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# The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to measure Competence Without Barring Entry into the Market?

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## I. INTRODUCTION

Mediation and other forms of alternate dispute resolution (ADR) are quietly revolutionizing our nation's court system. Overburdened by crowded dockets, courts nationwide are sending cases to mediation that traditionally would have been resolved by litigation.[1] According to an estimate of the National Center for State Courts, courts are currently referring cases to over 1200 ADR programs.[2] In more than a dozen states, task forces or commissions are planning statewide court-annexed mediation programs.[3] Furthermore, the Civil Justice Reform Act of 1990 encourages, and sometimes even

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1. Ellen J. Pollock, *Mediation Firms Alter the Legal Landscape*, WALL ST. J., Mar. 22, 1993, at B1.

2. The Law and Public Policy Committee of the Society of Professionals in Dispute Resolution, Public Encouragement of Private Dispute Resolution: Implications, Issues and Recommendations 1 n.2 (Oct. 1992) (unpublished manuscript, on file with the author).

3. *Id.*

requires, the federal district courts to use ADR.[4] As these examples indicate, the United States' adversarial court system is rapidly embracing mediation as an alternative to litigation.

As court-annexed mediation increases, more and more circuits must address the question of whether to require their mediators to possess certain qualifications.[5] This issue has erupted into a major policy debate, dividing the mediation community into two camps.[6] One camp believes that mediators should be licensed, like doctors or lawyers, to prevent unqualified people from becoming mediators. They believe that a system of licensing, or at least certification, is necessary in order to protect consumers of mediation services.[7] The other camp does not want mediation to become a profession that is open only to a select few who hold certain degrees or training. They believe that licensing or certification would create a monopoly, making mediation more expensive and the pool of practicing mediators less diverse.[8]

## II. LICENSING, CERTIFICATION OR THE FREE MARKET

### A. *Arguments for Licensing or Certification*

The proponents of mediator licensing raise a number of arguments to support their position. They claim that the flexibility and informality that make mediation popular also can make it harmful if the mediator does his job poorly.[9] In mediation, informal and flexible procedures guided by the mediator replace the procedural safeguards that protect parties in litigation.[10] The parties in mediation must rely upon the skill and knowledge of the mediator to guide the mediation to a fair and well-reasoned conclusion. Because mediation is an imprecise process manipulated by the mediator, the parties can easiliy be harmed by incompetent or unscrupulous mediators.[11] Furthermore, the fact that mediation proceedings are usually confidential means that any evidence of misconduct probably will be inadmissible in a courtroom.[12] Proponents of mediator licensing believe that given the power

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4. *Id.*

5. Court-annexed mediation is a term often used to refer collectively to both court-ordered and court-connected mediation programs.

6. *See* Society of Professionals in Dispute Resolution, *To Certify or Not to Certify: What Are the Issues?*, NEW ENG. NEWS, Fall 1992, at 1 [hereinafter SPIDR].

7. *See* Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23 (Jan. 1990).

8. *See* SPIDR, *supra* note 6, at 6.

9. The New South Wales Law Reform Commission, Training and Accreditation of Mediators 49 (Sept. 1991) (unpublished manuscript, on file with the author).

10. *Id.*

11. *Id.*

12. *Id.*

with which they are entrusted, mediators must be licensed to ensure that they are competent and ethical.

Licensing proponents believe that the need for licensing will grow as mediation becomes more common.[13] They fear that as more mediators enter the field, incompetent mediators will practice freely on an uninformed public while the talents of highly skilled mediators will go unrecognized.[14] They also believe that as more courts order mandatory mediation, the courts should assume a responsibility to ensure the mediators are competent.[15] According to the Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, "the need for protection against incompetence rises as the parties' ability to protect themselves by freely choosing or rejecting particular dispute resolution processes, programs or neutrals diminishes."[16]

Certification proponents advocate a less restrictive alternative to licensing. A certification system would grant a certificate,[17] and perhaps a professional title, to mediators meeting the requisite qualifications;[18] whereas, a licensing system would restrict mediation to those licensed.[19] In practice, however, certification would have much the same effect as licensing since court-annexed mediation programs would probably only use certified mediators.[20]

### B. *Arguments for a Free Market*

Opponents of both licensing and certification claim that a licensing or certification system would create barriers for those entering the mediation field.[21] These barriers would limit the diversity of practicing mediators and rob mediation of potential innovations and perspectives.[22] Instead of being a field of creative and innovative problem-solvers, mediation would be composed of a homogeneous group of licensed professionals. Parties entering mediation could no longer choose from a large and diverse pool of prospective mediators to find an individual whose background and experience have relevance to their case.

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13. Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 378 (1992).

