

1-1-2004

Creating and Certifying the Professional Mediator - - Education and Credentialing

Joseph B. Stulberg

Ohio State University, Moritz College of Law

Donald C. Peters

University of Florida Levin College of Law, PetersDon@law.ufl.edu

Tracy L. Allen

Sommers, Schwartz, Silver & Schwartz, P.C.

Judith P. Meyer

J.P. Meyer Associates

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Joseph B. Stulberg, Donald C. Peters, Tracy L. Allen & Judith P. Meyer, *Creating and Certifying the Professional Mediator: Education and Credentialing*, 28 Am. J. Trial Advoc. 75 (2005), available at <http://scholarship.law.ufl.edu/facultypub/21>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

Creating and Certifying the Professional Mediator—Education and Credentialing

Joseph “Josh” B. Stulberg[†]

Donald C. Peters^{††}

Tracy L. Allen^{†††}

Judith P. Meyer^{††††}

Abstract

Existing and pending law school mediation programs, post-graduate mediator training programs, mentorship programs, credentialing movements, and continuing mediation education were examined by a panel and speakers directly involved in those fields. Are we effectively training new mediators in law schools and post-graduate programs? Should we, and how can we, “credential” mediators? Do good mediators need to be re-trained? How would continuing mediation educational requirements be implemented?

Josh Stulberg: I want to thank Larry and Bob for inviting me to participate in this part of the program. I want to pick up, actually, on their invitation to ask the panel and members of the audience to focus on this topic in the following way. First, what’s happening in the field in terms of how people are creating and certifying the mediator? Second, what can we do collectively to help shape what we think ought to be happen-

[†] B.A. (1967), Kalamazoo College; J.D. (1970), New York University School of Law; M.A. (1975), Ph.D. (1975), The University of Rochester. Josh Stulberg is a Professor of Law and Associate Dean at the Moritz College of Law at The Ohio State University and is the Faculty Director of its comprehensive Program on Dispute Resolution.

^{††} B.A. (1965), University of Northern Iowa; J.D. (1968), University of Iowa College of Law. Don Peters is a Professor of Law, Trustee Research Fellow, and the Director of the Institute for Dispute Resolution at the University of Florida’s Levin College of Law.

^{†††} B.A. (1976), high honors, University of Michigan; J.D. (1980), *cum laude*, LL.M. (1984), Wayne State University. Tracy Allen is a full time neutral mediator and arbitrator with the firm of Sommers, Schwartz, Silver & Schwartz, P.C., in Southfield, Michigan.

^{††††} B.A. (1966), Barnard College; J.D. (1974), Cornell Law School. Judith Meyer is the principal mediator and arbitrator in J.P. Meyer Associates of Philadelphia, Pennsylvania, which has resolved more than 800 private commercial claims. She helped open the Philadelphia office of JAMS in June 2004.

ing? We hope to encourage an interactive dialogue that perhaps ends with some suggested directions for how we might proceed.

The format of this panel presentation and discussion is to take three perspectives. I've asked Don Peters, first, to offer a perspective about what is happening in terms of creating and certifying professional mediators from the vantage point of law school training. We know that training goes on in other academic environments, in the helping of professions in particular. We're going to focus primarily on what's happening in the law schools, both in terms of J.D. students and about the interaction between law schools and bar associations, CLE programs, courts that impose training requirements, and so forth.

Then, Tracy Allen is going to speak from the vantage point of the persons who have conducted programs that many of us have attended. Individuals who want to get on various mediator panels must attend these programs. What are the strengths and weaknesses of those mediator training programs? How have courts or other organizations shaped their delivery of those programs, and are those guidelines desirable or undesirable?

Finally, Judith Meyer from Philadelphia is going to offer some perspectives on a question that typically arises but is now coming with a slightly different sense of urgency: credentialing and certification as another way of "creating and certifying" the mediator. I've asked each of these individuals to share some initial comments.

Don Peters: What role do law schools currently play, what's happening in the training? As an aside, we've got to stop calling this "training." You train dogs and horses. *We teach, we instruct, we educate.* I just don't like to talk about *training*.

I have some good news and some bad news. The good news is that the law schools are playing a modest, if not small, role in educating current J.D. students in mediation skills. A 2003 ADA directory of law school dispute resolution programs shows that 31 of the 184 accredited law schools in this country offer mediation clinical programs. These are programs in which, presumably, students actually learn about how to mediate and then provide mediation services in some context. Some of these programs in Florida where I live and teach have coordinated with state certification systems and actually create clinical courses that lead to eligibility for certification. In Florida this is done in the county court, which in most instances is the small claims court context. I have created

and currently direct such a clinic at the University of Florida. I know my good friend Sharon Press teaches one at Florida State University. I think there's another one going at Stetson Law School.

We can get into some debates about whether law school is the appropriate place to actually focus on a level of instruction that leads to eligibility for certification. I'm very happy to debate the proposition with you that I think, in the context of small claims dispute resolution, it is a great place to give students instruction.

Our clinics in Florida provide and comply in every respect with what the Florida Supreme Court has mandated regarding county court mediation instruction. I have found that my students are very, very interested in mediation. I make the argument to them that you take this course, you fill in your application, pay your fifteen bucks, and for the next four or five years, while you are learning the ins and outs of the family law systems. This is important if you want to mediate in family law or in circuit civil court systems, or if you want to do circuit civil mediation—you can sharpen your mediation skills by participating as a volunteer smalls claims mediator. I have a few very dedicated graduates doing precisely that, even as we speak.

I believe that these mediation clinics are an excellent way for students to learn about the mediation process and to become much better adept at representing clients before and during mediations. I think it's a great way to learn mediation advocacy.

I think law students need to learn problem solving. What better way to learn problem solving than to help them learn how to resolve disputes in a small claims context?

I have to share a personal secret with you. I have worked for almost twenty-five years in a family mediation clinic trying to teach my students the value of empathy. There is something about the advocacy role that threatens most law students' ability to empathize with a client who seeks a divorce and is often crying in our office. However, there's something about the objective mediator role that allows students to use some active listening and see how powerful it is. I've actually experienced that students learn this critically important problem solving, mediative, lawyering skill of active listening and empathy in mediation far better than they do in other areas. I'm not aware of the kinds of mediation services that the other twenty-eight clinics are doing. I presume it is mostly within the

realm of something like community dispute resolution or small claims mediation.

