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# To Certify, or Not to Certify: A Comparison of Australia and the U.S. in Achieving National Mediator Certification

Mandy Zhang<sup>‡</sup>

## I. INTRODUCTION

Mediation and other methods of alternative dispute resolution (“ADR”) are transforming the legal landscape in the world.<sup>1</sup> Such processes give adversarial parties the option to not spend years in litigation, or expend endless amounts of money on attorneys and courtroom fees.<sup>2</sup> With this rise of business in mediation comes an increasing number of self-proclaimed mediators who all want to be a part of this lucrative industry.<sup>3</sup> Noting this

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1. See, e.g., David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 DISP. RESOL. J. 66 (1999). In a survey, almost all respondents reported that they have used some form of ADR, and “an overwhelming 87% having used mediation and 80% having used arbitration at least once in the past three years.” *Id.* The authors concluded that “ADR has made substantial inroads into the fabric of American business, with counsel overwhelmingly preferring mediation (63%); arbitration was a distant second (18%) . . .” *Id.*

2. Dwight Golann & Jay Folberg, *An Overview of Mediation*, in *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 95, 102-103 (2006) (“One of the more significant forces driving corporations toward ADR is the cost of litigation and the length of time needed to reach a settlement . . . . Eighty-one percent of those surveyed said that mediation provided a more satisfactory process than litigation, 67% said that it provided more satisfactory settlements, and 59% reported that it preserved good relationships.”).

3. JEFFREY KRIVIS & NAOMI LUCKS, *HOW TO MAKE MONEY AS A MEDIATOR (AND CREATE VALUE FOR EVERYONE): 30 TOP MEDIATORS SHARE SECRETS TO BUILDING A SUCCESSFUL PRACTICE* (2006). Krivis asserts, “It seems as though everyone wants to jump on the mediator bandwagon these days.” *Id.* at 1. Jeffrey Krivis has mediated several thousand major cases and

trend in the United States, two highly distinguished dispute resolution organizations, the Association for Conflict Resolution (“ACR”), and the American Bar Association Section of Dispute Resolution (“ABA-DRS”) each developed task forces to evaluate the idea of mediation certification.<sup>4</sup> These groups were created for the purposes of designing suitable nationwide mediation certification programs to ensure the competence of mediators.<sup>5</sup>

Meanwhile, Australia was experiencing similar progress in the mediation profession, giving rise to comparable ideas for accreditation and setting a common benchmark for mediators.<sup>6</sup> Unlike the U.S., however, Australia took a decisive step towards actually establishing a nationwide system of mediator accreditation at Australia’s National Mediation Conference in May 2006.<sup>7</sup>

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retained a career in dispute resolution for over ten years. See Charles B. Parselle, Book Review, [http://www.niacr.org/pages/book\\_reviews/review1.htm](http://www.niacr.org/pages/book_reviews/review1.htm) (2006) (reviewing JEFFREY KRIVIS & NAOMI LUCKS, *HOW TO MAKE MONEY AS A MEDIATOR* (2006)). Considered to be at “the top of his field,” this is his second book in print. *Id.* His first book, titled *Improvisational Negotiation*, was an “instant success” and much sought after by mediators. *Id.* Interestingly, Krivis’ book focuses on the practical aspects of becoming a successful mediator, from marketing the business, to having a website, but he fails to address mediator accreditation or obtaining credentials. *Id.* Ironically, in his step-by-step guide to mediation, Krivis mentions that one trend the mediation profession must overcome is an “instant mediator[.]” which goes to the lack of, and resistance to, any kind of accreditation.” *Id.*

4. Diane Levin, *Online Guide to Mediation: Australia to Establish National System of Mediator Accreditation*, <http://mediationblog.blogspot.com/2006/08/australia-to-establish-national-system.html> (last visited March 3, 2008).

5. ACR Task Force on Mediator Certification, *Report and Recommendations to the Board of Directors*, 2004 A.C.R. REP. 1, available at <http://www.acrnet.org/pdfs/certificationreport2004.pdf>. The ACR Task Force was created in November 2002. *Id.* The report, issued on March 31, 2004, asserts that the goal of the Task Force was to design a national certification program. *Id.* The President of ACR appointed the members of the Task Force, and the selected group convened three times in 2003. *Id.* The ABA Task Force was also created in 2001. See ABA Section of Dispute Resolution Task Force on Credentialing, *Discussion Draft: Report on Mediator Credentialing and Quality Assurance*, 2002 A.B.A. SEC. DISPUTE RESOLUTION REP. 1-2, available at [http://www.abanet.org/dispute/taksforce\\_report\\_2003.pdf](http://www.abanet.org/dispute/taksforce_report_2003.pdf).

6. National Mediation Conference Party Limited Accreditation Sub-Committee, *Report to the 8th Australian National Mediation Conference in Hobart, Tasmania: Mediator Accreditation in Australia* (2006), <http://www.mediationconference.com.au/html/Accreditation.html> (follow “FINAL DRAFT FOR CONSIDERATION NOW AVAILABLE (CLICK HERE)” hyperlink) (last visited Feb. 14, 2008) [hereinafter “NMC Proposal”]. According to this NMC Proposal, there had been debate in Australia since 1991 over issues of accreditation, training, standards, codes of conduct, and professional organizations for mediators. *Id.* at 2.

7. John Wade, Ed., *National Mediator Accreditation System*, 23 BOND UNIVERSITY DISPUTE RESOLUTION NEWS, AUG. 2006, at 2-3, available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1022&context=drcn>. The National Mediation Accreditation System was commenced at the mediation conference in Darwin during 2004, which mandated the directors of National Mediation Conference “to use monies granted by the Attorney-General’s Department in Canberra to investigate the feasibility of such a system.” *Id.* In “between the two conferences, a consultation was held involving written submissions and public forums in all capital cities.” *Id.* at 3.

This article aims to trace the progress of establishing mediation accreditation in Australia and the United States. Part II briefly describes how each country came to the decision of exploring the necessity of national mediator certification, and also illustrates the proposed designs for the Australian certification program and U.S. certification program recommended by the ACR.<sup>8</sup> Part III suggests possible reasons for why the U.S. has failed to implement the mediator certification program proposed by the ACR while Australia is moving forward to establish their system. Part IV concludes with why the U.S. should continue to push for national mediator accreditation in the future.

## II. BACKGROUND OF NATIONAL MEDIATION ACCREDITATION

Mediation is defined as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”<sup>9</sup> Thus, central to the definition of mediation is the participation of an impartial third party, who is known as the mediator. Despite the growing use of ADR and mediation as an alternative to litigation in the U.S., there is still an absence of a specific method to certify qualified mediators.<sup>10</sup> In Australia, while the National Mediation Conference Party Limited has begun implementation of a proposed standard for mediators, the road to accreditation has only just begun.<sup>11</sup>

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“This process was facilitated by Laurence Boule, [and over] 400 mediators and many organizations took the opportunity to be involved in developing the system.” *Id.*

8. See ACR Task Force Report, *supra* note 5; see also ABA Section of Dispute Resolution Task Force on Credentialing, *supra* note 5. While both dispute resolution organizations came up with proposals on mediator credentialing, this paper focuses on the ACR proposal.

9. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preamble (2005), [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2006.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2006.pdf) (last visited Feb. 14, 2008).

10. Professor Peter Robinson, Lecture at a Mediation Seminar at the Pepperdine University School of Law (January 8, 2007) (asserting that clients tend to only hire mediators who are either balding, or have gray hair, as it tends to indicate experience and maturity).