14. *Id.*

15. *Id.*

16. Society of Professionals in Dispute Resolution, REPORT OF THE COMMISSION ON QUALIFICATIONS 2 (1989) [hereinafter REPORT].

17. *See* The New South Wales Law Reform Commission, *supra* note 9, at 43.

18. *Id.*

19. *Id.* at 44.

20. *See infra* notes 35, 92-94, 129-32.

21. *See* REPORT, *supra* note 16, at 1.

22. SPIDR, *supra* note 6, at 6; *see* James Fallows, *The Case Against Credentialism*, ATLANTIC MONTHLY, Dec. 1985, at 17-22 (arguing that many businesses and professions are too quick to require degrees even when degrees are not really needed).

Licensing and certification opponents also fear the monopolistic effects of barriers to entry.[23] Regulation of mediation could result in a loss of the flexibility and innovation that have popularized it.[24] Also, hiring a mediator could become more expensive due to regulation because the pool of competitors would be much smaller.[25] Opponents of licensing and certification argue that supporters of these measures seek improved status and higher income.[26] These selfish gains, however, would be achieved at the expense of the public, which would no longer have an informal, innovative and inexpensive alternative to litigation.

The opponents of licensing and certification believe that a free market can successfully address concerns about mediator competence. They argue that a free market is the best way to guarantee competence since competition will ensure that only the best mediators will continue to practice.[27] Moreover, a free market would promote diversity rather than limit it.

Information is the key for advocates of a free market.[28] Therefore, free market advocates suggest that mediators should be required to disclose all of their qualifications to interested parties.[29] They also advocate the creation of a roster of neutrals, listing mediators in a given geographical area or area of practice, along with their qualifications.[30] Parties seeking a mediator could easily find all relevant information, including the background, fees and qualifications of prospective mediators. The roster would allow a free market to function efficiently by ensuring that consumers of mediation services are well-informed.[31]

## III. METHODS FOR MEASURING MEDIATOR QUALIFICATIONS

Proponents of licensing or certification need a way to accurately and objectively measure a mediator's qualifications.[32] What may be less obvious is that proponents of a free market are equally interested in finding an accurate way to measure qualifications so they can be used in a roster of neutrals or in another type of information system.[33] This article discusses

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23. *See* The New South Wales Law Reform Commission, *supra* note 9, at 47.
24. *See* Folberg et al., *supra* note 13, at 378; REPORT, *supra* note 16, at 1.
25. The New South Wales Law Reform Commission, *supra* note 9, at 47.
26. *See id.*
27. *See* SPIDR, *supra* note 6, at 6.
28. The New South Wales Law Reform Commission, *supra* note 9, at 46, 49.
29. REPORT, *supra* note 16, at 2.
30. *See* The Administrative Conference of the United States Office of the Chairman, An Introduction to ADR and the Roster of Neutrals 6, 7 (Oct. 1989) (unpublished manuscript, on file with the author).
31. *Id.*
32. *See* The New South Wales Law Reform Commission, *supra* note 9, at 43-44, 49.
33. *Id.* at 46, 49; *see* SPIDR, *supra* note 6, at 6; REPORT, *supra* note 16, at 2; The Administrative Conference of the United States Office of the Chairman, *supra* note 30, at 7.

a number of methods for measuring a mediator's qualifications. Any of these methods could be used as part of a licensing or certification system, as part of a roster of neutrals, or as part of a mediator-hiring process.

### A. *Training*

One of the most common measures of qualification is the amount of training that the mediator has received.[34] Many court-annexed mediation programs require participation in training programs before individuals are qualified as mediators. For example, New York, Minnesota, Michigan, New Hampshire, Massachusetts, Missouri, Iowa, Texas, Oklahoma and North Carolina have statutes requiring training.[35] Some court-annexed mediation programs also require that mediators receive continuing training.[36]

Most mediators agree that training is very important to becoming a skilled mediator.[37] The SPIDR Commission on Qualifications found that training programs which teach specific mediation skills and techniques are of "critical importance" in developing competent mediators.[38] A report of the Georgia Alternative Dispute Resolution Commission explains that mediators must often conduct negotiations on subjects with which they are unfamiliar.[39] In order to conduct a mediation on an unfamiliar subject smoothly, a mediator must be extremely well-versed in the mediation process.[40]

Since groups like SPIDR and the Georgia ADR Commission believe that training is critical to mediator development, training would appear to be an appropriate measure of qualifications. Requiring a certain amount of training would be a reasonable way to ensure mediator competence, and it would not be an unreasonable demand since most mediators currently receive some training.[41]

To ensure that a mediator develops necessary skills for competency, participation in a comprehensive training program, including role-play and

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34. *See* REPORT, *supra* note 16, at 9-10, and *infra* note 35.