I believe very strongly that students have to learn how to negotiate, that they have to learn how to advocate at mediations, and that they have to learn how to problem solve. I'm happy to report that that same 2003 survey shows that 79, almost half of the 184 ABA approved law schools, offer a course focused on mediation. This probably is a simulation-based course where all of the actual role-playing is done in that context. Eighty-seven schools offer a course in negotiation. Nine schools now are offering a specific course in dispute resolution advocacy, which presumably includes mediation advocacy. One hundred forty-one schools offer a dispute resolution survey course, which presumably covers negotiation but may or may not cover mediation. That's the good news. Here's the bad news. With few notable exceptions, at most law schools, these courses comprise a very small part of the curriculum and are available to a very few students.

This ABA survey showed that the percentage of law students who take a least one dispute resolution course in America in 2003 averaged 40%, ranging from a high of 80% at one school to a low of 15% at another. Another recent survey showed an average of 27%.¹ At Florida, we accommodate only 22% of our graduating class in our negotiation, mediation and mediation clinic courses. There is tremendous law student interest in dispute resolution, in negotiation, in problem solving, in value creating, and in mediation.

We did a survey in our curriculum eleven years ago and predicted that two-thirds of our student body would take a negotiation or a mediation course if given the opportunity. My mediation clinic reaches only four percent of the graduating class at the University of Florida, although the student interest is always at least ten times that. American law schools are a long way from reaching the goal of exposing every student to a dispute resolution course. I really do think that's an excellent way to start the instructional process. I do believe that learning professional skills, including dispute resolution skills, is a lifelong continuum. I also believe

¹ Douglass S. Adams, *Alternative Dispute Resolution Programs in Law School Curricula—What's Next?*, at 23 (Aug. 24, 2001) (unpublished manuscript, on file with speaker).

in the recommendation that law schools could do a lot more to stimulate this without very much additional expense.

A 2001 project of the ABA Section of Dispute Resolution reported that dispute resolution instruction had reached a plateau in law schools in the mid-1990s.² Except for growth attributed to, again, these nine or ten schools that really emphasize the process, many schools are in a holding pattern or actually in a declining pattern. At Florida, I would simply share that we haven't added a new course in our dispute resolution curriculum since I created the mediation clinic in 1996. We haven't added a new faculty member with teaching interests in dispute resolution in four years.

We're reaching an average of forty percent of our students. What I would encourage you to do is to lean on people at your law school—deans and chairs of curriculum and appointments committees—to try to change this process. American legal education has been remarkably resilient to not responding to calls for change over the last thirty-five years, but a Crampton Report comes out and says we have more professional skills disappearing without a trace.³ The MacCrate report says the same thing. MacCrate found in 1992 that dispute resolution and other professional lawyering skills instruction consumes only about nine percent of the total instructional time in American law schools.⁴ There's no reason to think that has changed.

I've been doing this now for over thirty-one years, and I am convinced that significant legal reform is not going to come from within the academy. It is only going to come from outside stimulation. I suspect if you really looked at the nine schools that are doing it right—Ohio State, Pepperdine, Hamline, Willamette, and I'm leaving out some—you will find some significant pressure from segments of the bar and significant financial gifts. I always tell my students on the last day of class that I only

² *Id.* at 25-26.

³ American Bar Ass'n, *Report of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR (the Crampton Report).

⁴ American Bar Ass'n, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR (the MacCrate Report).

work with graduating seniors because we have a registration priority system at the University of Florida; you can't get into these highly sought courses until you're almost out the door. To combat this late exposure to mediation, I tell them when you are asked for law school donations, designate them to dispute resolution.

Much of the growth that we experienced in the last decade at Florida—two of the four people who work in the area—have been the result of a very significant gift from the Upchurch, Watson, White and Max group. That's one of the ways you can create more sensitivity to, and a greater response to, very identifiable student interest in learning the kinds of theories and skills that you would like to see lawyers display when they come before you to mediate on behalf of their client.

Tracy Allen: I'm somewhat irate that we have to think about the concept of credentialing and standardizing processes, that society is telling us the reason we've come to you is because we don't like standardization and we don't like trying to fit square pegs in round holes. I realize that to some great extent, we have already done that. Let me just share with you a little bit of the perspective that I bring to you on this topic.

When we were in London last week with our dear friend, Mark Jackson Stops, we heard a wonderful story about Dr. Henry Kissinger. I identified highly with it because it was a story of a man who had been asked to mediate a very difficult world conflict. He had sold a bill of goods to the people who hired him, and once he was successful in obtaining the role as mediator, he was in a panic. He sought education from the great master. On his way into Kissinger's estate, he noticed the gilded cage which contained a lion and a lamb. He was astonished. As he approached the home, he thought, "This man is really good that he could keep a lion and a lamb together in the same cage." Rather than beginning his conversation with Dr. Kissinger about his case, he wanted to know immediately how Dr. Kissinger had achieved this great feat. Kissinger, in keeping with the notion of transparency, said, "Well, I do it because it reminds me of who I am as a mediator and as a negotiator." He said, "I keep the lion and the lamb together because I am an optimist. I am an idealist. But I replace the lamb every day because I'm a pragmatist."

It's with that notion that I realize we're going to have some standardization and some credentialing. I ask us to look at what we've already done

in that context. We have already set some standards in the court programs and in programs such as Harvard, Pepperdine, Hamline and all of the other places that we know. We have already decided amongst ourselves that there are certain things we should and shouldn't do in trainings. When I look at this issue, I ask myself initially, "Why do we always have people who want to fix things that are not broken?" So are we broken? And if we are broken, is credentialing and standardizing the fix-it?

The irony is that we've already self-selected and self-designed some things that we thought would be helpful. In the guise of wanting to have high excellence in our standards of education and training, we've already decided these things as a profession and as an industry. We are chosen by people mostly by choice, not by courts. There are standards of excellence and standards of qualifications that we believe, as service providers, that we must maintain in order to deliver quality services. Therefore, it's a conundrum for me, quite frankly.

