Assuring Quality in ADR Practice & Programs

(*Resource from the Policy Consensus Initiative – some contacts / citations may not be up-to-date)

This Quality Assurance resource seeks to compile, and serve as an introduction to, a diverse array of policy documents, articles, authorities, and other ADR-related resource materials. While PCI has sought to include as many basic documents as possible, the materials that are cited can vary considerably in their quality, completeness, scholarly rigor, frame of reference, currency, and other characteristics. Except where a page specifically contains a description or assessment of a specific document, PCI does not endorse any particular resource that is cited.

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Quality Assurance Overview

Any dispute resolution program that offers mediation or facilitation service needs to consider how they can be assured that they are providing quality service. At least two key issues will arise:

1. How to enhance the likelihood that neutrals consistently provide high quality dispute resolution assistance
2. How to ensure that the agency operating the DR program (or other DR provider organization) fulfills its responsibility to provide fair, high quality processes.

Neutrals (mediators, arbitrators, facilitators, evaluators) are in many respects key to the effectiveness of any ADR process. Their skills and other qualities can be crucial to a successful outcome. The neutral typically presides over and manages the process by which parties seek to resolve their differences.

The bulk of attention concerning selection of neutrals and qualification has so far been directed at mediators. Occasional studies or guidance have examined the skills of early neutral evaluators. Arbitrator standards have typically required a law degree and some amount of experience with hearing procedures.

Depending on the ADR process and its setting, the neutral's background and role can vary substantially. In some controversies, agency employees with some training and mentoring may be apt neutrals. In other disputes, parties may demand a highly skilled professional with years of experience or a neutral from outside government.

This diversity of roles that mediators and other neutrals play can present complications regarding establishing standards of practice and procurement procedures for agencies considering ADR. Moreover, strong differences of opinion exist within the dispute resolution community itself as to what constitutes quality practice by neutrals and what are the best ways to assess whether practitioners have the required skills.

Research is only beginning to reveal the kinds of knowledge, skills, abilities, and other attributes ("KSAOs") that are important to effective performance as a neutral, and how those aptitudes are best acquired. Studies that have been conducted suggest that these qualities are derived from a mix of sources: innate personal characteristics, education and training, and experience. (Margaret Shaw's *Selection, Training, and Qualification of Neutrals* is a valuable, if slightly dated, exploration of much of this research.)

Further readings on some possible approaches to ensuring quality mediation include Chapter 11 of Nancy Rogers and Craig McEwen's *Mediation: Law, Policy, Practice* ("Regulating for Quality, Fairness, Effectiveness, and Access") and Dobbins, *The Debate Over Mediator Qualifications*.

Mediator Competence

Competence is the term used to describe the ability to use dispute resolution skills and knowledge effectively to assist others in prevention, management or resolution of disputes in a particular setting or context. While there is no clear consensus on the knowledge, skills, abilities, and other attributes (sometimes called "KSAOs") needed to perform as a mediator, one of the best descriptions of a mediator's tasks comes from the Test Design Project which summarizes them as follows:

- Gathering background information
- Facilitating communication
- Communicating information to others
- Analyzing information
- Facilitating agreement

- Managing cases
- Helping document any agreement by the parties

The difficulty comes in determining the best way to assess a neutral's ability to perform these tasks competently.

The Test Design Project sought to provide DR programs with reliable and economical tools for selecting mediators. The result of this *project Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators*-contains general measures of competence or KSAOs [knowledge, skills, abilities, and other attributes] for mediators. It also offers a methodology for making performance-based assessments of mediators' likelihood of future successes. The project set forth the following qualities as those "likely to be needed most to perform the most common and essential tasks of a mediator":

- **Investigation** - Effectiveness in identifying and seeking out pertinent information
- **Empathy** - Conspicuous awareness and consideration of the needs of others.
- **Impartiality** - Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias.
- **Generating options** - Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties.
- **Generating agreements** - Effectiveness in moving parties toward finality and in "closing" agreement.
- **Managing the interaction** - Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives.
- **Substantive knowledge** - Adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information.

The difficulty comes in determining how to measure these kinds of qualities.

Measures of competence may also need to be linked to context. A family mediator with a therapy background would not necessarily be competent to mediate a multi-party environmental dispute. For example, see the “Competencies for Environmental and Public Policy Mediators” prepared by a committee of SPIDR's Environmental/Public Disputes Sector.

Principles

The growing use of ADR processes has led some to argue that standards related to competence and the selection of neutrals are needed to protect consumers and the integrity of dispute resolution processes. The topic has been

controversial for years because the competence a neutral needs varies so much from one context or setting to another. And measuring competence cannot be done based alone on paper credentials. Several professional membership organizations and others have developed policies, principles, or qualification standards regarding who can serve as neutrals in various settings.

In 1989, the Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications was formed to investigate and report on basic principles that could be used to influence policy for setting qualifications for mediators, arbitrators and other dispute resolution professionals. In its 1989 Report, the Commission put forth three fundamental recommendations:

- That no single entity, (rather a variety of organizations) should establish qualifications for neutrals;
- That the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be; and
- That qualifications criteria should be based on performance, rather than paper credentials.

Another effort by the Center for Dispute Settlement and Institute for Judicial Administration at New York University produced the National Standards for Court-Connected Mediation Programs (http://www.caadrs.org/), which reached conclusions similar to those of the first SPIDR Commission report.

In 1995, a second SPIDR Commission on Qualifications developed a report that set forth a 7-step framework for analyzing how to assess quality.

Approaches to Credentialing Mediators

Credentialing is one method for attempting to assure competence. However, credentialing may work better in some contexts than in others. Most certification approaches involve some combination of requirements for training and experience-occasionally with some academic degree or apprenticeship or mentoring. A number of professional groups have developed standards for "credentialing" mediators or other neutrals —i.e., vouching for the individual's competency to perform.

The primary options for credentialing are:

- Certification - a designation granted by a private or public entity to indicate that a person has attained a certain level of competence in accordance with experience, training, and other standards established by the certifying entity.

- Rosters and directories - a listing of neutrals, who have met certain entry criteria in order to be included in the list that is developed by a program as a resource for interested parties to use in identifying a service provider.
- Licensing - A government process by which a person is designated as minimally qualified to engage in the defined practice.

Certification - Recognition through certification, usually by professional organizations, courts or other bodies, indicates that an individual has met certain specified qualifications standards. While some programs have adopted approaches that rely less on entry standards than on targeting needed improvements in mediator skills or developing "informed consumers," many courts, legislatures, and agencies now employ some method of "certifying" mediators. A useful resource that includes information on certification and credentialing is *Legislation and Court Rules re Mediator Qualifications*, developed by Maria Mone, Director of the Ohio Commission on Dispute Resolution and Conflict Management. The document offers an extensive summary of state rules regarding standards, liability, ethics, and other rules relating to mediators.

Rosters and directories - There are now hundreds of rolls (or directories) of neutrals who are listed because they meet criteria established by a program or agency. These criteria may be highly restrictive, or may require very little to be listed. The Federal Deposit Insurance Corporation made an early effort at creating a roster and developed selection criteria for mediators.

The U.S. Institute for Environmental Conflict Resolution, now maintains The National Roster of Environmental Dispute Resolution and Consensus Building Professionals. Deborah Laufer's Recommended ADR Links list has a section of links to other selected rosters of neutrals.

Charles Pou's *Issues in Establishing an EPA-Sponsored Roster for Neutrals' Services in Environmental Cases* explores creating and running an effective roster of neutrals, including qualifications for listing neutrals, assessing their performance, making panel assignments, and handling complaints.

Licensing - While many professions are licensed by the state, no state has used this method to certify ADR professionals. This may be because current knowledge about the qualifications needed to ensure effective DR practice are still being developed. The second (1995) SPIDR Commission on Qualifications thought licensure inappropriate because it risks establishing arbitrary standards in a field that is rapidly changing. Licenses typically confer certain due process protections. They also are accompanied by the power to impose sanctions for malpractice.

Criteria for Credentialing

The criteria and means of assessing performance that are used for credentialing and rosters typically incorporate some or all of the following methods:

- Training requirements
- Mentoring or supervision
- Continuing education or training
- Amount of experience, i.e., number of cases
- Performance tests or live or taped demonstrations
- User evaluations
- Complaint procedures
- References
- Interviews

Other Approaches to Assuring Mediator Competence

Credentialing is not the only way to assure quality practice by neutrals. Numerous methods of assessing mediator competence are available and they ought to be used in complementary combinations. Exclusive reliance on only one method—for example interviews, references or performance testing—is likely to measure certain elements of competence while neglecting others.

These methods and approaches to assessing mediator competence generally involve a combination of several of the following:

- Training standards
- Mentoring or supervision
- Continuing education and training
- Amount of experience (number of cases)
- Performance tests or live or taped demonstrations
- Monitoring and user evaluations
- Complaint procedures.

- References
- Interviews
- Advisory panels.
- Market approaches.

Numerous methods for assessing competence are available. These alternative methods and approaches to credentialing neutrals generally involve a combination of several of the following:

Training Standards - Some programs or standards-setters choose to certify specific trainers or to address the content of the training program that should be offered to mediators. Several entities have adopted standards for approving mediator training programs, such as the Academy of Family Mediators. The Florida and Georgia state courts require all mediators registered for court and domestic relations cases to be trained by training programs they have approved. The Florida Supreme Court Committee on Mediation and Arbitration Training provides the Supreme Court with recommendations relating to all aspects of mediation and arbitration training including the development of mediation training program standards, mentorship requirements, continuing education requirements and certification of mediation and arbitration programs. (See Florida's 2000 Training Standards, and Georgia's Training Approval Guidelines.)