11. See NMC Proposal, *supra* note 6, at 4. The National Mediator Standard System has only been launched into action since the May 2006 National Mediation Conference in Australia. *Id.* at 2. There is a two-year implementation period, during which an Implementation Body (“Implementation Body”), the interim body responsible for the initial implementation of the accreditation system, “will make six monthly reports to the directors of the NMC and the Accreditation Committee of National Alternative Dispute Resolution Council” (hereinafter, “NADRAC”). *Id.* at 11. At the 9th National Mediation Conference in 2008, the Implementation Body will report on the first two years of the National Mediator Standard System’s operation. *Id.*

### A. Mediation in Australia

In March 2004, Australia's National Alternative Dispute Resolution Advisory Council<sup>12</sup> ("NADRAC") noted the lack of a uniform system of accreditation in mediation in Australia in a published work.<sup>13</sup> NADRAC stated that the deficiency of such a system generated many concerns, including adequate protection of consumers of mediation services,<sup>14</sup> referrers' lack of knowledge,<sup>15</sup> the need for consistent standards,<sup>16</sup> the difficulty for new mediators to enter the field,<sup>17</sup> and fragmentation in accreditation offered by different organizations, among others.<sup>18</sup>

Due to the support of groups like the NADRAC, and debates conducted in the literature, at conferences, consultations, in commission reports and other contexts, the National Mediation Conference Party Limited appointed a committee or a representative group ("Committee") to supervise the

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12. See NADRAC Home Page, [http://www.nadrac.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/About\\_NADRAC](http://www.nadrac.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/About_NADRAC) (last visited Feb. 14, 2008). The NADRAC was established in October 1995 as a "national body to advise the Government, federal courts and tribunals on ADR issues with a view to achieving and maintaining a high quality, accessible, integrated federal ADR system." *Id.* It is a non-statutory body which provides advice on ADR to the Australian Attorney-General. *Id.*

13. NADRAC, *Who Says You're A Mediator? Towards a National System for Accrediting Mediators*, "The Need for Accreditation" [hereinafter "NADRAC Proposal"], [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_says\\_you\\_&apos](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_says_you_&apos) (follow "View this paper in PDF" hyperlink) (last visited Feb. 14, 2008).

14. *Id.* at 2. In terms of protecting consumers of mediation services, the NADRAC was concerned that consumers were unclear as to the quality and nature of the services offered, and their lack of satisfactory avenues of recourse if they were dissatisfied with the level of service received. *Id.*

15. *Id.* NADRAC also suspected that referrers, such as courts and lawyers, may not trust the quality of mediation services offered, so would resort to: "(a) establishing their own formal or informal systems of accreditation; (b) providing services in-house; (c) relying on word of mouth recommendations; or (d) choosing mediators on the basis of the mediators' personal status rather than their mediation skills." *Id.* In the U.S., federal courts have similar discretion over mediator selection and are directed toward individuals who have prior experience. Under 28 U.S.C. § 653(b), "the district court may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution process." *Id.*

16. *Id.* Since current mediation standards vary and are inconsistent, it would be difficult for prospective practitioners and students to enter the mediation field. NADRAC thus supports a system where there is a "series of similar entry level courses rather than a continuous upgrading of skills and knowledge development." *Id.*

17. *Id.* ("The reliance on word of mouth and informal accreditation can make it difficult for new mediators to gain work, thus preventing new ideas and energy from entering the mediation field.")

18. *Id.* Due to the range of organizations that have developed comprehensive systems for accrediting mediators, NADRAC is concerned with the fragmentation in accreditation—the "competing claims made by rival mediation organizations which would reduce community and government trust in the mediation movement." *Id.*

accreditation initiative.<sup>19</sup> After the Committee created an original proposal labeled the “draft standard” on mediator accreditation, it was revised according to many sources.<sup>20</sup> At the 8th Australian National Mediation Conference<sup>21</sup> (“Conference”) in Hobart, Australia from May 3-5, 2006, the Committee strongly recommended the move to an implementation phase of a national system of mediator accreditation, which was documented in the final report and proposal to the Conference.<sup>22</sup> The delegates of Australia’s National Mediation Conference endorsed the decision of the committee.<sup>23</sup> As a result, Australia has taken a major step forward toward the establishment of this system.<sup>24</sup>

#### i. Australia’s Proposed Accreditation System

The objectives of Australia’s national uniform system of mediator accreditation has several objectives: (1) improving mediator knowledge, skills, and ethical standards; (2) promoting quality in mediation practice; (3) protecting clients of mediation services by establishing a system of accountability; (4) giving recognition to mediators for their skills and expertise; (5) bringing more credibility and acceptance of mediation in Australia within the country and abroad.<sup>25</sup> At the outset, the proposal assures that this uniform system is “not mutually exclusive of other forms of accreditation.”<sup>26</sup> It is stated that in the intermediate term, it would be used along with existing systems, and in the short term, it would be the point of reference in the industry.<sup>27</sup>

19. *Id.* There were eleven members of the Committee and one facilitator. *Id.*

20. *Id.* at 3. The final report and NMC Proposal was revised from the original Draft Standard from “written submissions made in response to it, public consultation forums conducted in different cities in Australia, including Canberra, Sydney, Melbourne, Brisbane, Adelaide, Perth and Darwin, the feedback responses and documentation from the public meetings, the facilitator’s report on the consultations, and the directions and deliberations of the organizing committee.” *Id.*

21. *Id.* at 6-7. It is noted that the National Mediation Conference has no legal or constitutional authority, but is only a “gathering of members of the mediation field,” and thus can make recommendations and provide direction regarding a uniform national accreditation system. *Id.* at 6.

22. NMC Proposal, *supra* note 6, at 6-7.

23. *Id.* at 3.

24. Levin, *supra* note 4.

25. NMC Proposal, *supra* note 6, at 2.

26. *Id.*

27. *Id.* at 3. The NMC Proposal suggests that if the system moves forward rapidly, it may influence other systems and become adopted by them, but it is not created to be exclusive or competitive. *Id.* The NMC Proposal insists, “[u]nlike other systems it would provide consistency,

The System will be put in place and guided by an Implementation Body, or the interim body who is responsible for the initial implementation of the System for the first two years.<sup>28</sup> This Implementation Body is appointed by the National Mediation Conference Party Limited to ensure that it represents the diversity of Australian mediators and mediation practice.<sup>29</sup>

There are five key elements to Australia's proposed system of mediator accreditation. First, a National Mediator Accreditation System (the 'System') will be created for Australian mediators who fulfill specific requirements to be accredited to a National Mediation Standard ('NMS').<sup>30</sup> Second, the System will be voluntary and not mandatory for mediators who wish to be accredited to the NMS; mediators will not need accreditation to practice.<sup>31</sup> Third, the System is focused on only mediators for the time being, and excludes arbiters, negotiators or other ADR practitioners.<sup>32</sup> Fourth, the System will initially begin with only one level of accreditation, and possibly expand to more advanced levels of accreditation in the future.<sup>33</sup> And lastly, those who meet the requirements for accreditation will be included on a National Register of Mediators, which will be publicly available.<sup>34</sup>

Accreditation is defined by two parts: fulfilling the requirements of the NMS<sup>35</sup>, and complying with a uniform Code of Practice.<sup>36</sup> Operating this

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uniformity and transportability in mediator standards and accreditation across the diversity of mediation systems. *Id.*

28. *Id.* at 1, 11.

29. *Id.* at 11.

30. *Id.* at 7.