The longer I think about training programs and credentialing, the longer my list of questions grows and the weaker my list of answers becomes. There is also something that we all know, which is Bob Creo's repeating song: what we do is not a science, it's an art. What we know about this, as with any other human skill, is that some people are born with it, some people can learn it, and some people just better find something else to do.

This year I will spend twenty-five days doing trainings in five different continents. I will have the privilege to train mediators, lawyers, judges, lay people, psychologists, social workers, human resource advisors, corporate management, and people all over the world. Forget the language difficulties and the cultural difficulties. Every time I take the podium as a mediator or as a teacher, I ask myself first, "Why have these people come? Why do we as a profession go to education? Why do we seek it? What is it about it that we think we need to have it? Why do we seek certain things rather than others?" If we are going to go out into the world and standardize trainings and standardize credentialing, I think we have to ask why others want it. Is what we've already done enough? If it isn't, what more do they want from us? How can we deliver it? I agree with Mel Rubin's statement that we are responsible for doing it. I don't want the inmates running the asylum. I would rather have us setting training standards going out, rather than non-mediators coming in to us.

When I look at training programs around the world, they are quite varied. I won't bore you with the details about why it's 240 hours of training to become a mediator in Italy, why in Geneva it's only forty hours, why in Michigan it's forty hours plus three co-mediation cases, or why in certain countries there's no experience requirement whatsoever. What I will tell you is that, what I find most interesting as we go into these markets to do cases with advocates and co-mediators and people who sit on panels of NGOs, the results are astonishingly the same. I wonder if it really matters. I wonder if the mere introduction of a third party to a conflict is sufficient enough to change the nature of that conflict. That if we provide that environment, does it really matter in the end how or who we asked to sit in that chair? I don't know the answer. I am astonished, though, when I look at the diversity of programs and credentialing and standardizing and see that we're still successful. If we call settlement success, that the international rates of mediation results are similarly as high as they are here in the United States. Indirectly, I think, and perhaps purposefully, I know that we can improve. There are things lacking in our programs. Let me just touch on five areas that I think we can contribute to those programs, particularly following up on what Professor Peters has shared this morning about law schools.

There is a need for more knowledge among mediators about negotiation. You've heard this morning about how few courses are offered. Most of us in this room, as lawyers, probably never had a course in negotiation in law school. The closest thing in my law school twenty-plus years ago was labor arbitration. That taught you about negotiation. We need to understand bargaining styles. We need to understand negotiation strategies, their impact on the process, as well as on the experience in the mediation.

I think we also need to be more in tune to neuropsychology, personality styles, and the basic human reactions to conflict. For example, there's a difference between the way women process conflict and the way men process conflict. We can talk about the obvious things about different cultures, but I want to get more basic. Although it might be somewhat boring, I think we need to know more about that and we should force ourselves to learn it. We should force ourselves to design programs that contain those components, because if we, as leaders, say we need it, other people will believe us. I mean, we live by myths, do we not?

I also think that, until you have the experience of sitting in the chair as a mediator, you do a disservice to the people who hire you. If we think of it as an art—the way we think about learning to ride a bike or swing a golf club—we can read all we want about it in a book, but we won't understand balance. We won't understand the swing and the finesse of a golf club until we do it and do it and do it. If we are going to standardize trainings, I am a huge proponent for incorporating a very large internship or experience quotient in that program. It's like letting law students out of law school and telling them to practice law when they've had no practical experience. I've always believed that was a mistake. Doctors somehow have learned to wear out their potential doctors and put them through internships and residencies. When they're finished with that, if they still want to be doctors, then they license them.

I also think that we need to look at whether or not training programs should include emphasis on subject matter expertise. As lawyers, we know the profession has gone from generalists to specialists. I wonder if, in our craft, we will become specialists as mediators? That opens a whole Pandora's Box on evaluative forms and biases, but I raise the question. I don't know the answer.

I think we all recognize that mandatory continuing education only makes us better. We come to seminars perhaps to find out if we've committed malpractice. We're all going to leave here going home and relooking at our mediation agreements, our confidentiality agreements, and our malpractice policies. I think that as we standardize training and programs, we must also include continuing education requirements.

Ours perhaps is not a lonely profession, but it is a solitary profession. I think we need to give permission to ourselves, as we look at this, to make ourselves whole and to protect ourselves. To allow us to acknowledge the struggles and the stresses of what we do and to learn to develop, within ourselves and as a community, the different mechanisms which we use to survive in this craft. If we believe that the train has left our station on this, I think those five critical components need to be part of anything at which we look. I think, as Mel said, that we have a responsibility to do this, but I really wonder in the global sense, will it matter? Because I think if you look at the world, we're doing great. Can we do better? You bet. I don't want to fix what's not broken. I just want to make it stronger and better.

Josh Stulberg: Thank you, Tracy. Judy. Judy is actually the conscientious one among us and has prepared some written materials that are in the packet distributed to you yesterday.

Judy Meyer: I entitled my little piece “What is Credentialing? Do We Need it and Will We Like it” or “How I Learned to Stop Worrying and Love the Bomb?” for those of you who remember the old movie in the 1960s, *Dr. Strangelove*.⁵

Tracy talked about mediation trainings. I am certain there are more mediation trainings than there are mediators or, even, cases submitted to mediation. Because this field is such a developing, exploding field, however, those of us on board have some desire to pull up the gangplank behind us and say, “We’re here, everyone else stay out.”

Most of us are lawyers. I have passed bar exams in California, Pennsylvania, and Idaho. I can raise my hand and say that I am a credentialed, certified member of the bar of three states, and boy, was it hard. Whether I am a good lawyer or a bad lawyer, I am in an exclusive club. I think there is a pushing desire to join that exclusive club, and we conflate that desire in language that the compilation is between protecting the public. I mean, that’s the good part, the aspirational part. It really comes down to protecting ourselves, though. We say we want to make entry levels harder in order to protect the public, but we really want to create a monopoly for ourselves.