While a few states have been fairly specific as to length and curriculum of the training, and/or the trainers' credentials, a more common approach is to follow the National Standards for Court-Connected Mediation Programs, early, and somewhat simplistic, advice that courts need not certify training programs but should ensure that they include role-playing with feedback. In Massachusetts, a standards-development effort concluded similarly that mediation training should emphasize interactive participation, and encouraging 'learning by doing' in a constructive and supportive atmosphere. It also said training "should include a mixture of theory and practice that enhances the performance of trainees and provide a variety of learning techniques that reflect a sensitivity to individual learning styles."

The Ohio Commission on Dispute Resolution and Conflict Management has prepared a useful Consumer Guide for Selecting a Trainer.

Mentoring or supervision - Some programs, like the Massachusetts Office of Dispute Resolution's environmental mediation program, carefully assess a neutral's performance and provide appropriate follow-up to assure quality. Programs may use this method in connection with a credentialing process, or they may employ mentoring alone because it allows them to avoid developing a credentialing process and the attendant controversies and uncertainties over its effectiveness. Their approach generally involves co-mediation or some form of apprenticeship, with

experienced neutrals observing or leading new or problematic ones in actual sessions. They also provide targeted follow-on training or mentoring, and occasionally offer telephone advice for neutrals with specific concerns.

Continuing education or training - Some programs, like the aforementioned Massachusetts program, hold periodic seminars, conferences, or training sessions with interested neutrals as well as those with special needs concerning skills development or handling commonly experienced problems.

Amount of experience *(number of cases)* - Numerous programs and rosters permit any neutral to practice provided he or she has "logged" a certain minimum number of cases or hours in mediation. This is sometimes referred to as the amount of actual "flying time". (See the USIECR roster requirements as examples.)

Performance tests or demonstrations - Many neutrals believe qualifications are best measured through performance tests, such as participating in mock mediation sessions in which candidates have a chance to demonstrate their ability. SPIDR's Commission on Qualifications, for example, recommended that "where standards are set they should be performance-based." Efforts are underway to develop these kinds of competency tests. (See, for example, *the Test Design Project's Performance-Based Assessment: A Methodology, for Use in Selecting, Training and Evaluating Mediator*.) Several programs have employed performance-based approaches to select candidates for training. For example, the Massachusetts Office of Dispute Resolution has a panel of more than 65 private-sector neutrals who were chosen based on a performance-based selection and training process.

Monitoring and user evaluations - ADR programs may also wish to systematically monitor neutrals' performance to identify situations involving quality concerns. Some programs, like MODR's and the CPR roster, rely extensively on feedback from users as a tool to assess their neutrals. A similar approach used by some programs involves removing those neutrals who are never selected by parties. Another common method is using post-mediation questionnaires or evaluations from the attorneys and/or parties in each case to ascertain whether they found mediation helpful, and whether the mediator maintained neutrality, understood the issues, stimulated creative solutions, helped them reach agreement, and whether they would use the mediator again.

Complaint procedures - Establishing complaint procedures or a complaint "hotline" for parties is a method some programs may employ to promote quality. A few programs, such as MODR, then follow up with targeted mentoring or training when parties' assessments indicate troublesome patterns of behavior by certain neutrals.

References - A few programs have required neutrals to provide references from prior cases.

Interviews - A few programs—such as the D.C. Superior Court's Multi-Door Courthouse and some individual agencies' collateral duty mediator programs—rely on interviews as part of their mediator selection process, or get reports from the neutrals themselves and use them as a tool in assessing understanding and performance.

Advisory panels - Some jurisdictions employ more formal procedures for assuring that neutrals perform adequately. The Florida Supreme Court, for example, created advisory panels to field written requests from mediators on ethics questions and party grievances. The typical sanction in Florida has tended toward requiring further training or imposing restrictions on certain types of practice (e.g., no more family cases). A very few mediators have been suspended. In practice, however, agency programs have seldom found it necessary to employ such formal procedures.

Market approaches - Some programs take a "free market" approach. Supporters of this method fear that licensing or certification may be restrictive and rob ADR of valuable perspectives and approaches. They believe a market approach will ensure that only the best mediators continue to practice. This philosophy recognizes that a "market" solution requires consumers to be well-informed, so that they are better able to assess the kind of assistance they need and to evaluate the performance of the practitioner and program. Several state entities employing this method have devised consumer guides on selecting a neutral. See, for example, the Alaska Judicial Council's Consumer *Guide to Selecting a Mediator and the Ohio Commission on Dispute Resolution* and *Conflict Management's Consumer Guide: What You Need to Know When Selecting a Mediator*.

Assuring Quality in Provider Organizations

ADR programs themselves perform tasks in providing services. In addition to assessing practitioner competence, they conduct screening, provide training, mentor and monitor neutrals as well as provide intake and follow up and assign cases. These provider organizations have special responsibilities to provide fair, impartial, and quality processes. Programs should also be assessed on a regular basis. Some methods for accomplishing this include: consumer input, review of complaints, self-assessment, regular audits, peer review and visiting committees from other programs.

The CPR-Georgetown Commission on Ethics recently proposed Principles for ADR Provider Organizations. These principles recognize the central role of the ADR provider organization in the delivery of fair, impartial, and quality ADR services. According to the Commission, an ADR Provider Organization includes any entity or individual holding itself out as being able to (1) provide prospective users with conflict management services directly, or (2) provide prospective users with conflict management services indirectly through the management or administration of such services-including referral, clearinghouse, roster creation, brokering or similar activities. "Conflict management services" include activity as a neutral third party assisting disputants to clarify or resolve their conflicts, as well as provision of consulting, design, training, or other services intended to enable a user to better employ neutrals or enhance the capacity to resolve conflicts more effectively.

Several core principles guide this effort:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR provider organizations and to inform consumers, policy makers, and the public generally.
- The most effective architecture for maximizing the fairness, impartiality, and quality of dispute resolution services is the meaningful disclosure of key information.
- Consumers of dispute resolution services are entitled to sufficient information about ADR provider organizations and their neutrals to make well-informed decisions about their dispute resolution options.
- ADR provider organizations should foster and meet the expectations of consumers, policy makers, and the public generally for fair, impartial, and quality dispute resolution services and processes to ensure that best practices will be highlighted in the development of the field.

The CPR-Georgetown Commission on Ethics recommended several possible approaches to addressing the numerous issues of quality, selection, administration, access, oversight, and design that converge when public and private entities provide ADR services. It recognized that, as dispute resolution activity becomes increasingly institutionalized, the need will grow for those who administer ADR programs to ensure that their efforts are effective and their activities viewed as fair and appropriate.

The Commission recognized that provider organizations' efforts should be drawn from the following:

Obtaining consumer input/review of complaints. Some programs, like the D.C. Superior Court's Multi-Door Courthouse, seek parties' or lawyers' feedback as to the manner in which they have administered a case, in addition to their assessment of the neutral's performance.

Self-assessment/performance audits. Occasionally, programs have either retained a consultant, or undertaken themselves, to evaluate their administration efforts.

Peer review. This could include seeking review and input from administrators of other ADR programs or from ADR experts who can provide an unbiased look at the program's operation.

Finally, provider organizations can help themselves by doing more to share information and experiences among themselves, think through matters of effective systems design and evaluation, and focus explicit attention on "best practices" much as mediator groups have begun to do.

Next Steps-How to Approach Assessing Quality

What is the best way to proceed in designing a quality assurance program? A 1995 report issued by a SPIDR Commission on Qualifications made recommendations to policy makers, practitioners, program administrators, trainers, ADR associations, and consumers about their roles and responsibilities in ensuring competence and quality in dispute resolution practice. It provides a framework for determining which approaches to use. The report is an extremely useful resource for thinking about how to address the issues surrounding quality assurance.

Assuring competence is a key to quality and is a shared responsibility of programs, practitioners, parties and dispute resolution organizations. The 1995 report of the SPIDR Commission on *Qualifications, Ensuring Competence and Quality in Dispute Resolution Practice*, offers helpful advice and a framework for policymakers, organizations, and others to use in determining the approach to take in the context within which they work. The report recommends that all stakeholders should be consulted in formulating standards of competence and qualifications.

The report recommends using the following 7 questions to assess how to achieve quality. The questions are intended to help organize discussion or deliberation over the issues.

1. **What is the context?** The context of the dispute resolution service needs to be examined and understood, because that determines what should be considered competent practice in your specific situation.
2. **Who is responsible for ensuring competence?** Stakeholders-including practitioners, consumers, program administrators, and others-have roles and responsibilities in assuring quality. Practitioners can gain skills and knowledge and work within their area of competence. Consumers can familiarize themselves with the basics they'll need to make an informed choice and participate in the evaluation of the services rendered. Programs and associations can solicit views in developing guidelines on competent practice.
3. **What do practitioners and programs do?** It is important to examine the core tasks performed in any dispute resolution practice or program.
4. **What does it mean to be competent?** The core skills that have been described in this web page, and identified through studies and research, apply here.
5. **How do practitioners and programs become competent?** The multiple paths to becoming a competent practitioner need to be recognized. Practice involves some combination of natural aptitude, skills, knowledge, and other attributes developed through education, training, and experience.
6. **How is competence assessed?** No one method of assessment should be relied on because it may lead to emphasis of one measure of competence at the expense of other valuable measures. And assessing competence should be a shared responsibility among the various stakeholders.

