QUALIFICATIONS AND TRAINING STANDARDS FOR MEDIATORS OF ENVIRONMENTAL AND PUBLIC POLICY DISPUTES

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I. Introduction

The Center for Public Dispute Resolution of the New Jersey Department of the Public Advocate (the Center) requested a discussion of the issues of mediator qualifications and training standards. The Center's interest in requesting such a discussion was based upon its plans to identify a panel of private citizens who would be available to mediate public policy and environmental disputes. This paper was distributed in advance to a select group of practitioners and served as the basis of a moderated discussion on December 7, 1987, at Princeton University. The goal of that discussion was agreement on a set of qualifications and training standards that will aid the Center in establishing its panel.

The Center was established in 1984 by the Department of the Public Advocate and the National Institute of Dispute Resolution, expanding on the already functioning Office of Dispute Settlement. That Office, established in 1974 with the Department itself, is charged with the resolution of community disputes through the use of mediation and other third party neutral services.

This paper addresses several key questions. What are the qualifications necessary to serve as a mediator of public policy and environmental disputes? What are the basic components of training necessary for such mediators? Is it possible and/or desirable to certify mediators of public policy and environmental disputes?

In dealing with the questions of qualifications and training, I raise a number of important sub-issues. I also examine the practice and standards in several other areas of dispute resolution.

II. Qualifications

It is not unusual for professions to determine a set of qualifi-

cations that are necessary for candidates to become full-fledged members of that profession. Doctors and lawyers undertake rigorous courses of study at accredited institutions, pass regulated exams, and serve as apprentices or interns for some specified period of time, before they are allowed to practice as full professionals. Although the qualifications for teachers vary from state to state, teachers also have to pursue a prescribed course of study from specific colleges of education and obtain certificates that legitimize their professional status within certain jurisdictions. Nurses, pharmacists, architects, insurance and real estate agents, and even auto mechanics are required to fulfill certain requirements before working in their fields.

Therefore, the notion that there should be a set of qualifications for mediators is understandable. Or is it? What specific qualifications should be established? Who should establish them? Should each field of mediation have its own qualifications? Is each field ready to define and establish such qualifications? Is there a fundamental set of qualifications that are necessary for mediators in most fields of dispute resolution? What provisions for regulation, if any, are required?

Before attempting to answer these questions and to analyze the qualifications necessary to serve as a mediator in public policy or environmental disputes, it might be helpful to briefly examine some of the practices of other fields of dispute resolution for comparative purposes.

III. Experience in Other Fields

Labor Mediation

I am most familiar with the labor mediation field, having worked for the Federal Mediation and Conciliation Service (FMCS) since 1979. As the largest single employer of full-time, professional mediators in the world, the FMCS hires on an as-needed basis to fill positions in its approximately seventy-five offices nationwide. Over the years, the primary qualification that FMCS has looked for in its applicants is negotiation experience. The vast majority of new federal mediators come from career positions in industrial relations. The FMCS typically has looked for candidates with five to seven years of experience as chief spokesperson for either labor or management. Since mediation is an

extension of the negotiation process, it is critical that mediators be well-schooled in the bargaining arena.

Other new mediators have, however, been drawn from state mediation agencies, related governmental agencies such as the National Labor Relations Board or the National Mediation Board, or from the university sector. There is no formal education requirement, and mediators vary from those whose high school education was interrupted to those with law or doctoral degrees. It should be pointed out that in recent years, the FMCS has hired mediators with less collective bargaining experience as interns or trainees.

To be hired as an FMCS mediator, candidates need to complete a standard Civil Service application as well as an FMCS application. Candidates are interviewed at the District and/or National Office, and must pass a federal security review. Once hired, they face a three-year probationary process which determines their fitness for duty.

The practice of state mediation agencies differs from state to state, but generally mirrors that of the FMCS in placing emphasis on experience over education. For example, the Michigan Employment Relations Commission recently reduced its requirement of six years of experience to three years experience and a college degree. Additional experience can be substituted for a degree, but a minimum of three years experience is required. In addition, applicants must score well on a written examination that focuses on labor relations as well as meet with the staff at an interview.[1]

Family Mediation

The field of family and divorce mediation has undergone rapid expansion in the past five years. Family and divorce mediators come from diverse fields and disciplines including law, social work, mental health and counseling, psychology, and therapy. Persons practice as solo practitioners, associated with a court-related service such as the Friend of the Court, or with some agency or firm.