Most licensing standards, I think, are meant to create monopolies. Hairdressers are licensed, perhaps, so they cut hair and not scalps. Psychologists are licensed. Doctors now seek specialty board certification; you wouldn’t hire an expert doctor unless he was “board certified.” We keep trying to make the tip of the pyramid ever smaller and more exclusive.

A mediator. What is a mediator? One of my favorite stories is about the wise man of the ancient village. The chief of this village died, leaving an older son, a younger son, and a son by a favorite concubine or mistress. The chief willed his whole estate, which consisted of seventeen camels, as follows. He left one-half to his oldest son, one-sixth to his second son, and one-ninth to his illegitimate son. With seventeen camels, you can do

⁵ DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Hawk Films Ltd. 1964).

the math, it doesn't work. This was before the common law where you would simply sell the camels and divide the sales price. So they hired the wise person of the village to solve this problem. The man wisely said, "Would you young men mind if I added my camel to the seventeen camels your father left you?" They agreed. Starting with eighteen camels, it divides like this: one-half, that's nine, to the oldest son; one-third, that's six, to the second son, making fifteen; one-ninth to the youngest son, making two. Add that and you have just distributed seventeen camels. The wise person then took his camel and went home. It's a wonderful tale of a resolution of conflict, but Mel Rubin would say that today that wise man would be sued for conversion by false pretenses, misrepresentation, or fraud. So where are we going?

I'm a mediator, a lawyer, a mother or father, psychologist, cop, statesman, priest, rabbi, mullah, big sister, little brother. We're all mediators, but not any longer. We're all taking these specialized courses. You can go to Harvard's program on negotiation and get your certificate. ADR Associates offers training; you get your certificate. CPR has two days of training going on across the street at the Hotel Monteleone. Get your certificate. I mean, the mediation training programs have proliferated more than mediation, but what does that mean? You get your degree or certification. There are masters programs at Ohio State, Pepperdine, Hamline and other schools, but the ABA—because this is a law-related field—has now issued its report on credentialing.⁶ If I really wanted to draw up the gangplank and lock entry to this field, it would be in the following way: to be a mediator, you become a lawyer, you take a bar exam, and you practice law. You get a Ph.D. in clinical psychology. You take negotiation courses at business school, game theory, and the social psychological components. Then you have a three-month course in a monastery studying some Eastern religion or Zen. You put that all together with an apprenticeship, and you have a trained mediator. That would be like becoming a doctor is now. It probably would take eight years. None of us have that.

So what is coming out now? The effort to credential. The ABA has issued its task force report. They are not credentialing us; they are afraid

⁶ American Bar Ass'n, *Report of the Task Force on Mediator Credentialing and Quality Assurance*, 2002 A.B.A. SEC. DISPUTE RESOL., available at http://www.abanet.org/dispute/taksforce_report_2003.pdf.

to do that. Instead, they are taking a step back and credentialing the programs. They will look at the programs that are doing the training and put their seal of approval on those programs that are up to snuff. For \$50, you can get from the mediator credentialing in Texas, you can become a candidate to be a credentialed mediator. For \$100 a year, you can be a credentialed mediator. For \$125, you can be a credentialed advanced mediator, and for \$150 you can be a credentialed distinguished mediator. Now, these do come with a component of actual requirements, but basically you pay your money and you can hang a certificate. Judy Filner, who's of the Key Bridge Foundation in Washington, D.C., has a report on state and federal mediator membership associations.⁷ She identifies all the various places that are licensing mediators and then says that they want to focus on mediation preparation programs, because a mediator prep program has a greater invested interest in quality assurance. She talks about flexibility and its style being less expensive than dealing with mediator credentialing. That's where the focus is being placed first, because you have these thousands of private, not-for-profit associations that are training mediators. The attack first is going to be on these programs. First, they credential the programs and see if they're good, then maybe they'll move to the graduates to see if there is any merit there.

I don't know where all this is heading, but I am concerned in whose hand it's going to end up. The ACR is going its own direction right now, because there was an update at 2004 ABA section in New York. They are going to set their own standards for credentialing mediator training programs. Everyone wants to have a hand in the definition because everyone wants to "protect the public," which I think is code language for monopolizing the profession. That has both negative and positive elements. Right now, the task force wants to create a fifteen-to-twenty member group of people, highly visible in the field, who should be appointed to come up with a draft plan of certification or credentialing for all the mediator programs that exist. This would perhaps form a 501(c)(3) organization or certification entity so that each program would have to say, "I'm legitimate," just like law schools now have to do.

I have to tell you, this field is so murky to me that I would like to go back to you-know-it-when-you-see-it. I mean, let the market decide

⁷ *Id.* at Appendix C.

who's good and who's not good. Let's set up some ethical standards and leave it at that. If we don't do that, then let's set up a bar so high that only the most committed of us can and will reach it. I am certain that many of us will.

I have the report. I didn't append it; it is incredibly boring. In the report on mediator credentialing and quality assurance, the verbiage is incredible. What you learn, basically, is that there will be some vague standards for these thousands and thousands of training programs that exist. That is just the first phase.

Josh Stulberg: Thank you very much. I wish you had told us what you really thought, Judy.

Just a couple of observations of my own. One of the questions Larry Watson raised yesterday was: What are the factors influencing the development of the profession? Clearly the training of mediators is one such factor. As courts became connected to mandating or strongly encouraging the use of mediation, there was a belief that it was an appropriate responsibility of a public system to ensure that the participants in those programs were interacting with interveners who were competent. If I, as the judge, was sending people to mediation, I wanted to be confident that the participants were going to have "qualified mediators." In that context, a number of jurisdictions said, "How do you ensure that?" Some persons suggested that one way to do it is to look for "qualifications," but many in the field suggested you couldn't pick one qualification, such as a degree or a particular kind of training, so the move was made to require some type of performance skills training.