35. IOWA CODE § 679.8 (1987); MASS. GEN. L. ch. 233, § 23C (1986); MICH. COMP. LAWS § 691.1558 (1988); MINN. STAT. § 518.619 (Supp. 1987); N.H. REV. STAT. ANN. § 328-C:5 (1990); N.Y. JUD. § 849-a (1986); OKLA. STAT. tit. 12, § 1809, R. 12 (1989); TEX. CODE ANN. § 154.052 (West 1987); MO. S. CT. R. 88.05 (1990); SUP. CT. N.C. MED. R. 9 (amended 1995).

36. *See* N.H. REV. STAT. ANN. § 328-C:5 (1990); OKLA. STAT. tit. 12, § 1809, R. 11 (1989).

37. *See* REPORT, *supra* note 16, at 3, 6, 16.

38. *Id.* at 3.

39. Ansley Barton, Report of Georgia Joint Commission on ADR 15 (1992) (unpublished manuscript, on file with the author).

40. *Id.*

41. *See* Folberg et al., *supra* note 13, at 375. A survey of ADR providers in California showed that most had received at least 25 hours of intensive training, and many had received much more. *Id.* Some mediators had received up to 200 hours of training. *Id.*

other participatory exercises, should be mandated.[42] For example, The Multi-Door Dispute Resolution Division of the D.C. Superior Court (MDDRD) requires completion of a comprehensive training program before an individual can become a probationary mediator.[43] Each trainee in MDDRD must complete the entire program without absences or face dismissal.[44] Also, each trainee must successfully master the skills involved in one part of the training before proceeding to the next part.[45]

The MDDRD training program begins with classroom training on the basics of mediation, including lectures, demonstrations and exercises.[46] Each trainee role-plays and works with a trainer to identify strengths and weaknesses and to help improve performance.[47] After classroom training, each trainee is paired with a veteran mediator who serves as a mentor.[48] The trainees mediate with their mentors, who evaluate the trainee's performance and help them develop their skills.[49] The length of the mentorship is based upon the needs of each individual trainee.[50] Once the mentoring period is completed, each trainee is evaluated by the MDDRD mediator evaluator.[51] If the trainee receives a positive evaluation, the trainee becomes a probationary mediator in the MDDRD mediation program.[52]

### B. *Apprenticeship*

Although more mediation programs require training than require apprenticeship, apprenticeship can also serve as a measure of mediator qualification. In Michigan, an individual who wants to become a qualified community dispute resolution mediator may opt to participate in an approved apprenticeship program instead of receiving training.[53] New Hampshire requires its marital mediators to complete twenty hours of apprenticeship with a qualified marital mediator or mediation program.[54]

Apprenticeship, like training, is advocated as a way to ensure competen-

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42. Barton, *supra* note 39, at 15.
43. D.C. Superior Court Multi-Door Dispute Resolution Division, System for Selection, Training, and Monitoring Small Claims and Domestic Relations Mediators 2 (1991) (unpublished manuscript, on file with the Superior Court of the District of Columbia) [hereinafter MDDRD].
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. MICH. COMP. LAWS § 691.1559 (1988).
54. N.H. REV. STAT. ANN. § 328-C:5 (1990).

cy. SPIDR suggests that apprenticeship provides new mediators with evaluations and continued training.[55] The MDDRD offers one such apprenticeship program.[56] After a mediator has completed the MDDRD training program and becomes a probationary mediator, a more experienced mediator observes his mediation sessions or co-mediates with him.[57] The experienced mediator assesses the skills of the probationary mediator, completes evaluation forms and instructs him on how to improve his performance.[58] If the probationary mediator performs unsatisfactorily during the apprenticeship period, he must complete more testing and training to improve his skills.[59]

### C. *Educational Degree Requirements*

Educational degrees are another way of measuring mediator qualifications. For example, a mediator may hold a juris doctorate or a degree in behavioral science or psychology. Educational degree requirements attempt to predict ability based upon the mediator's formal education.

Many mediation programs currently measure qualifications based on educational degree requirements.[60] For example, The Academy of Family Mediators requires its members to hold a law degree, a master's degree or a bachelor's degree in addition to having several years of experience.[61] New Hampshire provides that only attorneys can qualify as mediators in court-annexed civil cases.[62]

Educational degree requirements, however, may not be a very effective way to measure a person's ability to mediate. The SPIDR Commission on Qualifications has stated that it has seen no evidence that a person needs educational degrees in order to be a competent mediator.[63] Furthermore, according to SPIDR, considerable evidence demonstrates that individuals who have not earned an educational degree can still be excellent mediators.[64] Since no educational degree can ensure that a person will be a good mediator, SPIDR believes that degree requirements only serve as a barrier, keeping many potentially skilled mediators out of the profession.[65]