31. *Id.* Hence, Australia's accreditation is called a "license," which is defined as an accreditation which is a mandatory pre-requisite to the practice of an occupation or profession. *Id.*

32. NMC Proposal, *supra* note 6, at 7. The NMC Proposal is careful to point out that this may change over time. *Id.*

33. *Id.*

34. *Id.* The NMC Proposal suggests the option of registering "Accredited in terms of the National Mediation Standard" as a trademark to ensure its exclusivity. *Id.*

35. *Id.* The NMS specifies the knowledge, process competencies, skills and techniques required for being accredited to the System. According to the NMS:

[M]ediators should be persons of fit and proper character who have been educated, trained and assessed in terms of: (1) Substantive knowledge relating to: (a) The nature of conflict, including the dynamics of power and violence; (b) The appropriateness or inappropriateness of mediation; (c) Pre-mediation preparation, screening and intake; (d) Communication patterns in conflict situations; (e) Negotiation dynamics in mediation; (f) Cross-cultural issues in mediation and dispute resolution; (g) The principles, stages and functions of the mediation process; (h) The roles and functions of mediators; (i) The roles and functions of support persons, lawyers and other professionals in mediation; (j) Key issues in a specific Code of Practice referred to in the course; (k) The basic law of mediation on confidentiality, enforceability of mediated agreements and liability of mediators. (2) Skills and techniques in: (a) Preparation for mediation; (b) Intake and

System and the accreditation process will be mediation and ADR organizations labeled “Recognised [sic] Mediator Accreditation Bodies (‘RMABs’).”<sup>37</sup> RMABs must be recognized by the Implementation Body as being in compliance with the System’s requirements.<sup>38</sup> While the main purpose of RMABs is to accredit mediators to the NMS, they can also “provide education and training programs themselves or can use the education and training services of other institutions as part of their accreditation procedures.”<sup>39</sup> However, if outside institutions are used, the ultimate assessment for accreditation will still belong to the particular RMAB.<sup>40</sup> Additionally, RMABs must also provide information on each

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screening of the parties and dispute to assess suitability for mediation; (c) Conduct and management of the mediation process; (d) Appropriate communication skills, including listening, questioning and reframing, required for the conduct of mediation; (e) Negotiation techniques and the mediator’s role in facilitating negotiation and problem-solving; (f) Mediator interventions appropriate for standard difficulties in mediation; (g) Potential responses to high emotion, power imbalances and violence; (h) Use of separate meetings and shuttle mediation; (i) Drafting of mediated agreements; (j) Protocols for terminating mediation; (k) Anticipating and responding to post-mediation difficulties; (l) The use of information and computer technology in mediation practice. (3) Ethical understanding in relation to: (a) The avoidance of conflict of interests; (b) Marketing and advertising of mediation; (c) Confidentiality, privacy and reporting obligations; (d) Neutrality and impartiality; (e) Fiduciary obligations; (f) Ensuring fairness and equity in mediation; (g) Withdrawal from and termination of the mediation process.

*Id.* at 14.

36. *Id.* The Code of Practice describes the ethical and professional obligations of mediators accredited to the NMS. Those implementing the System will develop the Code of Practice by using existing Australian mediator Codes of Practice. *Id.*

37. NMC Proposal, *supra* note 6, at 8 n. 9. The NMC Proposal suggests that many well-known organizations should be able to achieve the status of RMAB, and give a list of possible categories:

(1) membership associations (such as LEADR, IAMA); (2) service-providers (such as Community Justice Programs, Relationships Australia, ACDC); (3) professional associations (such as law societies, Australian Association of Social Workers, APS College of Counseling Psychologists); (4) courts and tribunals (such as the Federal Court of Australia, the National Native Title Tribunal and the Victorian Civil and Administrative Tribunal); (5) non-profit associations (such as VADRA, ADRA, WADRA); and (6) universities and other educational institutions.

*Id.* at 8 n. 9.

38. *Id.* at 7.

39. *Id.* at 8. The NMC Proposal believes that during the early years of implementing the System, “most RMABs will provide their own education and training.” *Id.* at 8 n. 10.

40. *Id.*



mediator they accredit to the Implementation Body to help maintain the Register of Mediators Accredited to the NMS (“Register”).<sup>41</sup>

To be certified as a mediator to the NMS by an RMAB, persons must be “fit and proper to practice as mediators”<sup>42</sup> and have received an education and have passed an assessment which complies with requirements.<sup>43</sup> Both the education and assessment components have specific instructions. For example, a training team must comprise of instructors, assistant instructors, or coaches with “suitable qualifications and experience as educators and mediators,”<sup>44</sup> and there is a requirement for a ratio of “one instructor for every three participants in the simulation part of the training.”<sup>45</sup> Australia also sets the minimum amount of training at “40 hours in duration, excluding the assessment period,” which is at the shorter end of the spectrum for mediator training across the world.<sup>46</sup> The assessment part of accreditation “will be based on competence . . . in mediation simulations”<sup>47</sup>, awareness displayed in the written debriefings,<sup>48</sup> performance in the examination,<sup>49</sup> and

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41. *Id.*

42. *Id.*; see also NMC Proposal at Annexure A. While the NMC Proposal has repeatedly insisted that persons must be “fit and proper to practice as mediators,” there appears to be no separate definition of “fit and proper” outside of complying with the specified requirements of NMS, receiving an education, and formally passing the assessment test. *Id.*

43. NMC Proposal, *supra* note 6, at 8-9.

44. *Id.* at Annexure C. It is likely that the initial selection of training instructors be chosen by the RMABs. See *id.* at 9.

45. *Id.* at Annexure C.

46. *Id.* The NMC Proposal admits that during public consultations, it was learned “that in some overseas countries, the education and training requirements range between 150 and 600 hours in duration.” *Id.* In the U.S., the best dispute resolution education program in the country according *U.S. News & World Reports*, known as the Straus Institute of Dispute Resolution at Pepperdine University, offers three separate programs. See Pepperdine University, Straus Institute of Dispute Resolution website, <http://law.pepperdine.edu/straus/>. The Certificate and Masters Programs require a bachelor’s degree. *Id.* The LLM has the pre-requisite of a law degree. *Id.* It is difficult to compare the required education training between this U.S. program and Australia because the U.S. requires other undergraduate or graduate degrees prior to pursuing a degree in dispute resolution. It should also be noted that this particular U.S. program encompasses all dispute resolution and not just mediation.

47. *Id.* There is a requirement that each course participant will take part in at least six simulated mediation sessions, in at least two of which they perform the role of mediator. *Id.* Different members of the training team will evaluate the mediator’s competence in those two simulations, and will be recorded in written form. *Id.*

48. *Id.* Each course participant is also required to complete “written debriefing evaluations of two simulated mediations, one in which they were a disputant and the other a mediator,” in an evaluation form. *Id.*

49. NMC Proposal, *supra* note 6, at Annexure C. The examination consists of a written test “between 45 and 60 minutes in duration in which the participants are evaluated on their theoretical knowledge and understanding of mediation practice and asked to suggest appropriate . . . ways of

general course participation, such as contributions to discussions. . .”<sup>50</sup> Each participant will then receive a written report which conveys: “the outcome of the skills assessment; relevant strengths and how they were evidenced; relevant weaknesses and how they were evidenced; [and] relevant recommendations for further training and skills development.”<sup>51</sup>

The education and training will be provided by the RMABs or by other organizations that they choose.<sup>52</sup> RMABs will also have the discretion to choose who enters accreditation programs, as well as the format of the education program and training.<sup>53</sup> It is also contemplated that individual RMABs and other organizations may eventually provide more advanced forms of accreditation for mediators in addition to this starting program.<sup>54</sup>