Look at how different states approach training or at how courts of varying jurisdictions have approached it. Florida, for instance, not only requires for civil circuit court mediator training a designated number of hours, but also requires an oversight committee that establishes qualifications of who can train and who can be the co-trainer. It has prescriptions with respect to student-faculty ratio, so that you can't have a training program of one person training seventy-five people and argue that that is a "training program." Florida, I think to its credit, has not only explicitly identified the subject matter that needs to be addressed in the training program, but also identifies how much time can be allocated to particular subject matter components of a training program. These prescriptions achieve consistency so you don't go to one training program and get

thirty-five hours of role-playing on communication skills and five hours on ethics, while another program might reverse that emphasis.

In other states there are variations on the theme, including the total number of hours required for training, a list of elements to be included in the training, qualifications of trainers, and pedagogical techniques and methodology. In some states, eight hours of a program is adequate orientation and training. For others, considerably more is required.

There's already some external response to shake the notion of how you get into the mediator training program, and it strikes me as remarkably exciting to envision the possibilities. Professor Peters provided us with some sense of what's going on in law schools. Then, there is Larry Watson appropriately asking, "What's a twenty-five-year-old kid going to do in mediating a class action suit when she or he has no experience?" How do you factor in your "experience" in being a qualified mediator? Minnesota's Rule 114 requires thirty to thirty-five hours of mediator training in order for a person to be eligible for appointment to a court roster of mediators to handle general civil controversies.⁸ Typically, that training has been delivered by a law school or people affiliated with a law school. What a teacher has in such a classroom are twenty-five students, ten of whom are persons with rich experience from the practice of law who want to fulfill the requirements of Rule 114 in order to become a mediator, and another ten or fifteen students who are less experienced but have the aspiration to become a mediator.

Therefore, the challenge becomes, if you're conducting that class, how do you do it? How do you shape its pitch and content? Is the experienced lawyer getting the same kind of educational experience in that sort of mixed classroom that he or she might get if it were just a group of experienced lawyers? Alternatively, does this mixture offer existing teaching opportunities? It strikes me that on the education front we have these kinds of developments and issues to raise.

Just one footnote to Judy's comment. ACR recently released a report on "certification." It's a proposed plan to implement a certification procedure that basically is a "portfolio review" of persons who, if they pass, get "certified" by ACR as a competent, capable mediator. There was a discussion, at least in the report, that people had considered whether

⁸ MINN. R. 114 (1997) (MINN. GEN. PRAC. RULE 114).

or not to require a performance-based component in this review process. The decision was made that it's too costly to do that and that there are too many unknowns. So at the moment, it's going to be a paper review process. There is quite an elaborate appeals process. If you get turned down, you can have the matter reviewed. At least from ACR's perspective, unlike the ABA that's going to focus on training providers and the design of those programs, ACR's notion of certification is that, within its organization, there is a profile review.

So at least with those kinds of additions to what my colleagues on the panel have said, let me come back to Judy.

Judy Meyer: I only wanted to add to the bad news of Don's report or discussion that it's interesting that most of the ADR courses offered in law schools are offered by adjunct professors. That tells you two things. First, many law schools are strapped for cash. It's far cheaper to pay an adjunct professor \$2,000 to \$15,000, depending on the law school, than it is to hire someone to teach the course with benefits on a regular tenure track. It also tells you in what respect most law schools hold this course. It's become demanded by students. It's part of the accreditation now that the law school supervisory bodies look at when they check off that is this a top school. One of the things they look at is does it offer ADR? So you plug an adjunct in, you teach the course, and you get the points.

Law schools are not committing the kinds of necessary funds, but Professor Moffitt is an exception. Scott Peppet is an exception. Out of a very preeminent law school that I am very familiar with, there is a \$1 million gift to fund a chair professorship in ADR. That money is sitting. The donor of that money is, for reasons of his own, not demanding its return. The faculty of this law school takes the attitude that it's not a real subject. We are not going to fund a chair in a subject that is not a truly academic, disciplined, intellectual field. We are above that. We teach law. We do not teach talk or fun and games or little clinical psychological problems. So that money is sitting absolutely unused, with no professor of ADR at this very eminent law school.

I just wanted to comment on Tracy's story that when the lion lies down with the lamb, I surely do want to be the lion. Further, will we become specialists? I think it is happening. Already I am asked to suggest mediators who are specialists in IP and securities. We are differentiating ourselves as the market becomes more sophisticated.

Don Peters: I just wanted to say in response to what Judy said that, if you agree with me that there are things we can do, I think we have to be creative in coming up with some of those solutions. I think we have to use our mediator skills. Certainly, the chaired mechanism is kind of a traditional way. Law schools take money. We had a similar problem in Florida, not involving ADR but involving trial practice. We ended up deciding that there was no one truly qualified in this field, because it was not a field. This is what a dean will tell you if you say, "Let's raise some money to generate more ADR in your law school." They will say, "Well, you know, give us a million dollars and we'll have a chair." Let's come up with some other solutions. Let's be creative if you want to engage in that warfare. No, it's not warfare.

Marvin Johnson: Persuasion.

Tracy Allen: Allow me just to ask and raise this question, because I find it interesting that we are seeing a growing number of law schools that are providing law school training. In Michigan, we did not have any ADR programs until about five year ago. Thanks to Josh, we started with a model and a training program and somehow or another managed not to screw it up too much. We came out with the program that I have now taught fifteen times.

One of my concerns about teaching this program is that there is no pass-fail. There is no standard of whether you should become "certified." In the law schools, at least you have a law professor that says you passed the course or you haven't passed the course. We do teach a forty-hour program in some of our law schools. If the students take that course, it qualifies them to apply to our court list, provided that they do the internship and have the legal training. Non-lawyers can be mediators on our court lists, but they need to take six hours of law courses to do it. I am curious what you do about that, if anything. By merely showing up and surviving forty hours and finding someone that will let you observe three cases, you can get on our court list. This is not to say that the court list is determinative of the quality of the service, because we all know that most people don't default to the list. It might be a resource for names, but it's very rarely used to find mediators. In fact, in 2003, in our largest county, nine mediators were selected off the court list because parties could not agree on the selection of their mediator. So out of 200 people on the list, nine names got pulled out of the hat and assigned to cases

where the conflict was so great that they could not even agree on a mediator. I do not know what to do about that. I do not know how you say to people such as ourselves, who volunteer and pay to go take a course. Especially afterwards, when, even though they took it, they still cannot be a mediator.

