifications and Family Certified Mediator Qualifications* 1–4 (Nov. 11, 2013) (available at <http://www.mtmediation.org/docs/MtMA%20CERTIFIED%20MEDIATOR%20&%20CERTIFIED%20FAMILY%20MEDIATOR%20QUALIFICATIONS%20Rev%2011-11-13.pdf>) [hereinafter *Qualifications for Full Membership*].

79. Sarah Rudolph Cold, *Mediation Certification: Has the Time Come?*, 11 Dispute Res. Mag. 7, 7 (Spring 2005).

80. *Id.* (citing ACR Task Force on Mediator Certification, Report to ACR Board of Directors, at 7 (March 31, 2004)).

81. Henning, *supra* n. 6, at 190.

a. *Quality*

Stories of incompetent mediators are becoming more and more common,⁸² but there is no empirical evidence establishing that the public actually needs protection from the consequences of using incompetent or unethical mediators.⁸³ To the extent mediators are causing harm, implementing a voluntary certification system *may* help parties (and their attorneys) choose competent, ethical mediators. A mediation succeeds when the mediator acts within ethical standards and gives the parties an opportunity to meaningfully participate in the process and exercise autonomy.⁸⁴ Regardless of whether success is defined as settling the underlying dispute, transforming the parties, or by some other measure, success is less likely to occur when the mediator prevents parties from meaningfully contributing or exercising self-determination.⁸⁵ A mediator does not make binding decisions for the parties but instead works with the participants to help them resolve their disputes;⁸⁶ thus, an ineffective mediator may actually help negotiate a harmful settlement, or bring other harmful consequences to the unsuspecting participants. Some disputants have alleged that but for the pressure of a mediator, they would not have entered into a costly or unfavorable agreement.⁸⁷ Mediator certification programs are supposed to ensure some degree of quality control to help minimize these types of losses.

Yet, there currently is no empirical evidence that the certification process actually ensures quality as intended. Program coordinators assume certification programs are working because there are so few complaints against mediators.⁸⁸ However, complainants do not have many options for reporting a bad mediator, so most go unnoticed. Without certification programs there are not many methods of bringing attention to a bad mediator.⁸⁹ As a result, it is unclear if a certified mediator is the same as a qualified mediator. Nonetheless, a certification program that allows for oversight has a better chance of providing quality control than no program at all.

82. Divorce Simply Done, *Guide to Avoiding Incompetent Divorce Mediators*, <http://www.divorcesimplydone.com/guide-to-avoiding-incompetent-divorce-mediators/> (accessed March 10, 2014); Deborah Sword, *Professionalization of Conflict Resolvers*, <http://www.mediate.com/articles/swordL7.cfm> (accessed March 10, 2014); Tel. Interview, *supra* n. 48.

83. Tel. Interview, *supra* n. 69.

84. Fran L. Tetunic, *Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly*, 32 *Nova L. Rev.* 205, 207 (2007).

85. *Id.*

86. Max Vilenchik, *Expanding the Brand: The Case for Greater Enforcement of Mandatory Mediation in Trademark Disputes*, 12 *Cardozo J. Conflict Resol.* 281, 287 (Fall 2010).

87. James R. Coben and Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 *Harv. Negot. L. Rev.* 43, 95–98 (Spring 2006).

88. Tel. Interview, *supra* n. 69.

89. *Id.* (according to Ms. Rinehults, prior to Virginia's certification program attorneys simply refused to recommend mediators with whom they had bad experiences); Tel. Interview, *supra* n. 39.