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55. REPORT, *supra* note 16, at 11.
56. MDDRD, *supra* note 43, at 1.
57. *Id.* at 2.
58. *Id.*
59. *Id.* at 3.
60. REPORT, *supra* note 16, at 15.
61. Catherine M. Scambler, Brief on Standards and Ethics For Mediators, Presented to the Attorney General of British Columbia 18 (Dec. 31, 1989) (unpublished manuscript, on file with the Mediation Development Association of British Columbia).
62. SPIDR, *supra* note 6, at 6.
63. REPORT, *supra* note 16, at 15; *see* Brad Honoroff et al., *Putting Mediation Skills to the Test*, 6 NEGOTIATION J. 37, 38 (Jan. 1990).
64. REPORT, *supra* note 16, at 15.
65. *Id.*

Ideally, any measurement of mediator qualifications should ensure competency without limiting entry into the profession.[66] Educational degree requirements, however, do not ensure competency.[67] In fact, this type of requirement can limit competency by closing the door to anyone who does not have a certain educational degree. Ultimately, this robs the mediation field of a diverse pool of talent. Recognizing these facts, SPIDR's Commission on Qualifications, the Canadian Bar Association Task Force on ADR, and the Canadian national organization The Network: Interaction for Conflict Resolution all have expressed opposition to the use of educational degree requirements for measuring mediator qualifications.[68]

### D. *Written Examinations*

Instead of using education or experience to measure an individual's qualifications, some programs use a written exam to test knowledge of mediation skills. The written exam tests the prospective mediator on questions about procedure, the laws regulating mediation, and how to handle different problems that can arise in mediation.[69] Both the Wisconsin Employment Relations Commission and the Suffolk County, Massachusetts Superior Court have used written exams as part of their mediator selection process.[70]

Using a written exam to measure a person's mediation qualifications has several advantages. The most important advantage is that it enables mediation programs to test diverse groups of people and determine who among them is competent to perform the job. Also, a mediation program using written examinations can select a more diverse group of qualified mediators than a mediation program using educational or experiential requirements.[71] Furthermore, written exams have the advantage of ease in administration.

There is, however, a serious problem with using written exams to measure qualifications. While written exams measure what a person knows about mediation, the exams have not been able to accurately predict a person's ability to mediate. Specifically, the mediation program for the Suffolk County, Massachusetts Superior Court found that its written exam was not an accurate predictor of the performance exam.[72] Since the mediators who

66. Scambler, *supra* note 61, at 21.

67. *Id.*; *see* REPORT, *supra* note 16, at 15.

68. Scambler, *supra* note 61, at 19.

69. *See* NATIONAL CENTER ASSOCIATES, INC. AND PRIVATE PEACE MEDIATION SERVICES, MEDIATION CERTIFICATION EXAMINATION 2 (1986) (giving examples of these types of questions).

70. Christopher Honeyman et al., In the Mind's Eye? Consistency and Variation In Evaluating Mediators, 3, 6 (Nov. 1990) (unpublished manuscript, on file with the Wisconsin Employment Relations Commission).

71. *See supra* notes 36-41.

72. Honoroff et al., *supra* note 63, at 40.

did well on the performance exam also tended to perform well on the job, the written exam appears to have been a poor measure of ability.[73]

Perhaps mediation programs should not weigh written exams heavily in the selection process unless the programs develop an exam that can accurately measure ability. A written exam, however, still can be useful when used in combination with other measures of qualifications. For example, a written examination can be used to narrow a pool of applicants so that more time-consuming procedures like interviews and performance tests need not involve large numbers of applicants.[74]

### E. *Performance Tests*

While a written exam measures a person's knowledge of mediation, a performance test attempts to measure a person's ability to mediate. In a performance test, the mediator's evaluation is based upon the observations of a group of experienced mediators who watch him conduct a mock mediation and evaluate his performance.[75]

Many mediators believe that performance tests are the best way to measure qualifications.[76] SPIDR's Commission on Qualifications stated that "any requirements concerning who can practice as a neutral should be based on performance. . . ."[77] Further, SPIDR is not the only organization committed to performance testing. Performance tests have been used by the Wisconsin Employment Relations Commission, the Suffolk County, Massachusetts Superior Court, the Massachusetts Office of Dispute Resolution and Hawaii's court-annexed family mediation program.[78] The use of performance tests by these mediation programs has produced some helpful information on their advantages and disadvantages.

The major advantage of performance testing is its ability to predict whether a person will be a good mediator. Although no scientific study has been conducted to demonstrate the correlation between performance test scores and mediator success, mediation programs using performance testing

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73. *Id.*

74. *See* Honeyman et al., *supra* note 70, at 3, 6.