Marvin Johnson: I find it interesting that most of the people who want to regulate us and credential us are, unfortunately, not experienced in the field. We are the target of people who do not understand what we do, so they want to regulate us because they do not understand us. They want to credential us in ways that are inappropriate. Training, for instance, is an ongoing problem for us. You have training courses that are churning out mediators by the hundreds around the country. You cannot swing a cat without hitting a mediator, but you can swing a lot of cats without hitting a good one. That's the problem we face when we're talking about mediation. Someone who has been involved in a mediation with a poor mediator then has a poor taste in her mouth, and it affects all of us. You can train people who just may not have the package to get the job done. There has to be more than just the training that goes into the credentialing process. I want to urge all of us here at ACCTM and IAM to get very actively involved in policing ourselves, in credentialing ourselves, and in creating our own standards. We have always found that those people who do not regulate themselves always end up getting regulated by outsiders.

Rod Max: Thanks for coming together in this symposium. We all know what happened in terms of the track to get here. What brought us here is, I think, the title that Bob and Larry created, which was "perfecting the profession."

It is interesting, your analogy of the lion and lamb. As I heard it, I did not know where it was going. I was thinking, "you know, the answer is feed the lion and train the lamb." Then I asked myself who the lion was. Is the lion the court system that wants to gobble up this profession? Is the lion all these training programs that bring people out? Is the lion the unskilled mediator who ends up putting a blemish on our profession? In the world of training the lamb, how do we get young people in this? If I keep mediating at the pace I am, in five years, I'm dead. Okay. Who's going to replace us? Quality and experience. Although I agree that it may not be the lawyer—that law student coming out of law school

day one—is it necessary, as Judy says, that we need specialization? The other day someone suggested that I need a specialist in securities—a securities mediator. As a matter of fact, I was at a conference in Orlando where they said, “We need a bankruptcy mediator.” Do they need someone who is a specialist of the process? Maybe the mediator—lion or lamb—needs to bring in a co-mediator who knows bankruptcy or securities, or maybe the attorneys themselves can be that specialist. We cannot just let it happen because Kissinger finds, apparently, that you just replace them every day. Maybe that is the thing. Say Larry Watson goes out, Bob goes out. Whoever the great ones are around the country that are doing this, we die and just feed them another lamb.

I say this. We have got to stop being territorial. I say it to the ABA, I say it to ACR, I say it to IAM, and I say it to ACCTM. This is a beginning, and it must begin here. The groups that are represented here, whether ABA or IAM or ACCTM or ACR, we need to take the next step. Should we just sit here and all pat ourselves on the back thinking we have done our thing by way of “perfecting the profession” or do we take the next step? Do we not worry so much about what the others are doing to get competitive? I found in Alabama that there is nothing competitive about it. There is more conflict out there than we know what to do with, so the cream will rise to the top. Let’s not worry about it. Let’s just make this profession better. We need to take the next step before this session is over and ask ourselves this: Where do these prominent organizations go from here? I will not answer that question. I just leave it to you.

Bob Creo: Yeah, what concerns me, and why I have been of two minds on this issue for the last five or seven years, is that we view mediation as an art. I do not think you can regulate art. I am not sure you can train or teach art. At the same time, we are faced with market forces and institutionalization forces so that we have to be as Kissinger of the realists, or a pragmatist. So I have moved from being an idealist and letting the market dominate, to being a pragmatist and asking how we drive the train that’s left the station?

Here is the real question though. Our good friend Larry Watson wisely framed it, and I’m in 100% agreement with him. I am just concerned when we start regulating the content of the art, the content of the process. We train and credential and standardize, are we going to get into that? We heard earlier this morning about the diversity of practice in this room

between writing or drafting an agreement, scribing or being a scrivener to an agreement, and making proposals. I think that is wonderful that we have a healthy difference of successful practices. I think the marketplace is served by healthy differences. My concern is that, if we go credentialing, you are going to have a lawyer who will be able to make a mediator proposal and draft an agreement because he can practice law. However, a non-lawyer will be able to perhaps scribe an agreement but not make a proposal or draft it. We are going to create a mess as we train, credential, and teach.

I'd like some comments from the panel on how you see any of that happening or any reaction to that.

Tracy Allen: I can say from a teaching perspective, and Josh is right, that there are a lot of common threads in the programs. I am happy to say that we are not trying to define the art. What we are trying to do is to develop skill sets in people to understand what happens in the process. At least now, in the basic core programs that I see in the United States and internationally, and even as we go into the beginning of advanced trainings, we are not trying to define the process. Rather, we are trying to give people tools to use in the process. That may or may not be the right approach. That is the approach I think we have developed. It is much easier to do that than it is to try and define the art. From that perspective, maybe we are doing that part right.

Judy Meyer: I think there is one component that is missing from most of our education. I know it is because I became a mediator as many of us did in the 1980s before there were any training programs. Many of us started our practices before anyone offered to train us to do our practices. It was on-the-job training. When Cornell, my alma mater, asked me as an adjunct professor to teach a mediation course, however, I had to take three steps back and ask, "What the hell am I supposed to be teaching?" There is no political program at Cornell. Am I teaching kids—law school students—to mediate? That did not make sense. I took a further step back and said, "Mediation is facilitated negotiation. I'm going to teach these kids negotiation." I sat down and spent six months reading all the negotiation literature and fell in love with it. I think that negotiation, as an element of our training, is a part of the process we need to know. If I had not had to teach, I never would have learned it. I would dare say that most of us are familiar with some of the larger labeled

reactive evaluations, but there are so many other interesting cognitive processes that we use in mediation. We do not recognize these processes, and in which we are untrained.

If I may, just to share one quick story of negotiation skills, about how to ask a question that no one can say no to. On an airplane traveling to Orlando, I had a suitcase that was way too heavy, in the overhead bin. I did not want to lift it down myself. There was this eighteen-year-old next to me plugged into his earphones. I said to the pimply, adolescent kid—thinking, I want a yes answer and I know how to get it—“Do you think you are strong enough to lift something from the overhead?” Well, what eighteen-year-old male is going to say, “Are you kidding, lady, get your own bag down yourself.” I mean, that was the objective—he lifted.