The specific goals cited above regarding certification programs are interdependent. By protecting consumers from incompetent mediators, creating a consistent system for verifying basic training, assisting the consumer in selecting a mediator, and enabling certified mediators to influence the development of mediation, certification programs can increase mediator competency. With increased competency comes better quality. Implicitly, better mediators should provide for a better court system. As the number of mediations increase, the court system becomes less congested and the judges can more readily handle the cases the parties are prepared to take to trial.⁹⁰ As judges' caseloads become lighter and more manageable, it follows that they might become more inclined to send only those cases most suitable for ADR to mediation. Consequently, mediators would not be overencumbered by futile mediations. Instead, mediators could focus on improving effective mediation skills so their own competency and professionalism could grow. As mediators' competency and professionalism grow, they are better able to contribute to the development of the field, which in turn increases mediator credibility and promotes mediation as a whole. As mediator credibility increases, so does the respect and legitimacy of the mediation field.

b. Respect and Legitimacy

Certification requirements can mitigate unethical or overbearing mediator practices that cannot be addressed informally. As shown in Sections IIB1 and IIB2, *supra*, apparently successful certification programs provide for discipline and public exposure if the mediator engages in misconduct.⁹¹ Many certification programs bind their mediators to a code of ethics⁹² and provide them with behavioral controls (see Section II, *supra*, for specific sanctions to which certified mediators may be subjected). However, a mediator may act unprofessionally without realizing his or her conduct is inappropriate. The best way to ensure mediators behave ethically is to provide the necessary training.

2. *Disadvantages of Certification*

Although the list is not as extensive, the arguments against certifying mediators are just as compelling as those in support of it. The primary argu-

90. Becky L. Jacobs, *Volunteers: The Power of Community Mediation*, 11 Nev. L.J. 481, 485 (2011).

91. See e.g. Fla. R. Certified & Ct. Appointed Meds.

92. See e.g. *Qualifications for Full Membership*, *supra* n. 78, at 1; ABA, Am. Arb. Assn., & Assn. for Conflict Res., *Model Standards of Conduct for Mediators* (2005) (available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf); *Virginia Guidelines*, *supra* n. 11, at § D(3).

ments against certification are that the programs might: (1) “decrease the diversity of available mediators and of possible mediation techniques”; (2) impede the growth and development of the field;⁹³ and (3) be unable to quantify what makes a qualified mediator.⁹⁴ Opponents also cite the lack of universal agreement on what qualities a good mediator should have as a disadvantage to certification.⁹⁵ Some of the questions included in Appendix B are intended to address this dilemma. These questions should be answered before Montana implements a formal certification program, so each point of view may be considered.

a. Diversity

Diversity in mediation has multiple aspects—diversity of professionals within the field, diversity of ideas, and diversity of mediation styles to name a few. A good certification program should be flexible to ensure diversity. The programs in Florida and Virginia are good examples, for instance. Neither requires a specific type of degree to become certified.⁹⁶ Using the formulas set forth in either state (e.g., a point system or requiring specific training followed by a specified number of hours of hands-on experience) would be a good starting point because neither are exclusive programs.⁹⁷ Without flexible programs, like those used in Florida and Virginia, certification requirements can prevent qualified individuals from becoming mediators.⁹⁸ Although certification requirements are not intended to license the professions, other aspects of certification programs may prevent individuals from entering the field (e.g., lack of money for training, lack of education, etc.). For example, some courts require their court-appointed mediators to be licensed attorneys.⁹⁹ Currently, Montana requires its court-appointed appellate mediators to be licensed attorneys with at least five years of legal experience and in good standing with the State Bar of Montana.¹⁰⁰ Such a requirement prevents a more diverse group of people from becoming appellate mediators in Montana. Parties to mediation come from varying social and economic backgrounds, and the mediators should reflect that same diverse background. Thus, non-lawyers should be encouraged to act as mediators. For example, it is logical that people with backgrounds in

93. Henning, *supra* n. 6, at 190.

94. *Id.* at 197.

95. Moffit, *supra* n. 12, at 154–155.

96. *Virginia Guidelines*, *supra* n. 11; *Florida Certified Qualifications*, *supra* n. 27.

97. *See e.g. Virginia Guidelines*, *supra* n. 11; *Florida Certified Qualifications*, *supra* n. 27.

98. Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. Toledo L. Rev. 327, 345 (1998).

99. *Id.* at 345.