Accredited mediators to the NMS will also be required to be associated with, or be members of, an RMAB on an ongoing basis.<sup>55</sup> This association requirement is used to maintain the current National Register of Accredited Mediators, and to handle complaints against mediators, and to provide resources to the Implementation Body.<sup>56</sup>

However, maintaining accreditation requires more than just passing the assessment and being certified to the NMS. Mediators are also required to undergo continuing professional development (“CPD”). These CPD requirements will be finalized by the Implementation Body and consists of a points system which must be completed within two years by acquiring a certain number of points in three out of six categories.<sup>57</sup> These CPD

dealing with specific ethical dilemmas, tactical issues, or difficult situations which can arise in mediation.” *Id.*

50. *Id.*

51. *Id.* The outcome of the skills assessment will be either competent or not yet competent. *Id.*

52. *Id.* at 9. Here, the NMC Proposal gives the alternative option of drawing a line between institutions which train mediators and those which accredit them, to avoid perceived conflicts of interest. *Id.* The NMC Proposal suggests that universities would take on the education aspect, and professional bodies retain the duty of accreditation. *Id.* However, it is noted that this arrangement would require time to organize. *Id.*

53. *Id.* It will be up to the RMABs “whether the education and training is continuous or in stages,” and whether the assessment test is immediately after education or after a period of delay. *Id.*

54. *Id.*

55. NMC Proposal, *supra* note 6, at 9. This can include an employment relationship. *Id.*

56. *Id.* The NMC Proposal suggests that if there were no membership or employment requirement for mediators, “there would have to be a staffed national system for initial assessment, for CPD and for complaints, discipline and possible de-accreditation.” *Id.*

57. *Id.* at 10, Annexure D. Under the CPD model, within each two-year cycle, mediators accredited to the NMS will have to obtain at least 50 CPD points, comprising 20 points from

requirements can be provided by different organizations, from RMABs to other identified institutions such as universities and training associations.<sup>58</sup> Mediators can choose from which bodies they undertake these requirements.<sup>59</sup> Additionally, if mediators must further their mediation development for any other professional purposes, this can also be credited towards CPD under the System if it satisfies the requirements determined by the Implementation Body.<sup>60</sup>

One of the most important goals of accrediting mediators by the NMS is to provide a procedural process to manage client complaints against mediators.<sup>61</sup> If a mediator breaches “the mediator Code of Practice, he or she may be suspended from NMS accreditation on a temporary or permanent basis.”<sup>62</sup> Moreover, if accredited mediators fail to maintain the necessary CPD requirements, they will be automatically de-accredited from the NMS.<sup>63</sup> However, all mediators will be provided with an appeals process for any decision made by an RMAB.<sup>64</sup>

To transform the proposal into reality, the Implementation Body was directed to address the following after the Conference in May 2006: “[1] the recognition of RMABs; [(2)] the drafting of the uniform Code of Practice; [and (3)] the admission of experienced mediators into the System

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Category 1 and 30 points from categories 2 through 5, while additional points can be awarded for category 6:

Category 1: The conduct of six mediations or co-meditations (20 points);

Category 2: Representation of clients in four mediations (10 points);

Category 3: Attendance at CPD courses or workshops on mediation or ADR for 20 hours (20 points);

Category 4: External supervision or auditing of their clinical practice (10 points);

Category 5: Presentations at mediation or ADR seminars or workshops (10 points);

Category 6: Other relevant experience as a practitioner or consultant in dispute resolution and conflict management (10 points). *Id.* at 18. While this model has not yet been finalized, it will be the framework used by the Implementation Body.

*Id.*

58. *Id.* The NMC Proposal has taken special care to note that CPD requirements for mediators practicing in rural areas should be accommodated in an equitable fashion. However, there are no specific examples for how this will be accomplished. *Id.*

59. NMC Proposal, *supra* note 6, at 10.

60. *Id.*

61. *Id.* This framework is seen as crucial to protecting consumers of mediation services. *Id.* at 3. The NMC Proposals states that the procedural framework must “ensure that complaints and grievances are handled with as little technicality and formality as possible in a process which accords procedural fairness to all parties.” *Id.* at 10.

62. *Id.*

63. *Id.*

64. *Id.* The NMC Proposal also gives an alternative option of creating a national complaints body which would “deal with complaints and grievances when necessary, or fill the role of an independent checking body. . . .” *Id.* at 11. Such a body “would require resourcing, personnel, and infra-structure.” *Id.*

on the basis of their training and experience.”<sup>65</sup> Another duty given to the Implementation Body is to ascertain public and private funding sources for the initial operation of the System.<sup>66</sup> The Implementation Body will periodically report to the National Mediation Conference on its progress.<sup>67</sup>

Once mediators are accredited to the NMS, they will be listed in the National Register of Mediators Accredited to the NMS (hereinafter, “Register”).<sup>68</sup> Such information will be open to the public for all interested parties.<sup>69</sup> To enhance the credibility of the Register, public bodies funded by the government may be required to use only NMS-accredited mediators, while private mediation providers are encouraged, but not required to refer only mediators from the Register.<sup>70</sup>

The System will be funded through fees paid by mediators who wish to be accredited.<sup>71</sup> RMABs and state and federal governments may also be asked to contribute resources for the administration of the System.<sup>72</sup>

In order to welcome and recognize existing mediators, the System will acknowledge “the prior learning, accreditation, practical mediation experience, and other relevant qualifications of existing mediators.”<sup>73</sup> While

65. NMC Proposal, *supra* note 6, at 11.

66. *Id.*

67. *Id.* “The Implementation Body must make six-month reports to the directors of the National Mediation Conference and the Accreditation Committee of NADRAC during the two-year implementation period and will report to the 9th Australia National Mediation Conference in 2008 on the first two years of the System’s Operation.” *Id.*

68. *Id.* “The National Register of Mediators Accredited to the NMS will contain standardized information on Accredited mediators and will be updated in the light of new accreditations, lapsed accreditations and de-accreditations.” *Id.* It will be maintained as an electronic database by the Implementation Body, and accessible to the public through an internet site. *See id.* at Annexure E. “The internet site will display at least the following information for mediators accredited to the NMS: (1) name of mediator; (2) relevant RMAB and link to that RMAB; (3) principal location of practice; and (4) link to the relevant Code of Practice.” *Id.* at Annexure E. The Implementation Body can also opt to “contain a link to the mediator’s CV and an e-mail link to reach the mediator.” *Id.*

69. *Id.* The NMC Proposal has promised that such accreditation information “will be accessible to the public, service-providers, courts, tribunals and other interested parties.” *Id.*

70. *Id.* at 11-12, n. 13.