7. **How should assessment tools be used to assure quality?** Quality assurance tools should be used to support the goals of the dispute resolution program and be consistent with the practice context where they are to be applied. Here is where use of certification and credentialing arise. Formal and informal certification are ways to assure competence of practitioners. The more formal the certification process, the greater the number of considerations that accompany its implementation. For instance, there are issues of costs of operating a certification programs as well as how to handle decertification. Programs can also assure competence through training, supervision, monitoring and the use of assessment tools.

While the framework is expressed in a linear way, it is adaptable to different situations and contexts. By answering all the questions, programs are likely to achieve more sound and practical approaches to qualifications issues.

References & Resources

Links may be out of date

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Academy of Family Mediators, Standards of Practice for Family and Divorce Mediation.

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MEDIATOR QUALITY ASSURANCE

A REPORT TO THE
MARYLAND MEDIATOR QUALITY ASSURANCE
OVERSIGHT COMMITTEE

FEBRUARY 2002

CHARLES POU, JR

DISPUTE RESOLUTION SERVICES

2227 20TH STREET, NW

SUITE 501

WASHINGTON, DC 20009

202-887-1037

FAX: 202-887-5374

E MAIL: CHIPBLOC@AOL.COM

MEDIATOR QUALITY ASSURANCE

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MEDIATOR QUALITY ASSURANCE

A REPORT TO THE MARYLAND MEDIATOR QUALITY ASSURANCE OVERSIGHT COMMITTEE

I. INITIAL FINDINGS

Overview. Typically, most professions think about quality assurance (QA) in terms of credentialing, which tends to involve licensing, certification, or "substitute" credentials (like degrees or professional background). For better or worse, mediation quality programs have not moved as far toward credentialing as most professions.

Many knowledgeable people still favor market-based approaches and balk at the idea that we know enough to measure or predict quality performance. However, recent developments indicate that credentialing[1] mediators in the name of promoting quality and protecting consumers is clearly a growth industry. Numerous quality assurance, or related roster development, efforts in scores of jurisdictions have been completed or are underway.

QA Typology. QA systems generally include some combination of “hurdles” and “maintenance” that could be plotted on a conceptual grid, with two axes:

- A vertical axis displaying the height of "hurdles" that mediators must meet at the outset to engage in practice, and

- A horizontal axis showing the amount of "maintenance" or development aid required to broaden their awareness and enhance skills over time.

The great bulk of QA efforts to date have set relatively undemanding “hurdles” that typically require minimal training (20 to 40 hours), some actual mediation experience (3 to 7 cases, often involving co-mediation or supervised mediation). Apart from community programs, required “maintenance” has tended toward some commitment to take some periodic continuing education and adhere to basic ethical standards, with little or no active oversight.

[1] "Credentialing" means different things to different people, and may be taking on a somewhat broadened definition. Increasingly, the term is employed to include actions beyond setting a standard, or "hurdle," for applicants wishing to obtain listing or approval; these additional actions may include mentoring, targeted training, continuing education, user feedback, and grievance processes. Thus, it is not always clear just where "credentialing" stops and other forms of quality assurance start.

Goals for mediator QA. My interviews suggest that credentialing and other quality-related activities can seek a variety of goals and can be implemented with varying degrees of rigor. Observers point out that many credentialing programs are structured so as to allow people with minimal training and experience to mediate; many criticize this approach as indicating that "mediation is easy." A leader whose efforts led one state mediator organization to develop a credentials system described his intent as "creating something that would neither provoke resistance nor be ignored." An academic observer cautioned the Maryland QA Committee members to ask themselves, "Do we 'just want to do something that will make us feel good?'" or "do we instead want to take the next step toward making empirically based, defensible decisions that will stand up to close scrutiny from courts or others?'"

Defining quality mediation. Numerous people expressed a strong belief that definitions of "mediator quality" will vary depending on a particular program's goals. Indeed, some thought that initially defining "mediation" is critical to discussing quality intelligently, and that efforts to define and measure quality mediation must recognize and address these variations.

Who sets the hurdles, and decides? The site of quality assurance programs and decision making vary; they include individual judges, central or local court administrators, state supreme courts, advisory groups authorized by courts, executive agency roster administrators, other official entities, and private mediator associations. These activities may be centralized, with a single entity setting standards and accepting applications. In other settings, they may be decentralized, by either (1) having a central entity set policy guidance with local courts or administrators filling in the gaps or (2) fixing separate standards for different programs or kinds of mediation activity.

Within any entity, the individual gatekeepers may also vary, ranging from "blue ribbon panels" to groups of mediators to administrative or clerical personnel. In some of these, a tendency toward routinization of these decisions has driven them down to lower-level personnel levels than was initially envisioned.

Maintenance activities: Continuing education, mentoring, enforcing standards. A recurrent theme in interviews was the importance of training, mentoring, and continuing education. While the literature on mentoring and continuing education for mediators is sparse, actual practice is rich, especially among community mediation programs, and may offer the oversight committee useful lessons. A recent article on NAFCM's website by Melissa Broderick, Ben Carroll, and Barbara Hurt, entitled Quality Assurance and Qualifications, discusses community mediation programs' activities in this area, and includes a "quality assurance statement" that briefly addresses screening and recruitment, basic training, evaluation of training participants, apprenticeship, co-mediation, continuing education, and trainer responsibilities.

Many people expressed a view that key elements of a QA system will involve user feedback and a complaint handling procedure, but relatively little attention appears to have been paid to specifics. In particular, grievance and enforcement processes may raise confidentiality challenges. Several emphasized that complaint processes should attempt to employ mediative, ombuds, or other interest-based approaches -- at least at the first stage -- in lieu of formal hearings. For now, outside of Florida at least, it appears that relatively little attention has been focused on the mechanics of grievance and ethics processes.

A recent trend appears to place greater focus on accrediting mediator training programs, occasionally combined with putting some duties on trainers to advise trainees of their strengths and weaknesses or provide mentoring or other continuing feedback.

Multiple paths to competence. Quality mediators come from a variety of backgrounds, and many good ones have learned on the job or developed skills in ways other than standard training. Any approach to quality assurance that is exclusive, as opposed to inclusive, runs a risk of eliminating some potentially excellent mediators. Also, because of this (as well as political reasons), some observers see benefit in providing diverse options for reaching credentialed mediator status, perhaps “grandparenting” those who already serve as mediators, and/or affording judges or parties a way to look outside the list of "credentialed" mediators for particular cases.

Processes for developing quality standards and systems. Development efforts have ranged from having judges, legislators, or others hand down standards based on their individual opinions or research to consulting with key interest groups to collaborative activity in developing standards that promotes dialogue (e.g., outreach, focus groups, questionnaires, public meetings, circulation of drafts) in an effort to be inclusive. Occasional jurisdictions have sought (with limited success) to reach full consensus among representatives of affected interests.

Educational and political concerns. QA and credentialing processes are not established or operated in a vacuum. The nature and success of such activities will depend on numerous outside factors. Several interviewees stated that: (1) it will critical to educate users of mediation services about what to look for in a DR process and in a mediator, as well as the potential benefits of various styles of mediation; (2) while difficult, it may be valuable to try to bridge the gap that often exists between attorney-mediators, who sometimes are more "evaluative," and other mediators, especially those with more facilitative or transformative approaches; and (3) in many jurisdictions, the higher one goes in bureaucratic or political systems, the harder it gets for mediators' or similar professionals' views to affect policy decisions.

II. DEFINING MEDIATOR COMPETENCE

Mediators' skills and other attributes can be crucial to a quality outcome when they seek to help parties resolve their differences. Depending on the setting, the neutral's background and role can vary substantially. In some controversies, agency or company employees with some training and mentoring may serve. In other disputes, parties may demand a highly skilled professional with years of experience or even a subject matter expert.

The nature and diversity of roles that mediators are asked to play present complications. Many of the characteristics that make mediation useful -- its privacy, flexibility, and an atmosphere that encourages openness -- can give rise to abuse by mediocre or unethical neutrals, especially where vulnerable parties are involved. Moreover, strong differences of opinion exist within the dispute resolution community itself as to what constitutes quality results, how to define quality practice by neutrals, and how best to assess whether practitioners have the required skills.

Competence is the term often used to describe the ability to use dispute resolution skills and knowledge effectively to assist disputants in prevention, management or resolution of their disputes in a particular setting or context. Research is beginning to reveal the kinds of knowledge, skills, abilities, and other attributes ("KSAOs") that are important to effective performance as a neutral, and how those aptitudes are best acquired. Studies that have been conducted suggest that these qualities are derived from a mix of sources: innate personal characteristics, education and training, and experience. Margaret Shaw's Selection, Training, and Qualification of Neutrals is a valuable, if slightly dated, exploration of much of this research. (Further readings on some possible approaches to ensuring quality mediation include Chapter 11 of Nancy Rogers and Craig McEwen's Mediation: Law, Policy, Practice ("Regulating for Quality, Fairness, Effectiveness, and Access") and Dobbins, The Debate Over Mediator Qualifications.)

While there is no single, clear consensus on the knowledge, skills, abilities, and other attributes (sometimes called "KSAOs") needed to perform as a mediator, one of the most generally accepted descriptions of a mediator's tasks comes from the Hewlett-NIDR Test Design Project which summarizes them as follows:

- Gathering background information
- Facilitating communication
- Communicating information to others
- Analyzing information
- Facilitating agreement
- Managing cases
- Helping document any agreement by the parties

The difficulty comes in determining the best way to assess a neutral's ability to perform these tasks competently.