100. Mont. R. App. P. 7.

mental health or psychology may be better suited to act as divorce mediators. This is reflected in Montana's requirements for family law mediators.¹⁰¹ In fact, many states now encourage divorce mediators to have a background in psychology or other related social science.¹⁰²

Diversity also promotes originality. When a person's background is dissimilar from others on the project, the program can benefit from that person's original theories. For example, someone with a social science background may have expertise in disciplines entirely different from someone with a legal background. As such, that person's expertise may provide information—and at some point training relating to culture, diversity, and psychology—that lawyers might not have.¹⁰³ If certification requirements limited mediators to particular professions, competent, skilled, and innovative individuals would be excluded and the potential for stagnation would increase.

Finally, an overly stringent certification program can suppress innovation. A statewide certification program that requires all certifying organizations to maintain the same bare-minimum requirements has the potential to promote “one particular model or style of mediation” while ignoring other approaches.¹⁰⁴ Opponents to certification say such an approach would result in “a cookie-cutter approach to mediation, in which all mediators are ‘competent,’ but all mediators are also tied to the same tools and the same model.”¹⁰⁵ A diverse certification program should include multiple models (as reflected in Florida and Virginia) using varying tools depending on the strengths of the particular participant. Appendix B should help establish a comprehensive program that would implement the types of models most appropriate for Montana.

b. Growth and Development of Mediation

With diverse professionals come varied philosophies. However, even philosophy variations can become stagnant. Those who oppose certification believe it “[tends] to freeze and narrow the profession, [ties] it to the past, and [discourages] innovation.”¹⁰⁶ A good certification program should require continuing education, which could help practitioners become familiar

101. Mont. Code Ann. § 40–4–307.

102. See e.g. Cal. Fam. Code §§ 1815 & 3164 (2013); *Florida Certified Qualifications*, *supra* n. 27, at 4.

103. Shaw, *supra* n. 98, at 346.

104. Henning, *supra* n. 6, at 197.

105. *Id.*

106. Bowers & Nelle Moffett, *Mediator Licensing and Certification in California*, “Some Considerations on Licensing: The Other Side of the Story,” http://www.mediation-consultants.com/articles/Mediator_Licensing_and_Certification_5.html (quoting Carl Rogers); also see generally Henning, *supra* n. 6, at 197.

with new techniques, thus refuting these arguments. A good certification program should embrace diversity to help the mediation field grow and develop.

c. What Qualities Make a Good Mediator?

There is no single viewpoint on what makes for a good mediator. In fact, the numerous means by which certification programs assess mediator qualification are frequently tied directly to the program coordinator's viewpoint.¹⁰⁷ For example, programs that assess a mediator's qualifications by education favor individuals with formal educations.¹⁰⁸ On the other hand, programs that assess a mediator's qualifications by written exam favor individuals who can remember methodology and statistics well and accurately recite that information back to a test giver.¹⁰⁹ There is no single effective approach to measure mediator qualifications and most programs use a combination of approaches.¹¹⁰ Yet, there appears to be some consensus that certified mediators need to maintain a certain level of ongoing training.¹¹¹ Thus, even though there is no one answer to what makes a mediator qualified, there does seem to be agreement that a qualified mediator is one that has had at least some training.

III. SHOULD MONTANA CERTIFY?

The *need* to certify has not been proven. However, whether certification is needed is not the basis on which Montana should make the decision to certify. There is no empirical evidence available to determine whether certification actually provides a "better" mediator. Moreover, no state has successfully implemented comprehensive, uniform certification requirements.¹¹² However, this fact does not mean Montana should refrain from implementing its own comprehensive certification program. As mediation continues to play an expanding role in our legal system, it is clear that Montana should address the certification issue. The programs in Florida and Virginia were enacted after extensive preliminary work. Montana needs to

107. See Dobbins, *supra* n. 10, at 99–110.

108. *Id.* at 102.

109. *Id.* at 102–103.

110. *Id.* at 109.

111. See *e.g.* Assn. for Conflict Res., *supra* n. 2, at 11 (recommending certification programs include a regular continuing education requirement).

