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Moving Mediation Practice Forward—Is It Time for Certification?

By Deborah Masucci

Celebrations were many in 2018. The New York State Bar Association Dispute Resolution Section celebrated its 10th Anniversary, the International Mediation Institute (IMI) also celebrated the same landmark, and the American Bar Association Dispute Resolution Section held its 20th Spring Conference. The celebrations covered domestic U.S. and international organizations. The field of dispute resolution has grown and developed in the past two decades. The adoption of the Singapore Convention by UNCITRAL¹ in 2018 is a testament to the popularity of mediation and its expansion to resolve cross-border disputes.

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The year is also one for examination. In April 2018, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks established an Advisory Committee to evaluate alternative dispute resolution (ADR) practices and programs in courts around the country to fortify the New York State (NYS) court system's existing ADR programs, extend the range of ADR services, and facilitate the utilization of mediation and other forms of alternative dispute resolution in civil legal matters, where suitable.² The legal profession expects that the outcome of the Committee's work will result in a substantial increase in court-sponsored mediation programs. There will be sharp focus on mediator quality with recruitment of large number of mediators to meet the demands of the court programs.

In this time of celebration and examination it may be timely to revisit whether mediators should be certified.³

The Pros and Cons

When the concept of certification is discussed proponents assert that certification is a means to ensure quality, share information about mediators, and open access to new, diverse neutrals. Opponents believe that certification is unnecessary since the market self-regulates when users select mediators whom they trust and have a proven track record for settlement. The field is open and broad. Many people who are regularly selected have no formal mediation training but are highly trusted by

the people who select them. Confidence in their abilities grows with successful resolution of disputes. Opponents also view credentialing as a slippery slope to regulation, thereby increasing the cost of mediation, and a way to keep especially talented individuals out of the process.

There have been a number of reports published by U.S. legal professional organizations both nationally and locally. The conclusion of all of these reports is that organizations should focus on mediation and mediator quality in lieu of supporting a credentialing or certification process.⁴ However, if a certification process is established that it should not bar non-lawyers from becoming credentialed, hamper innovation, or bar disputants from selecting non-accredited mediator. The goal for a certification program should be to protect consumers and the integrity of the mediation process.

What Is Certification?

One definition of certification is: Formal procedure by which an accredited or authorized person or agency assesses and verifies (and attests in writing by issuing a certificate) the attributes, characteristics, quality, qualification, or status of individuals or organizations, goods or services, procedures or processes, or events or situations, in accordance with established requirements or standards.⁵

According to the 2012 ABA Task Force on Mediator Credentialing there appears to be no common understanding of what a credential means in the context of mediation, either domestically or internationally, or what mediators should specifically be required to do or to demonstrate to obtain a credential. Most, if not all, private organizations and court systems that maintain panels of mediators require that members complete a training program. Some provide a credential, or certificate, to anyone who completes training and meets other qualifications, without requiring them to demonstrate specific competencies. Other organizations require candidates to demonstrate specific skills through a testing process. Still others emphasize provision of information, requiring mediators to provide client assessments which are made available to potential users.

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In fact, many of the reports created after studying the issue indicate that it is unclear what mediator and mediation qualities should be measured and what should be the standard of measurement.

U.S. courts have standards for an individual to be certified to mediate in their specific courthouse.⁶ The standards are different for each court but seek to achieve the same goal—high quality mediation. Despite progress, many judges anecdotally report bad experience or lack of confidence in the court rosters.

What should be paramount is that the basis for any certification or credentialing scheme must be supported by evidence and not guesswork, and that credentialing be premised on fair and objective criteria, not on arbitrarily chosen ones.

In 2008, the International Mediation Institute⁷ (IMI) was established to set high standards of mediation practice globally. The foundation of its promotion of high standards is a process to certify mediators based on the knowledge, education, and demonstrated understanding

centre for the resolution of business disputes. The IMI certification model was broadened and deepened to address the needs of Asia.

So, despite strong resistance, models for certification exist and are in demand to promote the professional, quality practice of mediation.

Is Certification Desired?

In 2016 IMI published a Biennial Census Survey Report⁹ on the field of international mediation and ADR. Mediators and stakeholders were asked several questions about what professional development attributes are valued when selecting a mediator. When mediators were asked about the type of support they valued in their profession they pointed to the ability to receive some form of tangible diploma or certification. Responding mediators also chose to acquire a professional license or certification to demonstrate professionalism and to signify personal credibility as well as credibility in the mediation process itself. The responses suggest that certification establishes self-confidence of mediators and confidence of clients.

"Any certification process should not bar non-lawyers from becoming credentialed, hamper innovation, nor bar disputants from selecting non-accredited mediator."

of mediation skills. The core of IMI certification is a feedback digest for every certified mediator. The feedback digest is created by an independent reviewer who collects information from the mediator's users and creates a summary of the input provided about how the mediator operates. The individual user names are confidential but the feedback digest is publicly available and transparent.