While there are no uniform qualifications established, there

[1] Interview with Edmund Phillips, Senior Mediator, Michigan Employment Relations Commission (Oct. 8, 1987).

are specific criteria for those practitioners who wish to become members in the Academy of Family Mediators (the Academy). Depending on the status of membership preferred, either associate or senior, the qualifications to be met include: education, both undergraduate and graduate; experience in handling mediation cases; specialized education in family mediation; completion of a certain number of hours of consultation with an Academy approved consultant; continuing their education; and submission of letters of recommendation from senior members of the Academy.

The Academy requires that both procedural skills and knowledge as well as specific subject matter expertise be included in the specialized training. For example, the rules of the Academy state that:

> Specialized training in family mediation shall consist of at least forty hours of training with a minimum of five hours in each of the following areas of knowledge: 1) conflict resolution theory; 2) psychological issues in separation, divorce, and family dynamics; 3) issues and needs of children in divorce; 4) mediation process and techniques; [and] 5) family law, including custody, support, asset distribution and evaluation, or taxation as it relates to divorce.[2]

Housing/Consumer Disputes

The National Academy of Conciliators (NAC) administers a nation-wide dispute settlement program that aims at the resolution of home-owner warranty (HOW) disputes between home buyers and builders through the use of conciliation and arbitration as alternatives to litigation. The majority of the NAC's dispute settlers have extensive subject matter expertise.

The NAC's literature cites four general skill areas required to become a dispute settler in the HOW area: knowledge of dispute settlement skills and professional ethics; knowledge of their expedited dispute settlement rules and procedures; knowledge of the terms and coverage provisions of HOW warranties; and subject matter expertise in residential construction.

The NAC has established a three-stage process for certification and re-certification including: an exam; participation in an

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[2] *Membership Qualification Changes*, MEDIATION NEWS, Sept. 1984, at 7.

introductory seminar; completion of a mentorship/internship program; and review of case handling on a continuing basis.

IV. Analysis

Having reviewed the qualifications for mediators in other fields, I now turn to those qualifications that are appropriate for mediators in public policy or environmental disputes. It might be appropriate to begin by commenting on what the writer has frequently referred to as the "we're different" syndrome—the tendency of different sectors of dispute resolution to see themselves and the work that they do as substantially different than the practice in other fields of dispute resolution.

The "we're different" syndrome encourages groups to define specific qualifications and subsequent training in terms that emphasize the perceived distinctive nature of their field. In some ways this process is analogous to the job description or help wanted ad that has clearly been composed with a specific individual clearly in mind. For example:

> International Trade Specialist. Intensive search for an individual with experience and qualifications in international commerce, marketing, and sales. Must be able to speak French, Ancient Greek, 3 dialects of Chinese, have an M.A. in theatre arts, and be left-handed. We are an equal opportunity employer.

The specialized mediators—family/divorce, community, environmental, labor—become so focused and obsessed with the alleged differences between themselves and the other sectors, that they engage in philosophical and intellectual isolation. The ultimate irony is that groups of peacemakers, committed to bringing together groups of conflicting parties, are erecting barriers and moving away from their fellow peacemakers and conflict resolvers, all to the detriment of the profession and their individual development.

It is important to recognize that some differences do exist between the various sectors of dispute resolution. To take just one example, labor mediators conduct the majority of their disputes between just two parties, while most environmental disputes are multiparty in nature, often involving fifteen or more parties. However, having practiced in the fields of labor, environmental, community, and public policy, I maintain that the differences between the sectors are outweighed by the similarities. The threshold question

then becomes whether there are qualifications necessary to mediate followed by a question of secondary importance as to whether there are any additional qualifications necessary to mediate environmental/public policy disputes.