75. *Id.* at 1-2.

76. *See* Howard S. Bellman et al., Interim Guidelines for Selecting Mediators 1-2 (1992) (unpublished manuscript on file with the author); REPORT, *supra* note 16, at 15.

77. REPORT, *supra* note 16, at 16.

78. Honeyman et al., *supra* note 70, at 1; Christopher Honeyman et al., Developing Standards in Dispute Resolution, Origins and Status of a National Test Design Project 2 (May 29, 1992) (unpublished manuscript, on file with the Wisconsin Employment Relations Commission); Douglas S. McNish et al., Program Narrative for Hawaii's Statewide, Multi-Level, Court-Centered Domestic Mediation Project 1-2 (1991) (unpublished manuscript on file with the author).

have had good results.[79] The Suffolk County, Massachusetts Superior Court found that the people with the highest scores on their performance test did very well as practicing mediators, while those who did not test as well had problems.[80] The experience of the Massachusetts mediation program indicates that performance testing may be a good measure of skill.

Performance testing does, however, have some disadvantages. Performance tests can be time-consuming and expensive, making it difficult for small mediation programs to afford them.[81] Although a performance test may be the best measure of skill, it may not be the most cost-effective.

Over the past several years, mediators have tried to standardize evaluation scales used by performance test judges. Much of this work has focused on a set of evaluation scales designed by Christopher Honeyman, a mediator and arbitrator for the Wisconsin Employment Relations Commission.[82] The Honeyman scales are based upon the experience of mediators around the country and lessons learned by mediation programs using performance tests.[83] The evaluation scales require the judges of performance tests to observe the mediator's performance and determine to what degree he possesses seven different mediation skills.[84] These mediation skills include: investigation, empathy, impartiality, generating options, generating agreements, managing the interaction and substantive knowledge.[85]

Earlier versions of the Honeyman evaluation scales have worked well in practice. In the mediation program of the Suffolk County, Massachusetts Superior Court, the Honeyman scales have been able to predict who would become good mediators.[86] Furthermore, data from the Massachusetts mediation program and the mediation program of the Wisconsin Employment Relations Commission show no evidence of race bias in use of the Honeyman scales.[87] The Massachusetts and Wisconsin mediation programs also found that judges using the Honeyman scales tended to agree closely on mediator scores.[88]

The good results experienced by the Massachusetts and Wisconsin mediation programs, however, were not achieved without expense. Both programs trained experienced mediators as judges for the performance test, and in each

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79. *See* Honeyman et al., *supra* note 70, at 18.

80. *Id.* at 14; *see also* Honoroff et al., *supra* note 63, at 40. The article did not expand on the nature of the "problems." *Id.*

81. *See* Bellman et al., *supra* note 76, at 6; Honeyman et al., *supra* note 70, at 6-7.

82. *See* Honeyman, *supra* note 7, at 27-31; Honeyman et al., *supra* note 70, at 2; Christopher Honeyman, *Five Elements of Mediation*, 4(2) NEGOTIATION J. 149 (Apr. 1988).

83. *See* Bellman et al., *supra* note 76, at 1-3, 7.

84. *Id.* at 7-10.

85. *Id.*

86. Honeyman et al., *supra* note 70, at 17-18.

87. *Id.*; Bellman et al., *supra* note 76, at 13-14.

88. Honeyman et al., *supra* note 70, at 15-17; Bellman et al., *supra* note 76, at 12-13.

mock trial, the same actors played the disputing parties.[89] Mediation programs that could not afford to train judges thoroughly and to use the same actors throughout the mock trial process have not had the consistent scoring evidenced in the Massachusetts and Wisconsin programs.[90] Ultimately, performance testing is effective for mediation programs that can afford it, but it is probably not feasible for small-budget mediation programs.[91]

### F. *Experience*

An inexpensive and simple way to measure a mediator's qualifications is to look at his experience. Many mediation programs require that their mediators have some experience in practicing either mediation or law. The Middle District of Florida, for example, requires ten years of practice as an attorney;[92] the Eastern District of Pennsylvania requires fifteen years.[93] In Michigan, an individual cannot become a domestic relations mediator unless he has been practicing law for five years and has actively practiced in domestic relations for three of the past five years.[94] Additionally, in a Michigan circuit where the population exceeds 250,000, a prospective mediator must have spent more than one-fourth of his time practicing domestic relations work during three of the past five years.[95]