112. Florida's requirements for certified and court-appointed mediators are the closest to a statewide uniform system. Florida's requirements are extensive and thorough. From what this author is able to determine, the only reason it does not qualify as having uniform, statewide requirements is because it limits its scope to mediators dealing in five different fields. For all practical purposes, these five different categories likely encompass anyone wanting to mediate in Florida and it thus may provide *de facto* statewide certification requirements.

do its own preliminary work to determine what type of certification program would work best and what the best means of overseeing that program might be. This work should include:

- (1) Establishing a taskforce to coordinate a comprehensive survey of mediation (including typical problem areas) and the relationship between the qualification and experience of mediators to mediated outcomes, as viewed from the perspective of the participants (including attorneys), mediators, and the judicial system.
- (2) Gathering statistics on relevant matters, including: the effect of mediation programs on court calendars; levels of satisfaction and dissatisfaction by the participants (including attorneys); benefits or lack of benefits for different types of cases, and why; the costs; and other related matters. This type of information would serve to monitor the field as it develops, allow for evaluation that is more accurate, and allow for fine-tuning to improve mediation programs.
- (3) Establishing a task force including mediators, academics, and training professionals to investigate what "competency" means. Specifically, to identify more fully the traits, knowledge, and skills that make mediators more successful, and to design appropriate educational programs.
- (4) Supporting further organization and communication among professional and volunteer groups to expand the gains made by groups like the Montana Mediation Association and the bar associations in advancing the development of mediation.
- (5) Boosting efforts to educate the public about the nature and availability of mediation services, including providing the public with rosters of mediation organizations and practitioners with corresponding qualifications and experience.

Advances in these five areas will furnish the basis for a fair and effective certification procedure and will help mediation grow toward its full potential in a more orderly manner.

Lingering questions regarding overseeing certification requirements still remain: Who will administer the mediator certification system? Should there be one state-sponsored certifying board or a variety of organizations capable of certifying mediators? If there are a variety of programs, how do you determine whether a particular program is eligible to certify mediators?

The Montana Mediation Association is an established mediation association that is well-suited to overseeing and certifying mediators within Montana, although it likely would need additional funding for the added workload. Yet, even though the association is qualified to oversee certification, it should not be required to implement all of the training sessions such a program would require. There are many established training programs throughout the state and the country. Some of those include continuing education programs meant for social workers and legal advocates. Montana mediators are well-suited to utilize the existing curricula for their own benefit and those using their services. Certification and subsequent renewal for

mediators would not be unlike the process the State Bar of Montana uses to oversee attorneys' qualifications and their continuing education. Although the Bar Association monitors the continuing education of licensed Montana attorneys, it does not provide all the training to those attorneys. Similarly, the Montana Mediation Association could oversee the certification and continuing education of mediators without implementing a formal continuing education program itself.

IV. CONCLUSION

The arguments both favoring and opposing certification programs share two primary concerns: the delivery of quality mediation services to the public and the advancement of the field of mediation. When done well, mediation "is a non-adversarial joint method which clears the way for honest and effective communication between the parties."¹¹³ Conversely, an unqualified mediator can inhibit honest and effective communication, thereby discouraging parties from further mediation and turning them instead to litigation.

The mediation profession, the judicial community, and the public all have a stake in the healthy development of mediation. In principle, certification is a good idea—it could increase public confidence in mediation, promote its use, and eventually raise its capabilities. However, this only works if the certification process ensures certified mediators are well-qualified individuals whose services will benefit the people in need of those services.

For mediators, this field offers new opportunities, challenges, and a good deal of professional satisfaction. For the judicial system, mediation can ease congested court calendars, thus advancing the administration of justice and allowing judges to devote more time to other important matters. For the public, it means less costly and more satisfactory settlement of many types of disputes. By taking additional time to develop and incorporate more meaningful certification requirements, a formal certification program should ensure that the full benefits of mediation are realized. Montana should take the steps necessary to implement such a program.

113. St. B. of Mont., *Dispute Resolution in Montana*, <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=26> (accessed July 28, 2013).