In labor mediation, both labor and management shaped the institution of negotiation (collective bargaining) and consequently gave form and life to the practice of mediation. It is not surprising that the majority of labor mediators came from careers as advocates/negotiators. They saw and have continued to see negotiation experience as the primary qualification for labor mediators. I submit that *knowledge of the negotiation process is essential not only for labor mediators, but for mediators in all sectors.* Negotiation is the central process in dispute resolution. Mediation is an extension of the negotiation process. The mediator's primary role is to enhance and facilitate the negotiation process. In the absence of the negotiation process, mediation does not exist. Knowledge of the negotiation process, therefore, is the *sine qua non* of qualifications for environmental and public policy mediators.

The environmental sector is an extremely difficult area in which to gain entry and experience. Parties who desire mediation are likely to turn to experienced, reputable organizations or individuals. To date, there have been relatively few cases and those few have been highly specialized. Moreover, most beginning environmental mediators generally do not come with extensive negotiation experience, nor from careers representing business, industry, or environmental groups. The lack of real-life practical negotiation experience is something that must be compensated with training.

A second qualification for consideration is *formal education.* I favor an undergraduate degree requirement. Issues in the environmental sector are fairly complex, as are the dynamics of resolving conflict in a multi-party setting. Personal experience has demonstrated that a broad-based liberal arts education will provide sensitivity to the issues, and an ability to deal with and relate to a wide variety of people and organizations. The relative lack of degree programs in mediation, negotiation, and conflict resolution presently prohibits the imposing of a specific degree requirement in those fields. Obviously, as is the case in any field, there are individuals with skills and abilities who do not possess formal education; these individuals should not readily be excluded.

Traditionally, labor mediators obtained their subject matter ex-

pertise in the trenches of the collective bargaining battlefield. Many mediators supplemented their experience with degrees in law, industrial and/or labor relations, personnel, and human resources. Environmental mediators are generally not subject matter experts, due to the fact that most do not work in the field before becoming involved in mediation. In fact, it would be extremely difficult to be a subject matter expert in environmental and public policy mediation. The fact that there are so many different areas involved in this field—water, energy, air, land, nuclear, incineration, siting, hazardous waste—and the technology changes so rapidly, makes it difficult for any individual to be an expert in the traditional sense of the term.[3]

At a conference sponsored by the American Bar Association, Mr. Lawrence Susskind contended that environmental and public policy mediators be both subject matter experts and process experts. Mr. Susskind stated:

> I think that there will be a great demand for people who can deal with scientific and technical disputes. There will be a call for people with sophisticated technical backgrounds and process management skills who can inject themselves into these situations. The professionals who will be in demand are those who are both specialized in certain substantive areas and good at process management. We will need people who have credibility with the specialists and who know about dispute resolution processes. People who are exclusively process oriented, who are expert at helping people deal with their differences but do not know much about the substance of particular disputes, will not be called.[4]

My problems with these projections for the future are threefold. First, technical experts are rarely drawn to the people-oriented, process-oriented world of dispute resolution. These experts often have little patience or respect for the uncertain, unscientific, emotional, and illogical nature of the process. Second, the nature of our experience to date would not seem to support the projection of substantial demand for these kind of dispute resolvers in the future. In the absence of a demand, it seems highly unlikely that individuals

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[3] Interview with Christopher Moore, Senior Associate, CDR Associates (Nov. 16, 1987).

[4] Address by Lawrence Susskind, ABA Special Committe on Dispute Resolution (Sept. 1984).

will be motivated to combine these very different kinds of training. Third, the mediator need not be a subject matter expert in order to effectively mediate. These kinds of disputes often require a team of mediators, and one of the roles of the mediator is to identify the kinds of resources that need to be brought to bear on the resolution of the dispute. Mr. Christopher Moore, Senior Associate at CDR states that CDR handles the need for subject matter expertise either by using a subject expertise team (i.e., outside resources), or a process design task group.