71. NMC Proposal, *supra* note 6, at 12.

72. *Id.* “Resourcing will be sought from RMABs for the review and evaluation of the System after its first two years of operation. Such funding will be based on an equitable allocation of contributions among relevant bodies.” One example for the use of these acquired resources is to hire a “part-time secretariat” for System use. *Id.*

73. *Id.* The Implementation Body, in the principles for recognizing existing mediators, will take into account “the recency [sic] of education and training, prior assessment of mediator

prior learning and experience will be recognized on a flexible basis, the proposal insists that there is no automatic “grandparenting” into the system.<sup>74</sup> Additionally, even “experienced mediators [who are] accredited into the System by an RMAB will [still] be subject to the ongoing CPD . . . requirements . . . .”<sup>75</sup>

After the initial two-year implementation period, this accreditation System will be reviewed and evaluated on its merits, with the possibility of developing the System further.<sup>76</sup>

### *B. Mediation in the U.S.*

The accreditation of mediators is an issue that has gained momentum in the U.S. within the last twenty five years due to mediation’s increasing popularity in all areas of the law, from personal injury, employment, land use, family and divorce disputes to court-annexed mediation programs.<sup>77</sup> As the usage of mediation increases, more and more questions were raised concerning whether mediators must have credentials, and retain baseline qualifications to adequately do the job.<sup>78</sup> Similar to the circumstances of Australia, there was a great deal of concern over the lack of uniformity or coherence in the various mediation practice codes, which was thought to

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knowledge and competency, the duration and regularity of mediation practice, and other relevant criteria such as references.” *Id.* The RMABs will then take these principles and apply them to mediators who are seeking admission to accreditation to the NMS through recognition of their prior learning and experience. *Id.*

74. *Id.* An alternative option suggested by the NMC Proposal, in the interest of enhancing the status of the System, is to require all existing mediators who wish to be accredited to the NMS be required to “apply for accreditation and undergo training, assessment and accreditation in terms of the System.” *Id.* Otherwise, “grandparenting” can be granted on a temporary basis after which mediators would have to apply for accreditation in terms of the System. *Id.*

75. *Id.*

76. NMC Proposal, *supra* note 6, at 13.

This review will focus, among other things, on the extent of mediator take-up in the System, on the attitudes and experiences of consumers, on how the costs of its operation are being borne, on the effectiveness of the Register and the complaints and de-accreditation procedures, on any structural conflicts of interest in the system (for example in organizations which both train and accredit), on how the System aligns with other accreditation systems, on the resourcing issue and the costs to mediators, and on the attitude of governments, courts, and industry bodies to the operation of the System.

*Id.* This review will be made available at the 2008 National Mediation Conference for consideration and decisions as to the future of the System. *Id.*

77. W. Lee Dobbins, *The Debate Over Mediator Qualifications: Can They Satisfy the Need to Measure Competence Without Barring Entry Into the Market?*, 7 U. FLA. J.L. & PUB. POL’Y 95, 96 (1995). The National Center for State Courts estimated that courts are currently referring cases to over 1200 ADR programs. *Id.* at 95.

78. Dobbins, *supra* note 78, at 96. .

[Vol. 8: 2, 2008]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

hamper development of the field.<sup>79</sup> Such questions have sharply divided the American mediation community, where one side insists that “mediators should be licensed, like doctors or lawyers, to prevent unqualified people from becoming mediators,” while the other side wants to keep mediation as a profession which is open to all people regardless of degrees or training.<sup>80</sup> Despite mediation’s ongoing affiliation with the legal community and attorneys, mediators do not need a degree to perform mediations, although acquiring clientele may be more difficult. Interestingly, it has even been speculated that attorneys may not be the best individuals to take on the role of neutral mediators because it may clash with their customary role of being a zealous advocate for one side.

The idea of having an accreditation or credentialing program for mediators is not new. In late 2000, the Federal Mediation and Conciliation Service (FMCS) planned for a credentialing program, but stated that it would only be one of the many existing programs that mediators used as a credential.<sup>81</sup> After much debate, in November 2002, the Board of Directors of the ACR authorized the creation of a Task Force on Mediator Certification (“Task Force”).<sup>82</sup> The members of the Task Force were appointed by the President of ACR, and the purpose was to design a national certification program.<sup>83</sup> This article will focus on the report and recommendations found by the ACR Task Force on Mediator Certification, although the ADR-DRS also conducted a separate report and recommendations.<sup>84</sup> As of January 2007, neither organization’s design on

79. ACR Task Force Report, *supra* note 5, at 6.

80. Dobbins, *supra* note 78; see also Kristina Haymes, *Mediation Master – Do You Have This?*, Oct. 1, 2006, NATIONAL INSTITUTE FOR ADVANCED CONFLICT RESOLUTION, <http://www.niacr.org/pages/blog/articles/2006/10-1-06.htm>.

81. Justin Kelly, *FMCS Mediator Credentialing Plan Stirs Controversy*, Aug. 28, 2000, <http://mail.abanet.org/scripts/wa.exe?A2=ind0009&L=ADR&D=0&T=0&P=3512> (last visited March 10, 2008).

82. ACR Task Force Report, *supra* note 5, at 1. The ACR considered it necessary at the time to create a mediation certification program, because it would bring a greater degree of coherence to the mediation field, and such a program would “foster the continuing development of a vital and distinct conflict management profession.” *Id.* at 6.

83. ACR Task Force Report, *supra* note 5, at 1.

84. *Cf.* ABA Section of Dispute Resolution Task Force on Credentialing, *supra* note 5. After developing its initial report for the Mediator Certification Program, the Task Force posted it “on its Web site for public comments from July through November 2003, and many individuals posted or sent comments and suggestions.” ACR Task Force Report, *supra* note 5 at 2. ACR’s CEO also obtained feedback from interested organizations by sending letters to several groups, “including the American Bar Association Section of Dispute Resolution (ABA-DRS), the National Association of

mediator certification had been established, and word has it that this project has been indefinitely placed on hold by the ACR.<sup>85</sup>

The Task Force thought implementing a voluntary certification process would offer at least four important benefits.<sup>86</sup> First, the process would create a more uniform and minimum level of training, experience and study by mediators.<sup>87</sup> Second, a mediator certification process would give a more solid foundation of competency and professionalism, giving practitioners something to show for their commitment to one disciplined course of study.<sup>88</sup> Third, consumers would be offered more protection because they would be able to gauge the qualifications of the mediators in the marketplace.<sup>89</sup> Lastly, the process would “influence the future development and direction of the field.”<sup>90</sup>

However, the Task Force also recognized that there were concerns and caveats to such a certification system and proclaimed that the designed

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Community Mediation (NAFCM), the Association of Family and Conciliation of Courts (AFCC), the Federal Mediation and Conciliation Service (FMCS), and the Maryland Council for Dispute Resolution.” *Id.* Several groups sent comments and they were reviewed and incorporated into this final report, when appropriate. *Id.* Additionally, at the Annual Conference in Orlando, Florida in October 2003, ACR held a workshop devoted to the initial report and to the work of the Task Force. *Id.* Many comments and suggestions were received about certification at that workshop. *Id.* Furthermore, the members of the Task Force evaluated a body of literature concerning the credentialing of mediators and other professionals. This “included publications of two of ACR’s founding organizations, the Society of Professionals of Dispute Resolution (SPIDR) and the Academy of Family Mediators (AFM).” *Id.* “The Task Force also reviewed other documents related to mediator certification programs currently in existence, such as the certification programs of Family Mediation Canada and several state groups,” and also evaluated “various existing statements of standards of conduct for mediators.” *Id.* at 2.