The Test Design Project sought, with some limited success, to provide DR programs with reliable and economical tools for selecting mediators. The result of this project -- Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators -- contains useful general measures of competence, or KSAOs, for mediators. It also offers a methodology for making performance-based assessments of mediators' likelihood of future successes. TDP set forth the following qualities as those "likely to be needed most to perform the most common and essential tasks of a mediator":

- ***Investigation*** - Effectiveness in identifying and seeking out pertinent information

- ***Empathy*** - Conspicuous awareness and consideration of the needs of others.

- ***Impartiality*** - Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias.

- ***Generating options*** - Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties.

- ***Generating agreements*** - Effectiveness in moving parties toward finality and in "closing" agreement.

- ***Managing the interaction*** - Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives.

- ***Substantive knowledge*** - Adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information.

Many mediators have offered general endorsement of this list and the assessment scales that accompany it, while others (especially some who espouse a transformative theory) have criticized them to varying degrees as tending to reflect a "labor" model that assumes an active, deal-seeking mediator or failing to acknowledge adequately that the relevant KSAO's will vary depending on a particular program or party goals.

A few researchers, like Margaret Herrman of the University of Georgia's Mediator Skills Project, believe that programs need to go further than did TDP, especially those contemplating establishment of credentialing systems that could exclude some applicants and thus give rise to litigation in which they might need to justify their methodology. They are seeking to analyze the jobs mediators in various settings perform. They hope to reach a more sophisticated understanding of roles

mediators perform, how good ones undertake them, and how to test for ability. So far, this work has produced few written results, though that should begin to change soon.

A number of programs (e.g., in several Massachusetts courts) have employed the TDP KSAO's in selecting trainees for new mediator cadres. Some programs (e.g., the San Diego Mediation Center's certification program evaluation procedures, Pennsylvania's Special Education Mediation Program, and Minnesota Mediation Center for family mediators) have adapted these KSAO's while seeking to do more to accommodate transformative or other models, to reflect more closely their own practices, or to improve assessment methods. For instance, the Minnesota Mediation Center developed scales that drew on the TDP list and discussions with family mediators; rather than using them as hurdles, the Center then employed these scales in giving feedback to junior mediators who wanted eventually to "graduate" to the roster of paid family mediators.

Some entities have made other efforts to link measures of competence to context. For example, the Competencies for Environmental and Public Policy Mediators prepared by a committee of SPIDR's Environmental/Public Disputes Sector, sets forth several different tasks and skills involved in organizing and mediating complex, multi-party conflicts.

III. APPROACHES TO ASSURING COMPETENCE

The growing use of ADR processes has led some to argue that standards related to competence and the selection of mediators are needed to protect consumers and the integrity of dispute resolution processes. The topic has been controversial for years, in part because the competence a mediator needs may vary from one context to another. And, measuring competence cannot be done based alone on paper credentials. Several professional membership organizations and others have developed policies, principles, or qualification standards regarding who can serve in various settings.

In 1989, the Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications was formed to investigate and report on basic principles that could be used to influence policy for setting qualifications for mediators, arbitrators and other dispute resolution professionals. In its 1989 Report, the Commission put forth three fundamental recommendations:

- That no single entity (but rather a variety of organizations) should establish qualifications for neutrals;

- That the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be; and

- The qualifications criteria should be based on performance, rather than paper credentials.

Another effort by the Center for Dispute Settlement and Institute for Judicial Administration at New York University produced the National Standards for Court-Connected Mediation Programs, which reached conclusions similar to those of the first SPIDR Commission report.

In 1995, a second SPIDR Commission on Qualifications developed a report that made recommendations to policy makers, practitioners, program administrators, trainers, ADR associations, and consumers about their roles and responsibilities in ensuring competence and quality in dispute resolution practice. It provides a framework for determining which approaches to use, and is a useful resource for thinking about how to address quality assurance issues.

The 1995 SPIDR Qualifications report, Ensuring Competence and Quality in Dispute Resolution Practice, states that assuring competence is a key to quality and is a shared responsibility of programs, practitioners, parties, and dispute resolution organizations. It offers helpful advice and a framework for policymakers, organizations, and others to use in determining the approach to take in the context within which they work. The report recommends that all stakeholders be consulted in formulating standards of competence and qualifications. It sets forth this framework for analyzing how to achieve quality, using the following questions to help organize deliberation:

1. **What is the context?** The context of the dispute resolution service needs to be examined and understood, because that determines what should be considered competent practice in a specific situation.

2. **Who is responsible for ensuring competence?** Stakeholders -- including practitioners, consumers, program administrators, and others -- have roles and responsibilities in assuring quality. Practitioners can gain skills and knowledge and work within their area of competence. Consumers can familiarize themselves with the basics they'll need to make an informed choice and participate in the evaluation of the services rendered. Programs and associations can solicit views in developing guidelines on competent practice.

3. **What do practitioners and programs do?** It is important to examine the core tasks performed in any dispute resolution practice or program.

4. **What does it mean to be competent?** The core skills that have been identified through studies and research, apply here, but may merit adapting for context.

5. **How do practitioners and programs become competent?** The multiple paths to becoming a competent practitioner need to be recognized. Practice involves some combination of natural aptitude, skills, knowledge, and other attributes developed through education, training, and experience.

6. **How is competence assessed?** No one method of assessment should be relied on because it may lead to emphasis of one measure of competence at the expense of other valuable measures. And assessing competence should be a shared responsibility among the various stakeholders.

7. **How should assessment tools be used to assure quality?** Quality assurance tools should be used to support the goals of the dispute resolution program and be consistent with the practice context where they are to be applied. Formal and informal credentialing promote competence of practitioners. The more formal the certification process, the greater the number of considerations that should accompany its implementation, including operating costs and how to handle decertification. Programs can also assure competence through training, supervision, monitoring, and the use of informal assessment tools.

While the framework is expressed in a linear way, it has been adapted to different situations and contexts. Several members of the second SPIDR Commission developed a draft Guide for Implementing the Seven Steps to Understanding and Ensuring Competent Dispute Resolution Practice (never published), which sets forth issues to consider in undertaking such a process. (See Documents Attachment.) Sidebars in this paper describe briefly how several entities used the "seven-step framework" to organize their review and development of qualifications policies.

IV. QUALITY ASSURANCE INITIATIVES -- WHAT'S HAPPENING?

Overview. While mediators and researchers have strived over the past 15 years or so to define “what mediators do” and better understand “how to do it well,” ADR programs, roster administrators, and parties seeking neutrals have had to deal with day-to-day choices. As Judy Filner states in a recent article in a special edition on mediation credentials in Dispute Resolution magazine, “ways to qualify mediators are being developed in literally thousands of different programs.” These range from professional organizations creating membership categories to judges, court administrators, and agencies establishing rosters or other means of “vouching for” their mediators. This section describes some of the more interesting or innovative among these activities.

ABA Section of Dispute Resolution. The section is in the process of establishing a Task Force on Credentialing, under the leadership of Judy Filner; members will include Peter Maida, Howard Bellman, and me. Likely goals include creating a report on past and current mediator credentialing practices, analyzing the relation of

credentialing to quality practice, networking and collaborating with other organizations interested in mediator QA and credentialing, and developing recommendations on policy or actions.

ACR/AFM. A pre-merger credentialing effort by AFM yielded primarily a description of the substantive knowledge desirable for family mediators. The newly-created ACR (formerly SPIDR, AFM, et al) has commenced an Advanced Practitioner Work Group, directed by Bob Jones, that is exploring development of a class of "Advanced Practitioner" members. If adopted, each ACR section (e.g., environmental/public policy, commercial, labor-management, community) that is interested will likely undertake the designation. While initially intended to serve only as a membership category (rather than a "credential" that would involve monitoring and policing), the work group will also explore whether and how this category can eventually serve as a recognized credential in the DR field. Each interested ACR section would be expected to identify (1) needed practice competencies (as the Environmental/Public Policy Section has already done) and (2) what would be measured and how (probably not performance-based) when applications are sought.

The work group's draft report was presented to the Board in April 2001 for guidance and feedback. The group will continue to seek input from ACR sections on the draft and the process and report to the Board and the membership in 2002.

Texas. Two different quality assurance initiatives are noteworthy.

An advisory committee to the Supreme Court has submitted a proposal for creating a registry of state court mediators (attorneys and non-attorneys). The Supreme Court has not acted on the report, which contained recommendations concerning minimum qualifications for mediators, a recommendation for a Commission on Training, and Rules of Ethics for Mediators.

Advisory committee members gathered extensive data on other jurisdictions' approaches during their deliberations. Committee co-chair Bruce Stratton, who permitted me to review these materials, saw Tennessee and Georgia as states with approaches to credentialing that they found most helpful (see below).

The advisory committee did not make a recommendation on "credentialing" for a variety of reasons, but it did recommend minimum qualifications for court mediators. (The committee stated that the minimum qualifications for mediators is not "credentialing" or "certification," but rather an effort to focus attention on continuing education and training. Likewise, it said, the Commission on Training is a focus on the quality of training.) In addition to the required training courses, the committee proposed requiring continuing education for court mediators. The committee recommends having judges select from the list of mediators possessing minimum qualifications, while allowing a judge to go outside the list if s/he provides a written explanation for doing so.

In addition, the committee would require that mediators adhere to the Texas Rules of Ethics for Mediations and Mediators as promulgated by the Supreme Court of Texas. As to enforcement, the committee recommended that the court in which the action is pending or the local administrative judge of the county, district or region enforce the ethics rules in any manner provided by law or by submitting the matter to mediation.