I have another story: when I was on a bus coming from Disney World holding my twenty-two-pound grandson on my hip, there were no seats. Desperately wanting to sit down and not wanting to start a fight, I thought I could do this by saying to the guy sitting down, “You know, I’m holding this twenty-two-pound kid and I’m about twenty-five years older than you are and you should really be standing up and giving me your seat.” He might have responded, “Lady, you’re not disabled and there’s no sign saying I’m sitting in a seat that belongs to you.” Instead, wanting a yes answer—again, this is negotiation training—I said to him, “This baby is awfully heavy; would you mind if I just sat him on your lap?” Well, this fellow leaped across the bus and said, “Please, sit down.” These are funny stories, but these are all skills in which most of us are not trained.

Marvin Johnson: This has been an excellent discussion of training or education of mediators. In my practice, however, I meet lawyers practically every week who do not know the difference between mediation and arbitration. They use terms like “binding mediation” and just do not understand the fundamental ADR principle. It would be interesting to hear from all of you who are involved in education, particularly law school education, what is being done to educate lawyers, who have no intention or desire to be mediators, about ADR. Will they learn how the process works so that they can properly advise their clients with respect to options and properly represent their clients in the process?

Don Peters: Not as much as should be is my first response. The courses that really get into this in some depth are not available to many students nationally, on an average. A few enlightened professors will talk

about it in courses such as civil procedure and professional responsibility, but not many. Certainly the frustrations you share are things that I encounter in my community, where most of the lawyers are graduates of my law school. I'll still hear them talking about "binding mediation." I think we ought to require an ADR course for every law student, but we are a long way from that. Maybe one of the things that these groups could do is plot a takeover of the ABA section on education. They are totally in cahoots with academia in not putting any pressure on anyone to solve these kinds of practical problems. The students, by and large, really want this. They are smart enough to realize that win-lose litigation and adjudication is not happening very much in our society. They are learning from the vanishing trial stuff that this is not something they want to spend all of their life doing.

Josh Stulberg: I think there are three ways in which law schools deal with that. The survey course in ADR is frequently deliberately designed for persons who need to know about ADR processes in the traditional practice of law, because they are going to be representing clients in those processes. A second is that the negotiation course is typically promoted for as many people in the school to take as possible, as negotiating is envisioned as part of lawyering. Then the ABA, through several student competitions—including the negotiation competition and, more recently, one called representation in mediation—promotes law students' learning these processes.

Don Peters: I would suspect that most of us in the room, like myself, do this mediation thing because we just love it and get fulfillment out of it. We also do it because we want to make some money. I would imagine that fits the profile of most of the people in the room as well.

I am going to pick up on Rod Max's challenge and Bob's challenge that this group needs to come up with some answers to this credentialing question. I will be the first, I guess, to use that terrible word "volunteer." This is not the day or the place, but there ought to be a joint committee or something that sits down and looks at it. I would propose that the following is another problem: "schementalizing." It is who does the credentialing that is important. From a purely business standpoint, I would certainly like to see us as a group approach Martindale-Hubbell and have them come up with a rating system for neutrals: AV, BV, MV, whatever it is. Because if you're going to be selected, the people who

are selecting you are going to look at who credentialed you to determine whether or not you're any good at what you do. They don't know who ACR and the arachnid group, SPIDER, and all these other people are who give you the credentials. They are going to either ask colleagues, or it would be real nice to put it in Martindale-Hubbell. I don't know if they do that, but if they don't, they ought to. We ought to be instrumental in getting them to do it.

Josh Stulberg: Thank you very much. Let's go to Marvin.

Marvin Johnson: First, Josh, I'd like to amend what you said about the ACR. There is another piece, and since I was involved initially in it and not involved anymore, there is always a test piece that goes along with that. There are certain areas that hopefully they would be tested on. So I wanted—

Josh Stulberg: And it is a written test. At least as I read it, it was an objective test—objective questions, not essay questions.

Marvin Johnson: I just wanted to start off with that. The other thing I wanted to mention that I think underlines some of the problems that we're dealing with is that mediation touches on a number of disciplines, not just the discipline of law. Because of that, how are we going to create, if it is going to be certification, a certification that is going to touch on all the disciplines? I think Rod Max talks about the turf, the territorialism that we have. That is because you have people in other disciplines that are afraid that one discipline is going to take over. I think we have to deal with that and bring it all together so that we also can work together. It is a barrier in who is in and who is out. Until we are able to deal with that, we are going to have a problem. It might be the money that is causing the problem. I do not know what it is, but I know that we have some problems with people who are in this particular room. We have to ask, Why aren't the other people in this particular room? Why are they not here? Are there artificial barriers already and what are we doing to allow people to come in? I think until we deal with that, we are going to have some problems. It may not show now, but later on.

Kevin Forrester: Kevin Forrester, Encinitas, California. I am confused about what solution we are looking for. We can all in this room agree that it would be very nice if everybody that is professing to be a mediator would be good at what they do, but it would be qualified. That is the weasel word, isn't it—"qualified"? We are talking about rights.

Who has the right to become a mediator? Everybody in the room has a driver's license. You have a right to operate a motor vehicle. That does not mean that you are good at operating motor vehicles. The same is true of licenses to practice real estate, which is moderately more difficult to get than a license to operate a motor vehicle. Well, that does not mean you are going to be good at it either. The same is true of the license to practice law. Many of us have a license to practice law. It is really difficult to get a license to practice law, but when you pass that bar exam, are you going to be a good lawyer? Well, we do not know. What kind of barrier are we going to set up? Well, to become a mediator, not only do you have to have the minimum qualifications, whatever those are, you have to be good at it, too. So who are we to set the bar? You cannot become a mediator until you are not only qualified, but you are good at it. We must be very, very careful about where we set the standards. I mean, who are we going to exclude from the profession? Who are we to say who has the right to be a mediator? Be very careful. If we are setting standards, we should be very careful about where we set those standards.