85. Levin, *supra* note 4.

86. ACR Task Force Report, *supra* note 5, at 7.

87. *Id.* The Task Force noted that the different requirements established by many mediation programs across the country are causing redundant training, substantial administrative costs to programs. *Id.* There is still no accepted procedure for granting recognition of mediators. *Id.* The multitude of “mediation programs and rosters, each with separate requirements that are not compatible also discourages the participation of skilled practitioners who might move from one state to another, or wish to gain experience in different contexts or settings.” *Id.* “A national (and even international) mediator certification program will achieve an economy of resources and lessen the competition” between different conflict resolution programs, which undermines the mediation community. *Id.*

88. ACR Task Force Report, *supra* note 5, at 7. It would also allow scrutiny by their fellow practitioners, and enhance the “adherence to higher principles of professionalism.” *Id.* It is proof that the mediator subjected themselves to “a rigorous process of review by a credible and recognized national organization,” much as it is with any other professional position. *Id.*

89. *Id.* While the report is careful to voice that certification is not an absolute indication of mediation competence, it suggests that it would be a useful factor to be considered when choosing a mediator. *Id.*

90. *Id.*

[Vol. 8: 2, 2008]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

program will try to minimize the risks.<sup>91</sup> One concern was the threat of creating barriers for those starting out in the mediation field and limiting diversity.<sup>92</sup> However, the proposal was hopeful in creating a “robust and vital discussion in the field between proponents of different styles of practice,” and insists that diversity should not be affected by the certification process.<sup>93</sup> Additionally, the proposal assured that the certification process is not meant to become a substitute for further training.<sup>94</sup> Similar to Australia’s program which will only initially feature one level of mediator accreditation, the Task Force hoped that the certification process could be a foundation upon which other ACR Sections can build, with qualifications for “Advanced Practitioner” membership.<sup>95</sup> The Task Force also felt the voluntary nature of the program will exemplify a practitioner’s willingness to prepare to render effective support for people who choose to use mediation to resolve conflicts.<sup>96</sup> Some of the risks that went unmentioned by the proposal of the Task Force include the foreseen increased costs of hiring mediators,<sup>97</sup> and loss of flexibility and innovation.<sup>98</sup>

The design recommended by the ACR focused on implementing a Mediator Certification Program with the following main objectives: (1) requiring a portfolio which showcases all mediation experience and training; (2) the successful completion of a written knowledge test; (3) an intermittent

91. *Id.* at 8.

92. Dobbins, *supra* note 78, at 97. Opponents to the program are worried that any type of certification will create barriers and limit the diversity for practicing mediators and “rob mediation of potential innovations and perspectives.” *Id.* Their concern is that certification would turn the mediation field into a homogeneous group of licensed professionals, and not creative and innovative problem-solvers. *Id.* “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.” *Id.*

93. ACR Task Force Report, *supra* note 5, at 8. The NMC Proposal specifically reads that “[t]he certification process should intrude as little as possible on the creative practice style choices of individual practitioners and the different schools and styles of mediation practice that embrace the parties’ self-determination and other core principles of mediation practice.” *Id.*

94. ACR Task Force Report, *supra* note 5, at 9.

95. *Id.*

96. *Id.* “It reflects a practitioner’s unbridled commitment to the ultimate principle of mediation, facilitation and conflict management practice: that people are capable of making substantially informed and consensual decisions in matters that directly affect their lives, if given the opportunity.” *Id.*

97. Dobbins, *supra* note 78, at 98. The costs of hiring mediators could escalate due to regulation because the pool of competitors would be smaller. As a result, consumers would no longer have an informal, creative and inexpensive alternative to litigation. *Id.*

98. *Id.* at 97.



re-certification process; (4) the possibility for waiver of certain requirements in special situations; (5) decertification when ethical or professional standards are violated; and (6) a process for appealing decisions at different phases in the certifying process.<sup>99</sup>

The “portfolio” requirement would be needed to demonstrate two areas: training and experience.<sup>100</sup> The submission of an adequate “portfolio” would also be a mandatory pre-requisite to taking the actual written examination to becoming certified.<sup>101</sup> Unlike Australia which only requires a minimum of forty hours of training, the U.S. Program requires the applicant to be able to document at least 100 total hours of training or academic coursework in conflict resolution.<sup>102</sup> Next, the applicant must also be able to document at least 100 total hours of mediation or active co-mediation within the last five years, or 500 hours of mediation or active co-mediation over a lifetime of practice.<sup>103</sup> Third, as a part of the “portfolio,” an applicant for certification must submit three letters of reference from individuals who are familiar with the applicant’s mediation work.<sup>104</sup> Lastly, applicants must also disclose criminal convictions or professional disciplinary actions, which may disqualify an applicant from certification.<sup>105</sup> Having satisfied all these elements of the “portfolio,” an applicant will then proceed to take the written knowledge assessment.<sup>106</sup>

The written knowledge assessment test would be administered through the Certifying Entity created specifically to handle the Mediator

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99. ACR Task Force Report, *supra* note 5, at 1.

100. *Id.* at 9.

101. *Id.*

102. *Id.* Even more specifically, eighty of the one-hundred hours must consist of training in mediation process skills. The next twenty hours can be in subject matters related to any of the areas to be covered in the knowledge assessment of the certification process. *Id.* Also, hours spent as a trainer of programs or courses related to the knowledge categories can be credited to the twenty hours. *Id.*

103. *Id.* at 9-10. Any observation of mediation sessions will not count towards these hours. *Id.*

104. *Id.* at 10. It is at the discretion of the Certifying Entity whether to grant certification to an applicant who has been convicted of a criminal offense or has been disciplined by a professional organization on ethical grounds. *Id.* However, the applicant may demonstrate that the conviction or disciplinary matter is not relevant to professional or ethical issues associated with practicing mediation. *Id.* If an applicant fails to disclose these matters, and they are discovered later, this may constitute grounds for de-certification. *Id.*

105. ACR Task Force Report, *supra* note 5, at 10.

106. *Id.* At the time of the NMC Proposal, the written knowledge assessment test had not been designed or tested. The Task Force recommended ACR to contract with a consultant to work with Task Force members to develop this test. *Id.* Prior to any “official” testing, the NMC Proposal called for written examination to be fully tested prior to the launch of the certification program. *Id.*

Certification Program.<sup>107</sup> The Task Force did not picture a test preparation course to be offered for the test, but believed that applicants would be able to pass the test by relying on previous education, training, or studying.<sup>108</sup> The Task Force also had an expansive, international mindset when it came to the test.<sup>109</sup> While the test would initially be created and offered in English, the proposal suggested that mediators in many countries may wish to apply for certification, and a U.S. or Canada residency requirement is not recommended.<sup>110</sup> Utilizing the list of attributes developed by Family Mediation Canada as a starting point, the proposal recommended testing eleven knowledge areas, including: (1) Communication;<sup>111</sup> (2) Conflict Theory;<sup>112</sup> (3) Content Management and Resources;<sup>113</sup> (4) Cultural Diversity;<sup>114</sup> (5) Ethics;<sup>115</sup> (6) History of Mediation;<sup>116</sup> (7) Models,

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107. *Id.* The Certifying Entity would likely be ACR or a related organization at the outset of the program. *Id.* The NMC Proposal also indicated that the test could either be conducted online, or applicants may be required to take the examination in a written or oral version at a specific location and time. *Id.* It would be either closed or open book, and would likely be multiple-choice to facilitate the task of grading. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 10-11. For Communication, specific sub-issues within this category would include: message construction—appropriate choice of words to convey intended meaning; styles of communication; effective listening; supportive/ defensive communication; effective feedback; asking good questions; identity issues; meta-communication (nonverbal); perception; barriers to effective communication; stereotyping; reframing and clarifying; managing emotions; how to connect with people; learning styles; theories of communication; pacing; reason and emotion; communication channels; empathy.

*Id.* at 11.