Stepping away from the environmental and public policy arena, I am reminded of the moving address made by Mr. David Morse to the Society of Professionals in Dispute Resolution (SPIDR) Conference in Detroit in 1978. Mr. Morse described his experience as the Director General of the International Labor Organization of the United Nations in Geneva by stating:

> [M]y experience suggests that a solid background and experience in labor negotiations *is* transferable to international dispute settlement and makes the mediator more knowledgeable and comfortable in the discharge of his responsibilities. The principles, practices, and techniques invoked are essentially the same in both. I finish this point where I began, that if you have solid experience in the field of labor dispute resolution, these skills are applicable at the international level since the approach, method, and even the procedures are much the same.[5]

The purpose of including this anecdote is not to focus on the relationship between labor mediation and international dispute settlement, but instead is to suggest that the parallel described by Mr. Morse is applicable to a number of different sectors. If one understands the negotiation process and is skilled in the role of a mediator, then one can effectively help resolve disputes in different sectors, problems of entry notwithstanding. I have every confidence that Mr. Moore or Mr. Susskind could effectively resolve a labor contract dispute between the Teamsters and a trucking company with the same professionalism that they bring to an environmental and public policy dispute.

Again drawing on personal experience, I have found that process skills are relatively more important than specific knowledge

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[5] Address by David A. Morse, Society of Professionals in Dispute Resolution Conference (1978).

about a subject area. A mediator must by definition be a quick learner. Often mediators do not have the luxury of extensive research and background work before entering a crisis situation. A mediator must be able to evaluate the issues and assess the areas of settlement relatively quickly in order to be effective.

Of course, every mediator wants to be as informed as possible about the subject areas of the mediation. If a mediator knows nothing about the subject area, then it will be difficult to assist the parties in an effective fashion. The mediator does not have to be a subject matter expert to be sensitive and knowledgeable about the issue, however. Where an individual has too much knowledge about an industry or environmental subject, it may adversely affect his openness to certain kinds of resolutions. In other words, the subject matter expertise may burden the mediator with certain preconceived notions or biases about how particular issues can or should be resolved.

I want to make it clear that this is not to negate the importance of subject matter expertise in resolving environmental and public policy disputes. Mr. Moore describes two ways of handling the need for such expertise. He suggests either using an outside resource team of subject matter experts, or creating a process design task group in which certain members of the group are assigned the responsibility of subject matter expertise.

V. Training

SPIDR President George Nicholau described training as a key to quality in his April 12, 1986 address to the Massachusetts Association of Community Mediation programs. Mr. Nicholau stated:

> When I was at the IMCR (Institute of Mediation and Conflict Resolution), our training program was fifty to fifty-five hours, and even then, I did not think it was enough. Some individuals are instinctive mediators. Most, even though they have the aptitude, are not. They have to be taught the skills. This takes time, it takes repetition, it takes evaluative analysis. Statutorily, New York State only requires twenty-five hours of training to be eligible for funding under its program. In Massachusetts, to qualify as a mediator entitled to the privileges of confidentiality under the new law, training need be only thirty

hours. All well and good, but in my opinion, not enough.[6]

I agree with Mr. Nicholau's linkage of training and quality. The explosion in the field of dispute resolution has been rivaled by a similar explosion in the amount of training for sale in the field of dispute resolution. In its most grotesque distortion, forty-hour training courses, which end with a certificate, produce certificate recipients who offer their own forty-hour training courses within weeks after having been anointed mediators.

The subject of training for environmental and public policy mediators evokes the following questions: How much training is needed? In what areas is training needed? What kind of training methods should be used? Should the training program be approved or certified? Is the completion of the training tantamount to certifying the mediator? How is training linked to certification?

Amount of Training

I am always amused by requests to spend three hours on mediation training, especially for novice mediators. Perhaps the most that I can accomplish in three hours is to create enough doubt among the aspiring mediators that mediation is an easy process that everyone is doing and that it requires little training or thought. As George Nicholau has noted, the State of New York requires twenty-five hours of training in order to be eligible under its community mediation program. The State of Michigan is considering legislation that would establish a similar amount. Texas has just passed a statute requiring forty hours for court-related mediators and an additional forty hours for family mediators. In the mid-1970's when the FMCS began to hire interns, a six month training process was developed including negotiation and mediation skills, labor relations, and related subjects. In the scaled-down budgets of recent years, the FMCS has been forced to rely on orientations for new mediators of one to two weeks duration, while emphasizing on-the-job training by veteran mediators.