According to the SPIDR Commission on Qualifications, mediation programs that lack the resources to conduct a performance exam could use experience as an alternate measure of mediator qualification.[96] SPIDR suggests that such programs use experience to screen potential mediators in order to determine which applicants require additional training.[97] The criteria considered in measuring mediation experience would include "the amount and diversity of prior dispute resolution experience, the complexity of previous cases handled, and the amount and diversity of experience as a negotiator in similar cases."[98] While SPIDR acknowledges that experience as a practicing attorney may help a person acquire mediation skills, mediation is the only experience relevant for determining qualification to mediate.[99]

Contrary to SPIDR's recommendations, evidence from Suffolk County, Massachusetts Superior Court's mediation program suggests that experience

89. Bellman et al., *supra* note 76, at 13.
90. *Id.*
91. *See id* at 6.
92. M.D. FLA. R. 9.02 (1989).
93. E.D. PENN. R. 53.2.1 (1995).
94. MICH. CT. R. 3.216 (1985).
95. *Id.*
96. REPORT, *supra* note 16, at 16.
97. *Id.*
98. *Id.*
99. *See id.* at 16, 19.

is not a good measure of mediator qualification; for example, mediators with extensive training or experience did not consistently score better than other applicants in their performance test.[100] More importantly, mediator experience could not be relied upon to predict whether a person would be successful as a practicing mediator in the Massachusetts program.[101]

The experience of the Massachusetts mediation program indicates that experience may be a poor measure of competence; however, many mediation programs still require some form of mediation experience.[102] Perhaps the most carefully thought-out system for examining a person's mediation experience is the system designed by the Federal Deposit Insurance Corporation/Resolution Trust Corporation (FDIC/RTC) Roster Qualifications Panel.[103] The FDIC/RTC system measures mediation experience by awarding points for the number of hours spent as a mediator, the number of cases mediated, the diversity of the mediations, the amount of money involved, the numbers of parties and the complexity of the cases.[104] The total number of points earned by an individual in these different categories is added together to produce a measure of mediation experience.[105] This system provides a way of quantifying the mediation experience that an individual possesses and compares it with the experience of other mediators.

### G. *User Evaluations*

User evaluations are a simple method for determining qualifications. At the conclusion of a mediation session, the parties, and perhaps their lawyers, fill out forms evaluating the mediator's performance. The mediator's qualifications are based upon his ability to satisfy his clients.

In 1991, a survey of 886 ADR providers in California ranked client satisfaction as the most important criterion for evaluating providers.[106] The ADR providers felt that client satisfaction was a better measure of a provider's qualifications than bar membership, training, breadth of experience, number of years of experience or even percentage of cases settled.[107] This evaluative approach is not unique to California. Hawaii also uses

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100. Honoroff et al., *supra* note 63, at 40.

101. *See id.* Mediation experience did not correlate closely with success on the performance exam. *Id.* Success on the performance exam did correlate with success as a practicing mediator. *Id.* Therefore, mediator experience could not be relied upon to predict performance as a practicing mediator. *Id.*

102. *See supra* notes 64 & 66; *see also* MASS. GEN. L. ch. 233, § 23C (1986).

103. Report of the FDIC/RTC Roster Qualifications Panel 6-9 (1992) (unpublished manuscript on file with author).

104. *Id.* at 7-8, 11.

105. *Id.*

106. Folberg et al., *supra* note 13, at 371-72, 403.

107. *Id.* at 403.

written evaluations by disputants. The evaluations are provided to help mediators improve their performance.[108] Presumably, the Settlement Coordinator considers these evaluations during the annual re-certification procedure.[109]

User evaluations, however, have some limitations. The evaluations cannot measure the qualifications of new members since they have had no evaluations.[110] User evaluations may be helpful in measuring the success of mediators once they have joined a mediation program, but not in determining qualification to practice. Therefore, mediation programs must rely upon other measures in their hiring processes.

Determining qualifications through user evaluations also raises more serious problems. Although the disputants may develop strong opinions about their mediator, they are probably not in a good position to evaluate their mediator. Most laymen are unfamiliar with the job of a mediator, and therefore, would have difficulty evaluating one.[111] Further, each disputant's perspective of the mediation is incomplete; neither is able to observe when the mediator caucuses privately with the other party.[112] Disputants also have partisan viewpoints. If a mediator coerces two stubborn parties away from their fervently-held positions in order to forge a settlement, each may resent the mediator and give him a poor evaluation.[113] Similarly, if the mediator favors one of the parties, the favored party would be inclined to give the mediator a good evaluation.[114]

Perhaps the biggest problem with user evaluations is that evaluations require disputants to devote careful thought to a detailed questionnaire. The easiest way to ensure that the disputants answer a questionnaire is to have them fill it out at the end of mediation. After mediation, however, the disputants may be tired and unlikely to spend much time or thought on the questionnaire unless they are angry about some part of the mediation.[115] On the other hand, if the disputants are allowed to take the questionnaire with them to fill out and send back later, a large number might not answer the questionnaire at all.[116]