112. ACR Task Force Report, *supra* note 5, at 11. Within Conflict Theory, applicants would be tested on: “distributive and integrative [conflict theory]; constructive and destructive conflict (e.g., Deutsch); conflict and culture (e.g., Roth); escalation and de-escalation; theory and philosophy of conflict; social justice; religious/ moral traditions; spectrum of conflict management processes; equity theory.” *Id.*

113. *Id.* Within the subject of Content Management and Resources, issues may include: “impact of content; identifying and finding resources; managing content resources in the process; awareness of legal issues; financial/ tax issues; counseling/ therapy issues; trade and business issues; “custody” issues; healthcare/ medical issues and scientific issues; supporting participants with disabilities or special needs; mediator as ‘advocate’.” *Id.*

114. *Id.* The main category of Cultural Diversity would include: meaning and use of language; negotiation rituals; use of interpreters; customs; understanding culture in varying contexts; including neighborhoods, organizations, ethnic groups, religions, etc. (when primary and when secondary); assumptions and stereotyping; high context and low context cultures (e.g., Edward Hall); respecting, removing, or ignoring cultural barriers; the impact of cultural diversity on conflict

Strategies and Styles;<sup>117</sup> (8) Negotiation;<sup>118</sup> (9) Process Structure;<sup>119</sup> (10) Role of Third Party;<sup>120</sup> and (11) Systems and Group Dynamics.<sup>121</sup>

Certification under the Task Force's proposal would be valid for three years.<sup>122</sup> The Task Force recommends a two-step re-certification process,

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situations and the mediation process; accessibility and accommodation; equity and diversity; the influence of "isms" (e.g., sexism, racism, heterosexism) on individuals and the mediation process.

*Id.*

115. ACR Task Force Report, *supra* note 5, at 11. Ethics could include: awareness of codes and standards of practice; informed consent; self-determination; conflicts of interest; UP of other professions; confidentiality; competence; quality of process; advertising and marketing; fees; obligation to the field; diversity; duty to best interest of child; normative vs. process standards (fairness); duty to report (to court or reporting abuse, fraud or criminal/ violent behavior); duty to report malpractice; awareness of conflicting ethical and professional codes; when to withdraw; grievance process; substantive competency.

*Id.*

116. *Id.* The History of Mediation would encompass sub-issues, such as: "community mediation; history of labor origins; Community Relations Service; Pound Conference; prison programs; history of major organizations; other cultures—impact and influences; classical literature within the field." *Id.*

117. *Id.* The category of Models, Strategies and Styles encompasses: "principles; assumptions; values; commonalities; outcomes; transformative; law-based; facilitative; evaluative; business; advice and information; goals; directiveness [sic]; cultural models; cyber; assessing risks and advantages of models; matching models to contexts and parties." *Id.*

118. *Id.* When tested on Negotiation, applicants may encounter issues such as: theories of negotiation; negotiation styles; tactics and strategies; elements of cooperative negotiation; timing; interests and positions; bargaining ranges; BATNAs; walk-aways; mutual gains; positional bargaining; generating and testing options; brainstorming; issue formulation; drafting agreements; decision-making; 3rd party roles; persuasion/ influencing; power and power imbalances; caucus and other techniques; multiple parties; multiple or limited issues; use of experts; risk analysis; transaction costs; ground rules; creative thinking; problem-solving; problem recognition/ issue formulation; negotiation planning and coaching; visual display of information; dirty tricks; deception; managing impasses.

*Id.*

119. ACR Task Force Report, *supra* note 5, at 12. Within the category of Process Structure encompasses the following sub-issues: "limited/ multiple parties and issues; convening; gaining commitment to the process; information gathering; issue formulation; negotiation format; confirming understanding; caucuses; negotiation process; resolving impasses; agreements to mediate; rules of mediation; agenda-setting; termination of mediation; managing the presence of third-parties; process pacing and timing." *Id.*

120. *Id.* Role of Third Party references the mediator when he or she walks into the room. This area of knowledge involves: "neutrality; impartiality; mediation vs. other conflict resolution processes; who is the client; mediation as a formal role vs. informal mediation processes and techniques within other contexts or roles." *Id.*

121. *Id.* Systems and Group Dynamics include: "systems theory; impact of third party; coalitions and alliances; boundaries; roles; group think; trans-generational patterns (tradition); precedent; subsystems; norms; change dynamics." *Id.*

which includes the submission of re-certification statements (or a re-certification “application”) and the completion of thirty hours of Continuing Education Units (CEUs) over the previous three-year period of certification, which are similar to Australia’s CPD requirements.<sup>123</sup> These units will be recognized for a “broad range of presentations, training, continuing education courses, and conference workshops.”<sup>124</sup> Additionally, an applicant who does not document 500 practice hours for the initial certification must document at least fifty additional practice hours for each re-certification until a total of 500 lifetime hours is reached.<sup>125</sup> If the applicant did document 500 practice hours initially, they are not required to document any more hours.<sup>126</sup>

Like its Australia counterpart, the Task Force threatens to de-certify any “mediator who is found by the Certifying Entity’s Ethics Review Committee (“CEERC”) to have violated ACR’s ethical standards, or other applicable standards of ethical conduct.”<sup>127</sup> While official rules of the de-certification process has not yet been developed, the report suggests that there would likely be a detailed review by the CEERC, a chance for the mediator to respond, and a final decision.<sup>128</sup>

At the end of the report, the Task Force urged the ACR Board of Directors to implement their proposed mediator certification program with a few straight forward recommendations.<sup>129</sup> First, the Board was advised to “approve the model of the Mediator Certification Program described in [the] report,” and to “make certification a strategic priority of the ACR Board of Directors and the Development Committee for 2004.”<sup>130</sup> Among other suggestions, ACR was asked by the Task Force to conduct market research to determine the feasibility of the Mediator Certification Program and to invite input from stakeholders in the decision, which ACR executed a year later. However, unlike Australia, which launched its NMC proposed

122. *Id.*

123. ACR Task Force Report, *supra* note 5, at 12-13.

124. *Id.* at 12.

125. *Id.* When a mediator has reached the 500 lifetime hours of practice, they will not need any more hours for re-certification. *Id.* at 12-13.

126. *Id.* In fact, when a certified mediator is a member of ACR, even their membership can be terminated, “as determined by ACR policy.” *Id.* at 13.

127. *Id.* at 13.

128. *Id.* “The de-certification process will also include a mediation step or possibly an arbitral proceeding.” *Id.*

129. ACR Task Force Report, *supra* note 5, at 17.

130. *Id.*

accreditation system after the 8th Australian National Mediation Conference, the ACR Board of Directors has quietly stopped the further implementation of national mediator certification after it completed a study on the feasibility of certifying mediators. Since the Task Force's support for certification was originally enthusiastic prior to this study, as demonstrated by their proposal,<sup>131</sup> it can only be speculated that the study results were what halted the progress of organized mediation certification.

### III. EXAMINING THE ACR'S DECISION NOT TO LAUNCH THE CERTIFICATION SYSTEM

Following the Task Force's suggestion to determine the feasibility of the Mediator Certification Program, the ACR and the ABA-DRS launched a Feasibility Study ("Feasibility Study") which consisted of an "online survey of attitudes" on issues relating to certification, representing the responses of over 3100 individuals.<sup>132</sup> The online survey consisted of thirty-two questions.<sup>133</sup> Twenty-nine of the questions consisted of a statement that survey participants could choose to agree, disagree, or express mixed feelings.<sup>134</sup>

The responses varied. When asked whether a national certification program is needed for the mediator profession, only 39% agreed, while 19% disagreed, and 41% had mixed feelings.<sup>135</sup> Only a little over half of survey participants agreed that obtaining a national certification would increase their competitive edge in this field.<sup>136</sup> A reason for questioning the need for mediation certification can also be attributed to the doubt retained by individuals that mediation is an area of expertise which can be adequately evaluated.<sup>137</sup> There is also concern, or perhaps gladness that a uniform

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131. *Id.* This enthusiasm can be seen in the Task Force's fervent recommendations to the ACR Board of Directors to implement their suggested Mediator Certification Program. *Id.*

132. ACR and ABA-DRS, *Mediation Certification Feasibility Study* (hereinafter, "ACR Feasibility Study") 2005 A.C.R. REP. 1, <http://www.acrnet.org/pdfs/certificationresults2005.pdf> (last visited Feb. 16, 2008).