The committee recommended a self-funding Commission on Training, made up of representatives of a cross-section of organizations and individuals having a historical connection with mediation in Texas and with at least two-thirds of the members being qualified mediators and/or mediator trainers. The Commission would establish standards for training court mediators, evaluate training curricula, and approve courses. It would publish standards along with a list of approved courses. Currently, the Texas Mediation Trainer Roundtable Standards describe training content, methodology, and administration for a 40-hour basic course; the Standards also discuss areas for which roundtable members decided not to make recommendations or could not reach consensus. (See Documents Attachment.)

A second Texas initiative, the Texas Mediator Credentialing Association, has recently been incorporated as a 501(c)(3) entity to serve as a voluntary credentialer for mediators and mediation trainers in all fields. The Association's 15-member board has begun meeting, and includes representatives from Texas' major mediator and trainer groups, the bar, consumers, education institutions, and the judiciary. The Board expects to set credentialing and training standards, as well as a grievance process. It has established a number of committees (credentialing standards, web page design, grievance process, application format and process, funding, marketing). Among the issues that TMCA is considering are instituting a "tiered" approach, with basic and additional advanced levels of credentialing based on training and experience; assessing fees and other resources to support establishing an administrative structure for TMCA; and establishing an effective grievance process that respects all participants' confidentiality concerns.

New York. Several sets of quality assurance activities are worth mentioning.

The New York Courts ADR Office does not certify mediators, but for several years has had standards and requirements for mediators and mediation trainers, mostly in connection with community mediation centers that receive courts funds; these centers provide extensive mediation services to many courts in the state. Court ADR Office personnel say that they are giving thought to reassessing their mediator training program requirements, since many community programs now offer training that goes considerably beyond the existing requirements. As part of its training oversight process, this Office reviews training agendas, manuals, and materials from those seeking accreditation, offers informal feedback, and observes trainings; they say they are considering hiring two employees to undertake to offer "train-the-trainers" sessions periodically.

A subcommittee of a court advisory committee, led by Lela Love, has begun to develop recommendations for another set of standards that courts could use in developing rosters or selecting individual mediators not affiliated with a community mediation center. These will likely be fairly undemanding (e.g., 40 hours of training), but will differentiate between various styles and processes. Court ADR administrators do not expect these recommendations to be put forward formally for another year, and will seek first to work informally with local courts to obtain their understanding and acceptance.

Finally, the NY State DR Association's Certification Committee is starting to develop a broad mediator certification process. It began by holding several interviews and focus groups on the issue with hundreds of stakeholders; some materials related to the focus groups and their results (including a history of mediation certification, a focus group participant letter, and focus group results regarding education, training, experience, and evaluation criteria) are set forth on NYSDRA's web site (http://www.nysdra.org/who.html). Committee Chair Kenn Handin said that NYSDRA was impressed with the Idaho and Washington mediator associations' work (see below). Drafting has not yet commenced, and NYSDRA officials are uncertain whether the new system will be administered locally or centrally.

Family Mediation Canada. FMC went through a lengthy collaborative process that resulted in a fairly strict set of credentialing standards for all family mediators there. They require completion of an initial 13-page application that documents completion of at least 80 hours of basic training and an added 100 hours of related education and training, as well as letters of reference and insurance. Applicants then receive a Candidate's Manual to guide them through an assessment process, including preparation of a videotaped skills demonstration, a self-evaluation, and a 4-hour "invigilated" written exam on substantive issues. Preparation workshops are offered to potential candidates. (See FMC Application Form; Steps in the Certification Process; and Practice, and Certification and Training Standards, in Documents Attachment.)

Massachusetts. Massachusetts has had criteria for court mediators for several years, but a court advisory committee studying credentialing has produced some controversy and, recently, consensus proposals for significant change. The longstanding guidelines have included standards for approval of training organizations; guidance for evaluation and mentoring; a statement of qualities and responsibilities for trainers, evaluators, and mentors; and a mediator skills checklist. (See Documents Attachment.) The recent advisory committee proposal would establish (among other things) general requirements for training (including orientation to the judicial system), observation (generally, one role-play observed by a qualified evaluator, plus observation and discussion of one case), experience, and performance assessment of mediators wanting to do court work. Some controversy over grandparenting those with no training has arisen, and, during the advisory committee's discussions, a group of Massachusetts attorneys retained a

legislative lobbyist to put forward their concerns. The court is scheduled to consider the advisory committee report.

Colorado. Five major entities involved with mediation in Colorado formed a steering committee in the mid-1990s to develop a consensus on credentialing mediators. Several years of work, with lengthy discussions of the definition of mediation and principles for handling qualifications, produced a product that would have had a newly-formed oversight group administer a certification program. Two constituencies, including the bar, then declined to endorse this product. The early stages of this history are described in Ortner and Shields, A Report on the Development of Qualifications and Standards of Conduct for ADR Professionals, The Colorado Lawyer (October 1997). (available from MACRO by fax.)

Idaho/Washington/Virginia/Florida/Tennessee/Georgia. Georgia's approach is a fairly typical court-administered one, though slightly less bureaucratic than Florida or Virginia. Its Supreme Court has issued rules, with quality being managed largely by individual courts. Neutrals wishing to work on court cases must register with the Court's Office of DR, and are then monitored by that Office and the GA Commission on DR (the court's ADR policy-making arm). Requirements for registration include training, education, and references -- as well as being "of good moral character." Registered neutrals are deemed qualified to serve in any court in the state, though individual courts may add more stringent requirements and select the neutrals who will serve their programs. A Commission on Ethics hears complaints of neutrals' violations; only one formal complaint has received treatment so far, and only one formal opinion has been issued.

The mediation associations in Idaho and Washington have recently adopted credentialing processes for members wishing to achieve something greater than "general member" status. At present, these credentials have not been recognized or adopted by court entities, though in both states obtaining such recognition is a goal of the associations. Washington's approach employs a slightly "higher" set of hurdles (e.g., more training hours), but both involve a fairly simple examination of paper submissions describing or substantiating skills training, case practice (including memoranda of agreement), additional experience or study, and letters of recommendation. Applicants who are found to fall short can receive a statement of deficiencies and usually negotiate a plan to obtain mentoring or demonstrate additional needed competencies.

U.S. Navy. The Navy's workplace mediation program relies almost entirely on several dozen employee-mediators who, after being nominated by their "commands," have received training and mentoring before being certified to mediate Navy workplace cases part-time. The Navy's four-step process seeks to assure competence, and involves a basic 20-hour mediation course, a supplemental 20-hour course emphasizing role-plays, a screening based on observation of how the trainee handles a 1 1/2 hour role-play, and three co-mediations and extended debriefs with experienced contractor-mediators (e.g.,

ADRvantage or Justice Center of Atlanta) or internal mentors. After completing these steps, a Navy mediator can apply for certification. The Navy has developed several instruments to aid this program (e.g., observer's checklist, co-mediator evaluation form), and provide occasional refresher sessions. The program's director anticipates developing a recertification process, based on the notion that approval is not "for life."

U.S. Postal Service. USPS trained a number of trainers to offer several thousand experienced mediators a two-day session on using a transformative approach to postal workplace mediation. Rather than evaluating trainees at that point, USPS then required those wishing to obtain paid referrals to submit to observation in an initial pro bono case. USPS also sought to train its mediation program administrators to assess neutrals on an ongoing basis, and provided listed mediators an opportunity to participate in periodic "mini-conferences" to discuss real-world problems and research findings. This approach has resulted in USPS paring its mediator list considerably, based largely on observations. Program managers expressed the view that QA is a continuing process, rather than a one-time assessment, and emphasized the importance of defining quality in connection with a program's goals rather than generically.

NAFCM/Community Programs. NAFCM's ongoing quality assurance initiative is expected to produce a non-prescriptive assessment tool that will help community mediation centers focus on improving general management for non-profits, case administration, and training, development, nurturing, and handling of volunteers. For each of these areas, the document should address practical service delivery considerations for centers and set forth some potentially useful approaches to dealing with them. Consonant with most community programs' emphasis on some regimen of basic and advanced training, mentoring, co-mediation, observation, and continuing education -- as opposed to credentialing individual mediators, which NAFCM officials describe as inherently exclusive -- the initiative is expected to describe aspirational standards, pose questions to consider regarding how to reach these goals, and offer examples of how some centers have dealt with these issues. A written draft is due this fall, with a final version by the end of 2001. A recent article on NAFCM's website by Melissa Broderick, Ben Carroll, and Barbara Hurt, entitled Quality Assurance and Qualifications, discusses community mediation programs' QA activities, and includes a "quality assurance statement" that briefly addresses screening and recruitment, basic training, evaluation of training participants, apprenticeship, co-mediation, continuing education, and trainer responsibilities.

FDIC. In the early 1990s, the FDIC sought the advice of a "Blue Ribbon Panel" of experts to develop a set of criteria for private mediators wishing to be listed on the agency's nationwide roster of neutrals who could be used to resolve agency cases. In brief, these experience-based criteria were total hours spent as a neutral, number of cases, diversity of substance and process, dollar amount involved, multi-party experience, and complexity of cases. The panel considered and

rejected several factors, including education, training, prior certifications, and professional association memberships. An initial decision to award points for women or minority status was later reversed in light of recent federal court decisions. (The Committee's report is available from MACRO by fax.)

Federal Mediation and Conciliation Service. FMCS "believes it is in the public interest to establish standards of training, ethics, and practice for our profession." (See FMCS credentialing, Federal Register notice, in Documents Attachment.) As the demand for mediation has grown, FMCS has established a roster of private sector neutrals to augment its full time staff occasionally in the delivery of labor, employment, multi-party, and commercial mediation services. FMCS "holds its internal roster of neutrals to the same high standards of training, continuing education, ethics and accountability as its professional staff." FMCS has decided that mediator effectiveness would be greatly enhanced and the professionalism of our field raised through a comprehensive credentialing effort, which began a year ago. It has contracted with the University of Arkansas at Little Rock to research standards for mediator qualifications and prepare proposals for the operation of the FMCS credentialing process. A team headed by Dr. Angela Laird Brenton, Dean of the College of Professional Studies, will issue a report to FMCS in March 2002.