APPENDIX A¹¹⁴
Point Requirements

Points Needed per Area of Certification		Minimum Points Required in Each Area
County	100	30 certified county mediation training; 10 education (minimum HS diploma/GED); 60 mentorship
Family	100	30 certified family mediation training; 25 education/mediation points (minimum bachelor's degree); 30 mentorship; 15 miscellaneous points
Dependency	100	30 certified dependency mediation training; 25 education/mediation points (minimum Bachelor's Degree); 40 mentorship points; 5 miscellaneous points
Circuit	100	30 certified circuit mediation training; 25 education/mediation points (minimum Bachelor's Degree); 30 mentorship points; 15 miscellaneous points
Appellate		For initial certification as a mediator of appellate matters, an applicant must be a Florida Supreme Court certified circuit, family of dependency mediator and successfully complete a Florida Supreme Court certified appellate mediation training program.

114. *Florida Certification Qualifications*, *supra* n. 29, at 4–5.

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Point Breakdowns¹¹⁵

Education/Mediation Experience (points awarded for highest level of education received)			
HS Diploma/GED	10 points	Master's Degree in Conflict Resolution	30 points
Associate's Degree	15 points	Doctorate (JD, MD, PhD, EdD, LLM)	30 points
Bachelor's Degree	20 points	PhD from accredited CR Program	40 points
Master's Degree	25 points	Graduate Certificate CR Program	+5
Florida certified mediator: 1 point per year in which mediated at least 15 mediations (any type) OR any mediator: - 5 points for minimum of 100 mediations (any type) over a 5 year period			

Mentorship – must work with at least 2 different certified mediators and must be completed for the type of certification sought	
Observation	5 points each session
Supervised Mediation	10 points each complete mediation

Miscellaneous Points	
Licensed to practice law, psychology, accounting, social work, mental health, health care, education or mediation in any US jurisdiction	5 points total
Florida Certified Mediator	5 points total
Foreign Language Conversational Ability as demonstrated by certification by ACTFL Oral Proficiency Test; qualified as a court interpreter or accredited by the American Translators Association; Sign language Interpreter as demonstrated by approval by the Registry of Interpreters for the Deaf	5 points total
Completion of additional mediation training program (minimum 30 hours in length) certified/approved by a state or court other than Florida	5 points total

115. *Florida Certification Qualifications*, *supra* n. 29, at 4–5.

APPENDIX B
MEDIATOR CERTIFICATION SURVEY

1. Have you ever been involved in mediation? In what capacity (e.g., mediator, advocate or disputant)?
2. Is there a need to certify mediators in Montana? Is the need greater in some areas than others?
3. What will enacting certification standards do for mediation in Montana? What should it do?
4. In order of importance, identify the goals of a successful certification program?
5. Do mediators see a benefit from being certified?
6. Do certain types of mediators benefit more than others?
7. What qualities make a competent mediator? Explain.
8. What are the advantages and disadvantages of the varying styles of mediation (i.e., evaluative, facilitative and transformative)?
9. If certification standards are adopted, should mediators be certified in specific “styles” of mediation (e.g., evaluative, facilitative or transformative)?
10. What criteria should be used to evaluate and achieve certification (e.g., training, background, or experience)?

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11. Should standards for certification vary by practice area (e.g., civil, criminal, family law/child custody)? If so, what are the benefits of varying certification standards?
12. Besides certification, what other steps could be taken to ensure a minimum level of mediator/mediation quality? Should those steps be considered?
13. Should the certification process include a complaint process or disciplinary procedures for mediators who fail to comply with adopted standards?
14. What is the distinction between certification and licensing?
15. Should there be different certification standards for lawyer and non-lawyer mediators?
16. Should certification standards differ by context (e.g., court-annexed or private)?
17. Should certification standards be enacted at the state or local level?
18. Who should oversee the certification process (i.e., courts, government entities, private organizations or associations)?
19. Should a certification program include continuing education or regular recertification requirements?
20. Should a certification program be mandatory?