Given all of these shortcomings, user evaluations would be more effective if used in conjunction with other methods. More accurate evaluations

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108. McNish et al., *supra* note 78, at 14.
109. *See id.*
110. Folberg et al., *supra* note 13, at 404.
111. *See* The Wirthlin Group, The National Institute for Dispute Resolution 4 (June 22, 1992) (unpublished manuscript, on file with The National Institute for Dispute Resolution).
112. Honeyman, *supra* note 7, at 25.
113. *Id.*
114. *See id.*
115. *See id.*
116. *See* Folberg et al., *supra* note 13, at 405.

could be achieved by using two questionnaires instead of one. Parties could be asked to fill out one questionnaire at the close of the mediation and another several months later. Despite the fact that many disputants might not return the second questionnaire, the responses received might indicate the parties' long-term satisfaction or dissatisfaction with the mediation.[117]

### H. *Settlement Rate Comparisons*

Another technique of performance analysis is to calculate the percentage of cases that a mediator successfully settles. The higher the settlement rate that a mediator achieves, the more qualified the mediator would be considered. Settlement rate comparisons and user evaluations both evaluate qualifications based on the outcome of mediations and are often discussed by mediation experts as tools to be used together.[118] The 1991 survey of California ADR providers ranked the success ratio as the second most important criteria for evaluating an ADR provider.[119] The California providers determined that the success ratio and "client satisfaction were more important than any other measure of an ADR provider's qualifications," and a survey of California judges agreed with them.[120]

Like user evaluations, settlement rate comparisons have serious limitations. Since no two cases are the same, it may be unfair to compare settlement rates among mediators. Some mediators may have had more complex cases to settle,[121] and others may have confronted legal issues not appropriate for settlement. Even mediators with lower settlement rates can greatly assist the parties by helping them resolve other issues.[122]

Another problem with using settlement rate comparisons as a measure of qualification is that these rates indicate nothing about the kind of settlement that was reached or how it was achieved. More settlements may not mean better settlements. A mediator may manipulate parties to push a settlement that neither party deems satisfactory.[123] Additionally, a mediator might reach a settlement by proposing an easy, short-term solution that avoids more significant long-term problems.[124] Settlement rate comparisons pressure mediators to settle every case, regardless of the quality of the settlement or methods used.[125]

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117. *Id.*
118. *See id.* at 376, 441; *see also Honeyman, supra* note 7, at 25.
119. Folberg et al., *supra* note 13, at 403.
120. *Id.*
121. Honeyman, *supra* note 7, at 25.
122. Folberg et al., *supra* note 13, at 404.
123. Honeyman, *supra* note 7, at 25.
124. *Id.*
125. Folberg et al., *supra* note 13, at 404.

Settlement rate comparisons reveal little about the quality of a mediator's work and should be used only with other measuring methods. User evaluations, for example, can put a mediator's settlement rate into context. Where the mediator does not reach a settlement, a user evaluation can reveal the actual work done. Any use of settlement rate comparisons must consider the longevity of the mediator's settlements and the rate at which the settlements return to court for resolution of matters not covered.[126]

### I. *Hybrid*

There is no single effective approach to measure mediator qualifications.[127] Most programs use a combination of approaches.[128] To be qualified in Michigan for community dispute resolution, a mediator must have completed either a training program or an internship program;[129] to be qualified for domestic relations, a mediator must be a member of the State Bar of Michigan, have practiced law for at least twenty-five years and have had an active domestic relations practice during three of the past five years.[130] In comparison, marital mediators in New Hampshire must complete a training program and an internship program.[131]

Using a hybrid of different qualification measurements has two major advantages over using any single method. First, the hybrid approach overcomes the drawbacks and limitations of any single method of measuring qualifications. Second, the hybrid approach enables mediation programs to identify the qualifications they deem important for their mediators. Several states, for example, require different qualifications for family mediators than for civil mediators.[132]

In 1988, the Suffolk County, Massachusetts Superior Court used a hybrid approach to meet its specific needs. It wanted to use a performance test to select its mediators, but the performance test proved time-consuming given the large number of applicants.[133] Ultimately, the program administrators solved the problem by implementing a written questionnaire to weed out

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126. *Id.*

127. *See* Scambler, *supra* note 61, at 17-18 (discussing several hybrid mediator qualification proposals).