V. POSSIBLE PROTOTYPE QA "MODELS"

There are several possible ways to think about "prototypes" of QA approaches and the potential and actual strengths and weaknesses of each. The chart accompanying this report summarizes (in an extremely simplified fashion) the approaches to mediator quality by approximately 15 key states, courts, and other entities.

One possible way to categorize these approaches might look to the following generic credentialing activities:

- Private voluntary paper standards for individuals (e.g., TMCA, WA, ID, NYSDRA)
- Public mandatory paper standards for individuals (e.g., TX Sup. Ct., FL courts, VA courts, U.S. IECR roster)
- Mediator mentoring and development approaches (e.g., SD Comm. Mediation Ctr.)
- Performance-based approaches
- Hybrids (e.g., Family Mediation Canada)

Several other ways exist to think systematically about QA "systems." For instance, some suggest "sorting" by location of case managers, standards setters, or source of cases; they say that this approach allows one to focus on "real world" developments in the field. They would use categories like:

- Court program credentialing and rosters

- Agency programs credentialing and rosters
- Community programs QA
- Private practitioner groups or private provider organizations credentialing
- Individual private practitioners self- credentialing

A possibly useful mode of categorizing QA systems employs a grid displaying the height of "hurdles" that mediators must meet at the outset to engage in practice and the amount of "maintenance" or development aid provided them later on. The quadrants of such a grid look like this:

High hurdle/Low maintenance	High hurdle/High maintenance
Low hurdle/Low maintenance	Low hurdle/High maintenance

A program with a "high hurdle" (e.g., Family Mediation Canada, which requires several hundred hours of training, or the US Institute for Environmental Conflict Resolution's roster, which calls for 200 hours of environmental experience) would require many hours of training, experience, and/or observation to obtain a "credential." A "low hurdle" program would typically demand only 20-40 hours of training, and, perhaps, a few mediations or co-mediations.

A program that takes a "high maintenance" approach (e.g., many community mediation programs) recognizes that initial training or substantive knowledge is not generally determinative of a mediator's abilities or long-term potential. Such a program may require little to become a mediator but would typically mandate that mediators either receive considerable "nurturing" or handle a large number of cases annually so as to broaden their awareness and enhance skills over time. This nurturing could include co-mediation, follow-on training, in-services, and coaching. A "low maintenance" program would impose a few mandates on a mediator once s/he has been credentialed – in the case of many court programs, as little as 6-8 hours of continuing education each year.

QA systems generally include some combination of "hurdles" and "maintenance." Any given combination would well produce differing impacts on key outcomes, including:

- The credibility and professionalism of the dispute resolution field
- The dispute resolution field's diversity
- Effective enforcement of ethics, consumer protection, and quality standards
- Mediators' knowledge, self-awareness and skills in facilitating communication and promoting appropriate resolutions
- Mediators' responsiveness to the goals of various DR programs and individual clients' needs
- Mediators' substantive expertise about the cases they handle

- The quality assurance process's perceived fairness, acceptability, and workability

Of course, factors in addition to any particular combination of "hurdles" and "maintenance" will also have a significant impact on how mediation practice ultimately develops in Maryland. These include:

- The extent to which the QA system is administered in a flexible manner -- e.g., following a single set of requirements or, instead, a generalized standard that is particularized for various areas of practice or even program-by-program
- Whether a QA system is administered in a centralized or decentralized manner -- e.g., is there a central QA decision maker or, instead, a delegation of authority?
- What entity (or entities) makes and enforces decisions regarding mediator quality, including credentialing -- e.g., state agency, mediator groups, the bar, courts
- The methodological basis for any QA system -- for instance, the quality of nurturing activities, or what criteria are used in setting hurdles and assessing abilities (observation, performance assessment, paper credentials, written tests, degrees, or other approaches)
- The extent to which provider organizations or potential users of mediation services employ, or pay heed to, the standard or approach that is established -- i.e., will Court X, Agency Y, or Roster Z view the system's requirements as important in, or at least relevant to, listing or selecting neutrals?
- Regional or other variations in access to training and other assistance
- The scope and nature of education to help consumers understand mediation, mediator styles and aptitudes, what to look for in typical settings, and how to select
- Other economic incentives and professional factors affecting parties, mediators, courts, other DR provider organizations, and quality assurers – e.g., practical availability of mentoring services, limited revenue or personnel resources, relative costs and benefits to mediators of obtaining credentials

Notwithstanding these factors, selecting any one of the various combinations of "hurdles" and "maintenance" is likely to have some predictable implications for the future of mediation in Maryland. Briefly described, they might be:

- *No hurdle/no maintenance programs* (free market). A market-based system could be seen as very close to "no hurdle/no maintenance," with any interested practitioner empowered to hang out a shingle with marginal, or even no, training, mentoring, continuing development, or oversight. This no-barriers approach could afford maximum diversity, a large mediator population, and minimum bureaucracy, but minimal consumer protection, ethics enforcement, and credibility. It could also allow undue emphasis on

substantive expertise or professional background. Skills would depend entirely upon individual mediators' inherent abilities and willingness to seek to improve them. Educating consumers and providing them accurate, useful information would assume critical importance in promoting informed selection and responsible, quality mediation.

- *High hurdle/high maintenance programs* (e.g., Family Mediation Canada). This highly professionalized system could yield great credibility, high mediator skill levels, and effective enforcement, but would likely require a significant bureaucracy. It could lead to substantial contention, with its high hurdles, and, unless some grandfathering provision were adopted, could run afoul of geographic variations, professional rivalries, and uncertain political acceptability. It probably would reduce diversity within the mediation field, unless specific outreach efforts were undertaken. While this system might enhance mediators' substantive knowledge (if acceptance criteria were written to include such knowledge), it could also reduce responsiveness to individual clients' or programs' needs by promoting particular styles or leading to a bureaucratized approach to QA.

- *High hurdle/low maintenance programs* (e.g., U.S. IECR). With a somewhat smaller bureaucracy than the prior system, this approach could yield substantial credibility, good mediator skill levels (depending on the criteria selected), and effective enforcement. However, it would also reduce attention to the value of mediators' continuing improvement of process skills and systematic attention to "reflective practice." And, by emphasizing high initial barriers to entry, it could produce disagreements over credentialing decisions, give rise to antitrust or other litigation, and negatively affect collegiality among Maryland mediators.

- *Low hurdle/low maintenance programs* (e.g., most state court mediation programs, Washington and Idaho Mediation Association credentialing). This approach would likely yield considerable diversity, a sizeable numbers of mediators, and greatly variable mediator skills levels, with little in the way of bureaucracy or support structures for mediators. It would establish some QA and ethics enforcement system that could be easily administered and would likely produce few disagreements over credentialing, but that could also allow undue emphasis on "contacts" and substantive expertise. This approach would reduce attention to the value of mediators' continuing improvement of process skills and systematic attention to "reflective practice." It would afford users limited quality assurance and the dispute resolution field fairly marginal credibility, unless combined with considerable attention to providing users with accurate information on mediators and educating them as to the value of being an informed consumer and the limits of this approach for securing quality practice.

- *Low hurdle/high maintenance programs* (e.g., most community programs, U.S. Navy workplace program). This approach could yield high mediator skills levels and effective enforcement, but would likely require some bureaucracy or structure for providing a support system for mediators. It would require some long-term commitment to, and by, each mediator and thus could raise practicality concerns (especially for solo practitioners) if embodied in a statewide system. It would likely produce fewer disagreements over credentialing than a high hurdle system, and could produce a somewhat greater sense of collegiality among Maryland mediators. If a truly effective support structure were established that targeted and addressed individual mediators' developmental needs, this approach could provide substantial credibility for the dispute resolution field, especially if combined with consumer education explicating the limits of "hurdles" as quality indicators.

VI. THE "VERTICAL AXIS": ISSUES IN CREDENTIALING MEDIATORS

What is credentialing? Credentialing is one method for attempting to assure competence. Most certification approaches involve some combination of requirements for training and experience -- occasionally with some academic degree or apprenticeship or mentoring. A number of professional groups have developed standards for "credentialing" mediators or other neutrals - i.e., vouching for the individual's competency to perform. Judy Filner's Certification Issues Outline for AFM's Voluntary Mediator Certification Project (May 2000)(see Documents Attachment) summarizes credentialing options and most of the key research and activity relating to credentialing mediators.

The primary options for credentialing are certification, rosters and directories, and licensing, discussed below.

Certification. Recognition through certification, usually by professional organizations, courts, or other bodies, indicates that an individual has met certain specified qualifications standards. While some programs have adopted approaches that rely less on entry standards than on targeting needed improvements in mediator skills or developing "informed consumers," many courts, legislatures, and agencies now employ some method of "certifying" mediators. A useful resource that includes information on certification and credentialing is Legislation and Court Rules re Mediator Qualifications, developed by Maria Mone, Director of the Ohio Commission on Dispute Resolution and Conflict Management. The document offers an extensive summary of state rules regarding standards, liability, ethics, and other rules relating to mediators.

Rosters and directories. There are now hundreds of rolls (or directories) of neutrals who are listed because they meet criteria established by a program or agency for interested parties or administrators to use in identifying a service provider. These

criteria may be highly restrictive, or may require very little to be listed. The Federal Deposit Insurance Corporation made an early effort at creating a roster and developed moderately restrictive selection criteria for mediators.