The IMI certification process includes many of the elements of a certification program recommended in the 2012 ABA Report. The elements include: defined skills, knowledge and values that a credentialed person must possess; adequate training that includes role playing, observation of the candidate being assessed and co-mediation with a certified mediator; the certification program should be administered by an organization different from the training organization; an assessment process; an explanation of what credentialing means; and, an accessible, transparent complaint system. IMI certified mediators include representation from the United States, Western Europe, Eastern Europe, the Middle East, South America and other parts of the globe. The breadth of its database shows its popularity.

In 2014, the Singapore International Mediation Institute⁸ (SIMI) was established based on the IMI model. Since its establishment, SIMI has become a force in Asia promoting mediation and establishing Singapore as a

From 2016-17, the IMI conducted a series of events to determine the future of dispute resolution globally. One of the questions asked participants sought guidance on what areas they believed would most improve commercial dispute resolution. Overall, the fourth highest ranked answer was accreditation or certification systems for dispute resolution providers. Party representatives and non-adjudicative providers believe certification systems will improve commercial dispute resolution.

The European Union (EU) was lauded in 2008 when it adopted its Directive on Mediation.¹⁰ The Directive sets a framework for mediation as an integral part of access to justice and directs its member states to develop mediation locally. Some member states such as Italy¹¹ and Turkey¹² established mandatory mediation schemes that have increased the mediation experience. No central certification system is in place but the EU and its member states regularly speak of registry systems. Can a certification system be far behind?

The 2012 ABA Report suggested that there may be a need for a certification process when mediation is mandatory through a public or private entity, or where the parties are unrepresented, or where the lawyers who select mediators do not have a good understanding of the mediation process. It is also believed that certification of a mediator is not needed in large civil disputes where the

mediator is selected by sophisticated counsel or a party or an experienced insurance adjuster. These users are regular consumers of the mediation process and understand the subtleties of the process.

What Now?

We can learn from the past and take ideas to the next level. We have certification models on an international level such as IMI and SIMI that are thriving and can be leveraged to address the concerns of opponents to certification.

The New York City Bar Association's 2006 Report on Mediator Quality¹³ suggested that NYS mediator membership organizations develop a voluntary system for mediators to acquire the skills, training, and experience to qualify for accreditation. The system would be publicly available and mandatory for mediators who are compensated. Yes, the system should be self-funded by compensated mediators or the provider organizations to which they belong should financially support registration.

Might this be the next chapter in the growth of mediation?

Endnotes

1. See http://www.uncitral.org/pdf/english/commission/sessions/51st-session/Final_Edited_version_in_English_28-8-2018.pdf for the text of the Model Rule and Convention adopted by UNCITRAL in August 2018. The Convention is expected to be signed in August 2019 in Singapore.
2. See https://www.nycourts.gov/PRESS/PDFs/PR18_10.pdf.
3. Throughout the article the words certification and credentialed are interchangeable.
4. The concept of certification or credentialing has been studied a number of times in the last 10 years. A history of the reports include the American Bar Association's 2002 report on Mediator Credentialing and Quality Assurance ("ABA 2002 Report"), https://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0116_report_mediator_credentialing.pdf, the New York City Bar Association's 2006 Report on Mediator Quality ("City Bar Report"), <https://www.nycbar.org/pdf/report/Mediator%20Quality%20Report%20Final%20June%202027.pdf>, the 2008 Report of the ABA's Task Force on Improving Mediator Quality ("ABA 2008 Report"), <https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.pdf>, the 2010 Report of the Mediation Committee of the Dispute Resolution Section New York State Bar Association, https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Final_Report_on_Mediator_Quality.html, and the 2012 ABA Task Force on Mediator Credentialing ("ABA 2012 Report"), https://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf.
5. See <http://www.businessdictionary.com/definition/certification.html>.
6. <https://legalstudiesms.com/learning/court-certified-mediator-qualification-requirements/>.
7. See www.imimmediation.org.
8. See <http://www.simi.org.sg/About-Us/Organisation-Information/About-SIMI>.
9. See <https://www.imimmediation.org/2016/10/16/results-published-imi-2016-international-mediation-adr-survey/>.
10. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1549459646379&uri=CELEX:32008L0052>.
11. See <https://www.imimmediation.org/2017/06/22/italys-mediation-law-an-overview/>.
12. See <http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/> Turkey first enacted legislation covering voluntary mediation in 2013. This expanded in 2017 to mandate mediation in labor disputes and expanded mandatory mediation to civil disputes in January 2019.
13. See pages 2-3 <https://www.nycbar.org/pdf/report/Mediator%20Quality%20Report%20Final%20June%202027.pdf>.

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