128. IOWA CODE § 679.8 (1987); MASS. GEN. L. ch. 233, § 23C (1986); MICH. COMP. LAWS § 691.1559 (1988); MICH. COMP. LAWS § 691.1558 (1988); MINN. STAT. § 518.619 (Supp. 1987); N.H. REV. STAT. ANN. § 328-C:5 (1990); N.Y. JUD. § 849-a (1986); OKLA. STAT. tit. 12, § 1809, R. 12 (1989); TEX. CODE ANN. § 154.052 (West 1987); MO. S. CT. R. 88.05 (1990); SUP. CT. N.C. MED. R. 9 (amended 1995); M.D. FLA. R. 9.02 (1989); MICH. CT. R. 3.216 (1985); MICH. CT. R. 3.211 (1985); E.D. PENN. R. 53.2.1 (1995).

129. MICH. COMP. LAWS § 691.1559 (1988).

130. MICH. CT. R. 3.216 (1985).

131. N.H. REV. STAT. ANN. § 328-C:5 (1990).

132. *See* MICH. COMP. LAWS § 691.1559 (1988); MICH. CT. R. 3.211 (1985).

133. Honeyman et al., *supra* note 70, at 6-7.

nearly half of the applicants.[134] The reduced pool of applicants was small enough that each applicant could undergo a performance test judged by a pair of experienced mediators.[135]

The hybrid approach used by the Suffolk County, Massachusetts Superior Court is one that many other mediation programs could follow. It allows mediators to be selected using a performance test since by narrowing the initial pool of applicants, fewer judges are needed for evaluating the performance tests.[136] This type of hybrid approach can help make a performance test feasible even for a mediation program that can only get a small number of qualified judges.

A different hybrid approach is being used in California. A survey of these ADR providers indicates they consider experience, training and the opinions of judges and peers when selecting mediators.[137] Once a mediator enters the program, his qualifications are measured by user evaluations and settlement rate comparisons.[138] This approach, however, may simply be a short-term measure until cost-effective performance testing becomes available.[139] The hybrid approach of the Suffolk County, Massachusetts Superior Court may make performance testing cost-effective.

## IV. CONCLUSION

Some methods of measuring mediator qualifications are more accurate than others, whether they are being used for a licensing or certification system, a roster of neutrals or a mediation program. Educational degrees and professional membership are among the least satisfactory measures of qualifications since they cannot accurately predict whether a person will be a good mediator.[140] Performance testing is probably the most appropriate measure of a mediator's qualifications since it measures a mediator's ability to conduct a mediation.[141] The accuracy of other methods falls somewhere between these two extremes, and each can be helpful as part of a hybrid system.

A hybrid approach is the ideal measure of a mediator's qualifications. A performance test could indicate basic skills, while user evaluations and settlement rate comparisons could reveal the mediator's success in practice.

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134. *Id.*

135. *Id.*

136. *See* REPORT, *supra* note 16, at 3; Honeyman et al., *supra* note 70, at 18; Folberg et al., *supra* note 13, at 411; Honoroff et al., *supra* note 63, at 40, 45-46.

137. Folberg et al., *supra* note 13, at 405.

138. *See id.*

139. *See id.* at 411.

140. See *supra* text accompanying notes 64 and 66 for further discussion.

141. For additional discussion on performance testing see *supra* text accompanying notes 82 and 89.

Also useful in qualification measurement is whether the mediator has received training to improve performance in any areas in which problems were experienced. A hybrid approach like this one would measure skill in diverse ways, presenting an accurate picture of the mediator's qualifications.

The ideal approach to evaluating mediation qualifications would involve several different methods of measuring competence. Nevertheless, this approach can be prohibitively expensive. A less expensive alternative would be to use only a performance test. Because performance testing is the most accurate method of measuring the ability to mediate, it should be used whenever possible to determine qualifications.[142] A mediation program or roster of neutrals with a small budget, however, may not be able to afford performance testing.[143] Even after using a written exam or experience requirement to narrow the initial pool of applicants, a performance exam still can be prohibitively expensive.[144] In this case, the next best alternative is a hybrid of less expensive methods. Ultimately, every group interested in testing mediator qualifications must look at their individual needs and resources to determine which methods best suit them.

As mediation becomes more common and the demand for qualified mediators grows, the need for accurate ways to determine mediator qualification increases. Already, many court-annexed mediation programs are requiring that their mediators be lawyers or hold certain educational degrees.[145] The mediation field must stop this disturbing trend toward requiring mediators to hold qualifications unrelated to their ability to perform mediation. Mediators must find better ways to measure mediation skills and must introduce these methods to judges, lawmakers and directors of mediation programs. If ineffective methods of measuring mediator qualifications are used, no licensing system, roster of neutrals or mediator-hiring program can succeed in providing good mediators to the public.

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142. *Id.*

143. See *supra* text accompanying note 81, explaining that small mediation programs have difficulty affording performance text.

144. *Id.*

145. See *supra* text accompanying notes 60-62, discussing these requirements for mediators.