133. *Id.* at 10.

134. *Id.* at 2.

135. *Id.*

136. *Id.* Fifty-three percent of individuals agreed that national certification would increase their competitive edge in the mediation industry, while 47% disagreed or had mixed feelings. *Id.*

137. *Id.* at 3. Only 40% of participants agreed that "[m]ediation covers a unique body of knowledge that could be evaluated using a national certification process." *Id.* Fifty-nine percent of individuals disagreed with this statement or had mixed feelings. *Id.* It should also be noted that a majority of survey participants (35%) have worked as a mediator for eleven or more years. *Id.* at 7.

system of certification would restrict entry into the profession.<sup>138</sup> Additionally, the survey also suggested concern that mediator certification would be expensive.<sup>139</sup> It can also be gathered that those already experienced and knowledgeable in the area of mediation are concerned that an objective evaluation of their skills set may not be accurate due to the varying factors.<sup>140</sup>

However, to acknowledge hopeful individuals who support accreditation, a majority of surveyors agreed that a national certification of mediators would be valuable to the participant personally or to individuals or organizations that use mediation.<sup>141</sup> Moreover, a majority of individuals agree that having a certification system would increase recognition in job settings,<sup>142</sup> and enhance the public image of mediators,<sup>143</sup> and enhance the professionalism of mediators.<sup>144</sup>

One suggestion for the varied feelings and discomfort of U.S. residents in creating a national mediator system stems from the traditional rivalry between those who feel mediation should be an exclusive area of expertise which must be accredited (likely those with degrees in other fields, like law or business), and those who argue that mediation should be inclusive and available to all who wish to practice it.

138. *Id.* at 4. A majority (59%) agree that certification would restrict access to the mediation profession, while 15% disagreed and 26% expressed uncertainty. *Id.* There is no way to find out whether participants believe this restriction would be positive or negative. It should be noted that 82% of the participants already retain a law degree or a graduate degree of some sort. *Id.* at 9.

139. ACR Feasibility Study, *supra* note 133, at 5. An overwhelming majority of surveyors (57%) only wish to pay \$200 for the process, and only 7% feel it should be more than \$500. *Id.* This concern can also be generated by the fact that 77% of all participants believed they would pay for certification on their own, as opposed to receiving help from employers, agencies, or programs. *Id.*

140. *Id.* at 6. This can be seen by the 84% and 72% of participants who believe that the submission of prior training and education in knowledge areas related to mediation, and prior mediation experience, respectively, should be used in assessing the knowledge, skills, and abilities of candidates. *Id.*

141. *Id.* at 2. Sixty-four percent of participants agreed that “[c]ertification of mediator knowledge, skills, and abilities would be valuable to me professionally,” while only 36% of individuals disagreed or had mixed feelings. *Id.* Moreover, 63% of participants agreed that “[n]ational certification would be valuable to individuals/ organizations that utilize mediation services.” *Id.*

142. *Id.* at 3. Sixty-four percent of surveyors agree that there would be increased recognition in job settings, while 12% disagree, and 24% are uncertain. *Id.*

143. *Id.* Sixty-one percent of participants agree that mediation certification would enhance the public image of mediators, while 12% disagree and 26% remain unsure. *Id.*

144. *Id.*

While it is difficult to analyze the exact reasons for participants' responses to the Feasibility Study,<sup>145</sup> the group appears evenly split as to whether a national mediation certification program should be implemented. It can be hypothesized that due to the diversity of responses received, the ACR has decided that certification is no longer an urgent goal worthy of pursuing, which has left some individuals discouraged and upset.<sup>146</sup>

#### IV. CONCLUSION

Despite the diversity in responses to the survey from those who are currently involved in mediation, it is important that the ACR and the ABA not lose focus of this enormous opportunity for growth in the mediation profession. One glaring problem with relying solely on the Feasibility Study to determine the fate of the mediator certification process is that the pool of individuals surveyed on the ACR and ABA websites are already somewhat involved in the mediation profession, whether as a student or as a practicing mediator.<sup>147</sup> Unrepresented and overlooked by the survey and are individuals and clientele who utilize mediation as a way of dispute resolution, whether individually or on behalf of a corporation or entity. While mediator accreditation should have positive benefits for mediators who would have to participate in the process and be certified, it is ultimately developed to protect consumers of mediation from mediators who are unqualified or too inexperienced to handle disputes. First time clients who try mediation may become disillusioned by an incompetent mediator, and turn away from mediation forever. Once in place, a mediation certification program would not only provide a more stable environment for new mediators to enter the field and develop the skills, and for experienced mediators to flourish in the profession, but also serve the public at large. Such a result would be very positive for the mediation community, as well as those who use this process, particularly because the public has

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145. ACR Feasibility Study, *supra* note 133, at 10. The ACR Feasibility Study asks quite a few questions to which a participant can type a subjective, personalized response. While this report displays the number of responses received from participants, the actual answers are not shown. *Id.*

146. Levin, *supra* note 4 (“The word on the street now is that the ACR has quietly decided to leave this project on hold and commit its resources elsewhere, leaving many mediators feeling frustrated and angry that a project launched with so much fanfare has now been placed on standby.”).

147. ACR Feasibility Study, *supra* note 133, at 7. According to the survey, 20% were full-time paid mediators, 34% were part-time paid mediators, 15% were part-time volunteer mediators, and 1% was a full-time volunteer mediator. Students made 4% of the surveyors, while 26% were in the “Other” category. Thus, a total of 70% of the survey participants were involved in some aspect of mediation. *Id.*

[Vol. 8: 2, 2008]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

increasingly turned towards mediation and other forms of ADR in recent years.<sup>148</sup>

According to the Feasibility Study, if this process were implemented, the majority of 3100 survey participants believe a joint committee by ACR and ABA would be the best organization to develop an acceptable program for mediator accreditation.<sup>149</sup> As such, the ACR, in working with the ABA, should refocus on this project and strive to put such a system in place. Indeed, as demonstrated above, the ACR Task Force has already spent an enormous amount of time and effort in developing the appropriate proposal for the implementation of this program. Now the ACR Board of Directors simply needs to make it a reality.

In the meantime, Australia's launch of their accreditation system could be an example for the U.S. committees to learn from.<sup>150</sup> Their implementation period will provide the U.S. with a huge advantage in learning from their successes and mistakes.

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148. See Golan, *supra* note 2.

149. ACR Feasibility Study, *supra* note 133, at 6-7. While 50% of survey participants agree that they would seek national mediator certification developed jointly by the ACR, only 32% agree with seeking certification from the ABA alone. *Id.* It is likely that this can be attributed to the fact that the ABA is actively intertwined with the law and attorneys which can cause some bias, while the ACR is more neutral, and unaffiliated with any particular profession.

150. Levin, *supra* note 4. Mediator Diane Levin has also acknowledged the advantage the U.S. retains by watching the Australian mediator accreditation program proceed. She noted, "[i]t's disappointing that while Australia moves forward into the future with national accreditation for mediators, we continue to lag behind here. But in the meantime we can watch and learn from Australia's experience as the mediation community down under prepares for the system's official launch." *Id.*; see also Diane Levin Home Page, *Conflict Resolution & Prevention*, <http://www.dianelevin.com> (last visited Feb. 16, 2008).