Susan Soussan: I just came back from a CPR meeting where they have decided to form a committee to do some disclosure of references on neutrals. The thought was to perhaps publish reactions of parties to the skill of neutrals. I guess I would postulate, why not have minimal credentialing, passing a certain number of hours for mediators, and then let the marketplace determine usage of mediators by having a central clearinghouse for recommendations, pro and con, about the skill of mediators? This would be better than having different levels of certification, or essentially what amounts to private clubs of different associations of mediators who are self-selecting.

Melanie Barnbeck: I would just like to say, I'm listening to all this as a practitioner and a trainer. I call these things workshops and advanced seminars because I do not like this training idea either. I am also adjunct faculty at a law school that cuts funds. I have double the number, at least, of students applying for the courses that I teach than we can handle. All these training programs have oriented, at least in the state of Maryland, thousands of lawyers and physicians and psychologists and social workers and judges to the process of mediation. They have stuck their foot in the water and have gotten an idea of at least the difference between mediation and arbitration. Many, many people, at least in Maryland, have taken these courses.

In the law schools, they are learning some basic skills. This whole thing is kind of like the process of mediation. It is an educational process. I think we have come a great distance. I think we are not really ready to make some of the decisions, but the discussion and the analysis are much more important, as they are in a law school examination. It does not really matter what conclusion you come to, so much as how you get there and the thought process that goes into it. I think we are still very much a laboratory across the United States, if not the world, in developing techniques and learning skills. I do get nervous when I hear about the clubs that we are beginning to organize, their exclusionary practices, and the way we all think they are really good. I do think that we all differ, even in this room, in the way we approach this. We are in the process. We do not have to come to very quick decisions, as long as we stay in the process.

Harry Goodheart: Harry Goodheart. I am first a mediator and second a teacher or trainer. I have been involved in the Carolinas doing some training for about seven or eight years, and Florida before that. About three or four years ago, we did something a little different, which addresses the question that was made earlier. In addition to billing the training or workshop for mediators to be trained and certified, we have a subtitle. The subtitle is Effective Advocacy in Mediation for Lawyers; that is what we were doing anyway. We placed an inordinate emphasis on effective negotiation techniques in the course. That has changed the dynamic of attendance, participation, and networking, and has created a better learning curve than we had before. It approaches an end to court. So that is one way to kill two birds with one stone.

Gig Kyriacou: My name is Gig Kyriacou from Los Angeles, California. The one thing that I want all of us to realize is that we are one of the most highly scrutinized professions by our customers. They refer to list serves, they go to colleagues, they call your reference list. If it is an important matter, you are scrutinized even more. Therefore, I do think there is a lot credentialing that is done by personal experience of our customers. We have to keep that in mind. We have to be careful when we set up best practices in an objective fashion that end up becoming standards that start taking away from the creativity and the art with which we do our job. I really am concerned about that issue as we go through this process.

Nikki Tolt: My name is Nikki Tolt, and I am also from Los Angeles. My experience is that, when you see what the attorneys in Los Angeles are doing, we are pretty sophisticated in this stuff. The mediators do not care if you went to Pepperdine School, they do not have any idea what this organization is. What do they care about? Things that have nothing to do with any of the things that we are talking about here. They could care less. A lot of this stuff is internally driven, but the people who are buying our services do not really care about that. I think we are worried about things that do not matter to our clientele. That is one thing to keep in mind. We can do all of this stuff and spend a lot of time on it, but does it matter to our clientele? I think the answer so far is no.

Mike Silver: Mike Silver, Toronto. There was debate earlier about whether it is a good thing that there are all these trainees. In Ontario, we call them “wannabe mediators.” I think our profession has no one to blame but itself. If that is a problem, it is because it is from our ranks who are doing the training. I teach a course at the University of Toronto. Very deliberately, we titled it a “dispute resolution course,” as opposed to a mediation course. We did not think that people graduating from it were really going to be qualified as mediators, though they might have liked to be mediators. We were not going to designate them as such. Other professions regulate their numbers. In Ontario, there is a College of Pharmacy, which only graduates 100 people per year. The medical schools are famous for limiting the number of graduates. Even law schools do it. Yet, I do not think there is any kind of maturation in our profession where we would actually sit down and say that there should only be so many people per year graduating. Ultimately, it may become a problem because we are obviously fostering the seeds of our own competition. Maybe we should question at some point as the profession matures, whether that is indeed a good thing. This is from both a standards point of view, as well as an economic point of view.

Jim Melamed: As a technologist, it would be remiss for me to not bring up a couple of points. Whatever the qualification standards, I think there is a concept in the field that informed disputants and their representatives can protect themselves. One of our duties is to make information transparent to the folks whatever we think our qualifications are. In fact, we are doing a better job of that all the time, and the worldwide web is no small part of that. As we look into the future, a year, two years down

the line, I think you will be seeing typical mediators with audio clips and video clips of themselves explaining who they are, how they do it, and what is important to them. I think it is a worthy discussion to ask with such valuable, rich information being provided to disputants and their representatives. Really, how much more do we need and aren't these always somewhat arbitrary standards? The big question always is, "What should the qualifications be for the trainers themselves and who select them and the like?" I wonder whether we might be better off putting as much energy into the issue of promoting mediation and getting the word out there, both to the public and referring professionals as to the traditional somewhat anal focus on particular standards. Are you going to regulate state-by-state? I am mediating a case in one state with a variety of people in other states; then, I am traveling to another place but still mediating by phone and on-line and in other ways. Is the whole concept of geographic regulation itself worthy of consideration? Right now we tend to talk almost unconsciously about mediating the litigated case as if that is the world of mediation. Though litigating cases is a critical world of mediation—and for many of us, our world of mediation—there is probably 80% or 90% of mediation that is not in the litigated context. We really need to question whether we are in a position to pass standards for all of those others beyond legal mediators as well. Thanks.

Josh Stulberg: Thank you very much. It was stated earlier that institutions of higher learning are receptive to \$1 million gifts for chairs. At Ohio State, we require \$1.5 million, but we're more than willing to have a second chair in dispute resolution if someone were so willing.

Thank you so much for your participation. Thank you, panelists.