It is difficult to pinpoint exactly how much time should be devoted to training for environmental and public policy mediators. Rather than deciding up front what the time limits

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6 Address by George Nicholau, Massachusetts Association of Community Mediation Programs Conference (1986).

will be, attention should be focused on the subjects that should be covered. In all likelihood, the training will have to be spread over several sessions, because most adults will find it difficult to have training of one or more weeks at one time, even when it is on official work time.

With respect to the content of the training for environmental and public policy mediators, the following list of topics is intended to be a bottom-line starting point for discussion.

1. Negotiation
   - theory
   - dimensions of negotiation
   - negotiating behavior
   - preparation
2. Mediation
   - timing
   - confidentiality
   - creating doubts
   - caucusing
   - neutrality
   - procedure v. substance
3. Effective Communication
4. Joint Problem-Solving
5. Strategic Planning in Negotiations
6. Unique Characteristics of Multi-Party Disputes
7. Background in Environmental/Public Policy Issues
   - areas of substantive knowledge

The training should be as participatory as possible, with heavy use of role-play and simulation. Wherever possible, the use of a video camera should be used to provide an opportunity for the mediator trainee to observe himself visually. Feedback and constructive critique from experienced mediators is necessary.

In a draft proposal to the SPIDR Long-Range Planning Committee, Christopher Moore, a member of the committee, outlined a creative approach to developing training standards.[7] Mr. Moore suggested a five-stage model including the following steps:

PHASE 1: Conduct a survey of dispute resolution professionals, trainers, researchers, and potential clients regarding training needs and recommended qualifications, identifying the: a) content;

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[7] C. Moore, Development of Training Standards (1987) (unpublished manuscript).

b) skills needed; c) preferred training methods; d) recommended length of training; e) training program models; f) criteria for admission into training; g) methods of certification of training programs; h) procedures for evaluating trainee performance; i) desirability of certifying successful trainees.

PHASE 2: Convene a conference of practitioners and trainers to analyze the survey results and assign responsibilities for proceeding in specialized task groups.

PHASE 3: Send the results of the various task groups on to a central drafting committee to produce a final document.

PHASE 4: Refine the final draft and prepare it for distribution.

PHASE 5: Implement the final draft pursuant to the approval of a number of professional organizations.

This approach was intended to be used for the development of training standards in any field of dispute resolution. Certainly a micro-version of the approach would be useful in designing training standards within individual fields such as environmental and public policy dispute resolution. The disadvantage of the approach is that it is a time-consuming process which takes great coordination and leadership. The advantage of this kind of strategy is that it is more likely to produce a consensus as to the kind of training standards that are required, and more likely to generate the kind of serious thought and reflection that this subject warrants.

After the Training . . . Then What?

Once the training has been completed, how do we insure that quality services are being delivered? How do we insure some standard of practice? Obviously, one of the first steps is to define what we mean by good practice. What does it look like? How do we get there? Another threshold question is whether the field of environmental and public policy dispute resolution has enough experience at this time to establish a clear and workable definition.[8] Several methods have been suggested for monitoring the work of recently trained mediators, including:

- Observation by supervision
- Mentor/apprentice program
- Peer debriefing

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[8] The author appreciates the comments of Margaret Shaw and Christopher Moore.

- Client satisfaction survey
- Post-case exam

There are difficulties with the use of supervision to observe mediation, and other equally troubling difficulties with the use of video tapes of real participants to evaluate mediator performance. The use of a mentor or apprentice program to gradually expose the mediator trainees and develop their skills has a great deal of merit, as does the practice of peer debriefing.

Continuing the education and training of mediators can also help to insure a good standard of practice. Not only does the training provide additional information and skill practice, but it also allows for additional opportunities for trainers to observe the mediators. "Another key is continued training—observation sessions by experienced mediators, post-session discussions to talk over missed opportunities, discussion and analysis of each case, so that the individual mediator will grow and become even more skilled."[9]

VI. Certification

Discussion of mediator qualifications and training standards almost inevitably leads to the subject of certification. One of the by-products of the incredible expansion in the field is the accompanying distortion in quality that invariably follows rapid expansion of any sort. The need for certification stems from within the profession to protect itself and to protect the consumer. SPIDR has commissioned a special committee to study the question of certification for mediation in general. I have serious doubts as to whether practitioners in the field of environmental dispute resolution have enough experience at this time to enable themselves, clients, and researchers to agree on criteria for certification. The field is simply too young. I fear that it would be counter-productive and restrictive to define a set of criteria for certification before we have enough data and experience on which to base such criteria. On this subject, Mr. Susskind and I seem to agree. As Mr. Susskind has stated:

> Finally, with regard to certification, I urge caution. As more people decide to become mediators, they will want to "pull up the bridge." They will want to impose standards and exact

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9 *See supra* note 6.