The U.S. Institute for Environmental Conflict Resolution, now maintains The National Roster of Environmental Dispute Resolution and Consensus Building Professionals. Deborah Laufer's Recommended ADR Links list has a section of links to other selected rosters of neutrals. Charles Pou's Issues in Establishing an EPA-Sponsored Roster for Neutrals' Services in Environmental Cases explores creating and running an effective roster of neutrals, including qualifications for listing neutrals, assessing their performance, making panel assignments, and handling complaints.

Licensing. A government process by which a person is designated as minimally qualified to engage in the defined practice. While many professions are licensed by the state, no state has used this method to certify ADR professionals. This may be because current knowledge about the qualifications needed to ensure effective DR practice are still being developed. The second (1995) SPIDR Commission on Qualifications thought licensure inappropriate because it risks establishing arbitrary standards in a field that is rapidly changing. Licenses typically confer certain due process protections. They also are accompanied by the power to impose sanctions for malpractice.

Criteria for credentialing? The criteria and means of assessing performance that are used for credentialing and rosters typically incorporate some or all of the following methods:

- Training requirements
- Mentoring or supervision
- Continuing education or training
- Amount of experience, i.e., number of cases
- Performance tests using live demonstrations
- Taped demonstrations
- User evaluations
- References
- Interviews

Most of these systems tend to be at the "minimalist" end of the spectrum, most often requiring little more than some training (typically 20-40 hours), some experience and/or supervised practice (3-10 cases), and modest continuing education. Occasional programs, such as the Family Mediation Canada and the U.S. Institute for Environmental Conflict Resolution, have raised the bar considerably beyond these typical requirements.

Who should credential? Some state mediator organizations serve as gatekeepers to credentials, whether designated a membership (or special status)

in an association or a credential to be cited. (e.g., Idaho, Washington) Several non-governmental groups have thought it highly beneficial to obtain some imprimatur from the state legislature or Supreme Court to give their decisions added luster and credibility. While most credentialing appears to occur at a central location, some observers have suggested that a more localized approach (e.g., at the regional or judicial district level) may have advantages, while acknowledging that the latter can introduce issues involving reviewer/assessor consistency and fairness.

State Supreme Courts, or affiliated entities, have served as the credentialing body in several states (e.g., Florida, Virginia, Georgia), though occasionally this notion has caused worries among non-lawyers (Texas) and among those with concerns about having competitors judge their potential competitors' qualifications. Several people expressed doubt over locating credentialers within a state bureaucracy, which may prefer to focus on paper credentials to ease their task. Similarly, some jurisdictions have tended to avoid governmental credentialing, in part from concern over possibly heightened openness, judicial review, and procedural requirements. Colorado contemplated using a state agency, though this proved some hindrance to implementation when a "sunrise" process, required to justify the need for regulation, turned up scant evidence of substantial problems stemming from incompetent neutrals.

What role should paper, performance, or other methods play in credentialing? Virtually no one interviewed believed that paper credentials or written testing can adequately measure mediator competence or potential, and many expressed strong views that observation of performance is the only valid means. They believed mediation requires skills that can only be demonstrated in actual practice or effective simulations, and fear trainers would "teach to" any written test.

Most would limit written testing to the substantive knowledge needed to handle specified types of cases; a few, such as Peggy Herrman, see somewhat greater potential for written tests; she sees them as possibly useful in combination with performance-based skills testing. A recent article in the ABA Dispute Resolution Section's Dispute Resolution (by Ellen Waldman) examines how some programs, including the Maryland Council for Dispute Resolution, have begun to make greater use of performance-based approaches.

How long should credentials last? A few programs take note of the fact that mediators' capacity to perform can change over time, often through no fault of their own. So far, none seem to have called for "re-credentialing," but some -- especially in community contexts -- emphasize the value of continuing education, maintaining a caseload over time, getting periodic observation and feedback, or other informal approaches to assuring continued competence.

Grandparenting mediators. Some jurisdictions have sought to accommodate the fact that mediators have taken many routes into the field, with some effective ones

having had little training, mentoring, or observation. A few have employed "grandparenting" (formerly grandfathering), or other credentialing approaches that recognize that there may be several paths to competence and acknowledge the value of actual experience, in assessing applicants who might otherwise lack specified training or other attributes.

Processes for developing credentialing systems. The most cogent advice is in the report of SPIDR's Second Commission on Qualifications, summarized above. Several observers cautioned that efforts to address credentialing are often highly contentious, and thought Maryland's committee might be somewhat optimistic in anticipating one year to be adequate time. A very recent Mediation Quarterly article by Linda Neilson and Peggy English, based in large part on Family Mediation Canada's multi-year effort, discusses "The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience."

Feedback has been split as to whether the development process should seek actual "consensus" (i.e., agreement) among stakeholders or be a "collaborative" one committed to maximum feasible involvement. Several efforts at true consensus appear to have floundered, including an Oregon Mediator Competency Work Group that met over a dozen times with limited results and the aforementioned Colorado one that produced an initial consensus that two constituencies then declined to endorse. According to some reports, both groups spent inordinate time seeking to address the scope of their efforts and define "mediation." One Colorado participant suggested that a lesson from that process is to assure that representatives continually keep their constituents briefed as options are explored and tentative decisions reached. The New York State DR Association's current credentialing effort has sought to achieve wide awareness, input, and buy-in through a consensus-based process that has involved extensive outreach, numerous focus groups, and group drafting exercises; they are just beginning to develop actual proposals.

Several people have advised making a concerted effort to include mediation consumers' views in the process of developing a QA system, pointing out that lawyers, judges, and parties often define quality differently than do mediators. These people noted, for example, research by Roselle Wissler indicating that more parties viewed the mediation process as fair (and thought the mediator understood their views) when the mediator expressed some views on the merits of the case (though not necessarily the appropriate outcome). Some recommended establishing a broad-based advisory committee to reach out to customers, much as has been done with the Texas Mediator Credentialing Association, and thought that such a committee, if it included representatives with credibility and authority, could enhance long-term implementation of a quality assurance system.

Market approaches. Some programs take a "free market" approach to credentials. Supporters of this method fear that licensing or certification may be restrictive and rob ADR of valuable perspectives and approaches. They believe a market

approach will ensure that only the best mediators continue to practice. This philosophy recognizes that a "market" solution requires consumers to be well-informed, so that they are better able to assess the kind of assistance they need and to evaluate the performance of the practitioner and program. Several state entities employing this method have devised consumer guides on selecting a neutral. See, for example, the Alaska Judicial Council's Consumer Guide to Selecting a Mediator and the Ohio Commission on Dispute Resolution and Conflict Management's Consumer Guide: What You Need to Know When Selecting a Mediator.

VII. THE "HORIZONTAL AXIS": OTHER QA APPROACHES

Credentialing is not the only way to promote quality practice by neutrals. Numerous methods of assessing mediator competence are available to be used in complementary combinations -- though it is difficult to say where "credentialing" stops and other means begin. Most people interviewed suggest that exclusive reliance on only one method -- for example training, interviews, references, observation, or performance testing -- is likely to measure or promote certain elements of competence while neglecting others.

These less formal approaches to promoting mediator competence generally involve a combination of several of the following:

- Standards for training programs
- Mentoring or supervision
- Continuing education and training
- Amount of experience (e.g., number of cases and/or hours)
- Performance tests or live or taped demonstrations
- Monitoring and user evaluations
- Complaint procedures/panels
- References
- Interviews
- Market approaches

Standards for Training Programs. Some standards-setters choose to certify or accredit trainers, address the content of the training program that should be offered to mediators, or discuss trainers' broader (or longer-term) responsibilitties. As one knowledgeable person has written, "Training standards should be reviewed with the goal of making trainers more accountable for 'graduating' or recommending incompetent students." Ansley Barton, "Who Goes There? New Questions at the Gate," 1 The Conflict Resolution Practitioner 43 (2001). This viewpoint appears to represent a growing trend, reflecting observers' belief that quality training -- especially combined with effective mentoring -- can make a substantial difference and that trainers should bear an obligation to mentor their students (or at least offer feedback that discourages substandard trainees from moving forward).

Several entities have adopted standards for approving mediator training programs, such as the Academy of Family Mediators. The Florida and Georgia state courts actually require all mediators registered for court and domestic relations cases to be trained by in-state training programs they have approved. The Florida Supreme Court Committee on Mediation and Arbitration Training provides the Supreme Court with recommendations relating to all aspects of mediation training including the development of mediation training program standards, mentorship requirements, continuing education requirements, and certification of mediation and arbitration programs. (See Florida's 2000 Training Standards, and Georgia's Training Approval Guidelines.) I have been told that Kansas had, at one time, a sophisticated set of training requirements, but have not yet tracked them down.

In 1993 a group of Texas mediation trainers conducted a series of discussions to examine possible standards for the basic 40-hour mediation training in Texas, leading to a document describing standards agreed upon by the trainers, the areas in which trainers agreed that standards would not be appropriate, and areas in which the trainers have not reached consensus. See Texas Mediation Trainer Roundtable Standards, Documents Attachment.)

The Ohio Commission on Dispute Resolution and Conflict Management has prepared a useful Consumer Guide for Selecting a Trainer.

Mentoring or supervision. Many community mediation programs, and some others, like the Massachusetts Office of Dispute Resolution's environmental mediation program, carefully assess a neutral's performance and provide appropriate follow-up to assure quality. Programs may use this method in connection with a credentialing process, or they may employ mentoring alone because it allows them to avoid developing a credentialing process and possible attendant controversies and uncertainties over its effectiveness. Their approach generally involves co-mediation or some form of apprenticeship, with experienced neutrals observing or leading new or problematic ones in actual sessions. They also may provide targeted follow-on training or mentoring, and occasionally offer telephone advice for neutrals with specific concerns.