> fees. They will want to limit the number of people in the field. I think we are slipping and sliding towards some form of credentialization or certification, whether by the state or federal government or by one or more professional organizations. This worries me. I think certification makes sense only after a field has matured and there is a generally shared view of what constitutes good practice. I am not opposed to certification, just premature certification.[10]

Another question I raised in the certification debate concerns sanctions. If we at some point agree on the criteria for certification, then are we ready for the next stage which involves the establishment of a procedure for the handling of complaints? Are we ready to enforce such a procedure? The Massachusetts Council on Family Mediation endorsed such a procedure in 1985, involving a formal mediation process for the airing of complaints against its members.[11] There does not exist a system of certification nor enforcement at present for labor mediators, largely because they work almost exclusively for governmental agencies charged with the responsibility of regulating their employees. Similarly, consumer mediators generally work for agencies of one sort or another with identical responsibilities. I think that it is premature to establish sanctions and an enforcement system. Returning again to the need to first establish what constitutes good practice, it would be easier to define violations of ethical questions as opposed to clear violations of performance standards.[12]

Personal Qualities

As I review the above discussions of experience, education, training, and certification, it seems to me that I may have taken for granted an area that may be more important than all of the above—namely, the question of the personal qualities and temperament of the individual. William Simkin, former Director of the FMCS, listed some of the characteristics essential for a good mediator:

1. Demonstrated integrity and impartiality.

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10 Address by Lawrence Susskind, Society of Professionals in Dispute Resolution Conference (1978).

11 *See supra* note 3.

12 *Id.*

2. Basic knowledge of and belief in the collective bargaining process.
3. Firm faith in voluntarism as opposed to dictatorship.
4. Fundamental belief in human values and potentials, tempered by the ability to assess personal weaknesses as well as strengths.
5. Hard-nosed ability to analyze what is available in contrast to what might be desirable.
6. Sufficient personal drive and ego, qualified by a willingness to be self-effacing.[13]

Many other qualities and characteristics could be cited, including patience, good judgment, the ability to listen and communicate effectively, and a sense of timing. My own belief is that the right combination of personal qualities may be more important than any of the other criteria that I have mentioned above. In 1980, when the FMCS was initiating the program to mediate age discrimination complaints (ADA) for The Department of Health, Education and Welfare, it decided to use outside "community conciliators" to mediate half of the ADA complaints. To interview and select these community mediators, it established an assessment center concept.

The basis of the assessment center concept was the establishment of a group of personal qualities necessary in mediator candidates. Once the criteria were established and the initial screening undertaken, role plays were developed in which the candidates were rated for the criteria. Some of the primary criteria included: negotiation experience; judgment; process leadership; tolerance for stress; job motivation; and communication skill. The assessment center concept was successful in identifying sound mediator candidates for the ADA project. It may be an excellent method for identifying candidates suited for environmental and public policy mediation as well.

VII. Conclusion

This paper is designed to provide the basis for a fruitful discussion of the issues surrounding the necessary qualifications and training standards for mediators of environmental and public policy disputes. I have highlighted negotiation and mediation

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[13] W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 53 (1971).

experience, formal education and training, and certification. I conclude with what may be the most significant—and the most overlooked—aspect for consideration: the personal qualities; temperament; and personality of mediator candidates. Although this may be a throwback to the issue of whether mediators are born or trained, it should not be taken for granted. Yes, mediators can be trained, and quality training has been developed which aims at developing both procedural and substantive skills. It is that core of inherent personal qualities, however, which may ultimately play the leading role in determining how well-suited an individual is for mediation. Identifying those qualities and characteristics may make an important contribution toward the ultimate task of determining mediator qualifications and training standards.