Continuing education or training. Many community, agency-based, and court programs hold periodic seminars, in-services, "mediator master classes," conferences, or other training sessions with their neutrals (or, in some cases, those with special needs) concerning skills enhancement, new developments in the field, or handling commonly experienced problems. . The Texas advisory committee proposals, for example, would require that court mediators get a minimum of 10 hours of approved continuing education annually on mediation or mediation-related issues, with at least 2 hours on mediation ethics and 4 hours on mediation practice skills enhancement.

Amount of experience. Numerous programs and rosters permit any neutral to practice provided he or she has "logged" a certain minimum number of cases or hours in mediation. This is sometimes referred to as the amount of actual "flying time".(See the FDIC and USIECR roster requirements as examples; the latter requires over 200 hours in environmental or public policy settings, a requirement that is considerably higher than most.)

Performance tests or demonstrations. Many neutrals believe qualifications are best measured through performance tests, such as participating in mock mediation sessions in which candidates have a chance to demonstrate their ability. SPIDR's Commission on Qualifications, for example, recommended that "where standards are set they should be performance-based." While efforts have been made to develop these kinds of competency tests, few large-scale programs have had the time and resources for wide performance-based testing. (See the Test Design Project's Performance-Based Assessment: A Methodology, for Use in Selecting, Training and Evaluating Mediator.) A few court and community mediation programs have undertaken this approach is selecting candidates for training. For example, the Massachusetts Office of Dispute Resolution has a panel of more than 65 private-sector neutrals who were chosen based on a performance-based selection and training process.

Monitoring and user evaluations. ADR programs may also wish to systematically monitor neutrals' performance to identify situations involving quality concerns. Some programs, like MODR's and the CPR roster, rely extensively on feedback from users as a tool to assess their neutrals. A similar approach used by some programs involves removing those neutrals who are never selected by parties. Another common method is using post-mediation questionnaires or evaluations from the attorneys and/or parties in each case to ascertain whether they found mediation helpful, and whether the mediator maintained neutrality, understood the issues, stimulated creative solutions, helped them reach agreement, and whether they would use the mediator again.

Complaint procedures/panels. Establishing complaint procedures or a complaint "hotline" for parties is a method some programs employ to promote quality. A few programs, such as MODR, then follow up with targeted mentoring or training when parties' assessments indicate troublesome patterns of behavior by certain neutrals. Some people expressed a view that complaint processes should be available both to customers of mediation services and to mediators wanting a say concerning negative assessments of their performance.

Some jurisdictions employ more formal procedures for assuring that neutrals perform adequately. The Florida Supreme Court, for example, created advisory panels to field written requests from mediators on ethics questions and party grievances. The typical sanction in Florida has tended toward requiring further training or imposing restrictions on certain types of practice (e.g., no more family

cases). A very few mediators have been suspended. In practice, however, agency programs have seldom found it necessary to employ such formal procedures.

A few entities and observers have suggested employing mediative, or ombuds, methods to handle consumer complaints. Related issues include "who should review complaints" and what degree of confidentiality should be afforded to complaints, complaint-handling, and decisions of reviewers.

References. A few programs (e.g., Idaho and Washington) have required neutrals to provide references or lists of clients from prior cases.

Interviews. A few programs -- such as the D.C. Superior Court's Multi-Door Courthouse and some agencies' collateral duty mediator programs -- employ interviews as part of their mediator selection process, or get reports from the neutrals themselves and use them as a tool in assessing their understanding and performance.

VIII. BEYOND THE GRID: QA FOR PROVIDER ORGANIZATIONS

It is worth noting that the quality of dispute resolution services that users ultimately receive will depend on factors besides the skills of the individual neutral involved. Recently, thoughtful observers have also begun to focus more broadly on quality issues relating to the ADR programs that perform intake, matching, advice-giving, and other tasks in providing parties with the services of ADR neutrals. In addition to assessing practitioner competence, these “provider organizations” may conduct screening, provide training, assign cases, educate users, and mentor and monitor neutrals, as well as provide intake and follow-up. These observers have found that provider organizations have responsibilities to provide fair, impartial, and quality processes.

The aforementioned NAFCM project is one such effort. Earlier, the CPR-Georgetown Commission on Ethics, proposed Principles for ADR Provider Organizations. These principles recognize the central role of the ADR provider organization in the delivery of fair, impartial, and quality ADR services. According to the Commission, an ADR Provider Organization includes any entity or individual holding itself out as being able to (1) provide prospective users with conflict management services directly, or (2) provide prospective users with conflict management services indirectly through the management or administration of such services-including referral, clearinghouse, roster creation, brokering or similar activities. "Conflict management services" include activity as a neutral third party assisting disputants to clarify or resolve their conflicts, as well as provision of consulting, design, training, or other services intended to enable a user to better employ neutrals or enhance the capacity to resolve conflicts more effectively.

Several core principles guided this effort:

- It is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR provider organizations and to inform consumers, policy makers, and the public generally.

- The most effective architecture for maximizing the fairness, impartiality, and quality of dispute resolution services is the meaningful disclosure of key information.

- Consumers of dispute resolution services are entitled to sufficient information about ADR provider organizations and their neutrals to make well-informed decisions about their dispute resolution options.

- ADR provider organizations should foster and meet the expectations of consumers, policy makers, and the public generally for fair, impartial, and quality dispute resolution services and processes to ensure that best practices will be highlighted in the development of the field.

The CPR-Georgetown Commission on Ethics recommended several possible approaches to addressing the numerous issues of quality, selection, administration, access, oversight, and design that converge when public and private entities provide ADR services. It recognized that, as dispute resolution activity becomes increasingly institutionalized, the need will grow for those who administer ADR programs to ensure that their efforts are effective and their activities viewed as fair and appropriate. The Commission recognized that provider organizations' efforts should include some self-assessment drawn from the following:

Obtaining consumer input/review of complaints. Some programs, like the D.C. Superior Court's Multi-Door Courthouse, seek parties' or lawyers' feedback as to the manner in which they have administered a case, in addition to their assessment of the neutral's performance.

Self-assessment/performance audits. Occasionally, programs have either retained a consultant, or undertaken themselves, to evaluate their administration efforts.

Peer review. This could include seeking review and input from administrators of other ADR programs or from ADR experts who can provide an unbiased look at the program's operation.

Finally, provider organizations can help themselves by doing more to share information and experiences among themselves, think through matters of effective systems design and evaluation, and focus explicit attention on "best practices" much as mediator groups have begun to do. NAFCM's current effort to develop an assessment tool for community mediation programs, discussed above, is one

example of how providers are beginning to address this aspect of quality assurance.

IX. PROCESS OPTIONS FOR THE OVERSIGHT COMMITTEE

MACRO and the oversight committee have already begun a process to gather data helpful to a sound decision. The next step is to decide on an approach for considering that information, examining technical and policy issues involved, obtaining input or agreement from affected interests, and developing principles and a final decision.

Collaborative decision making processes range from one-time hearings and brief information-sharing activities to full-fledged consensus procedures like negotiated rulemaking. I see these potential process options for the QA effort:

(1) a structured data gathering and information exchange process that provides interested persons one or more chances to offer views to the oversight committee (and perhaps react to interim proposals),

(2) an advisory process in which selected representatives seek to reach a general agreement on recommendations to the oversight committee and no one is formally "bound" by the decision, and

(3) a consensus decision making process in which representatives of affected interests negotiate in an effort to reach a specific agreement and each interest is expected to abide by it.

Experience suggests that undertaking a full consensus process ("option 3") – similar to the one now being employed by NYSDRA -- would be challenging, resource-intensive, and time-consuming. While some people thought that a consensus process would offer greater incentive for the participants to “think outside the box” and find creative solutions, most were dubious about achieving full agreement among so many affected entities.

Many emphasized the value of real communication and mutual education. Some of these supported a facilitated, broad-based decision making process ("option 2") that would seek to produce actual agreement on policy recommendations advising, but not binding, the oversight committee. They cited several advantages to their approach: (1) increasing some parties’ comfort level in mutual sharing of information and perspectives, and (2) permitting more focused, intensive dialogue on “real world” concerns that should be addressed in crafting realistic guidance.

However, even supporters of "option 2" saw difficulty reaching full consensus, given that the process may have contentious aspects. They also wondered whether any consensus that is reached could really bind all key parties.

My tentative recommendation is option 1. The Oversight Committee would:

- sponsor a structured data gathering and information exchange process that provides interested persons one or more chances to offer their views,

- develop background papers, statements of options and principles, and/or interim proposals that interested persons could react to, and

- seek consensus within the Committee on an ultimate QA plan that takes into account as many views and reactions as possible.

Of course, this approach will require the representatives on the oversight committee to ensure that they speak effectively for their constituents, and keep them apprised of developments, as the committee consensus process moves forward.

X. SELECTED RESOURCES ON QUALITY ASSURANCE

Academy of Family Mediators, Outline of Credentialing Basics and Application for "AFM-Approved Mediation Training Program." (May 2000). *Extensive summary of credentialing literature and initiatives in credentialing ADR neutrals.* http://www.mediate.com/afm/afmtrainapp.html

Academy of Family Mediators, Standards of Practice for Family and Divorce Mediation. http://www.mediate.com/afm/afmstnds.html:

Alaska Judicial Council, A Consumer Guide to Selecting a Mediator (1999). *A guide to picking a mediator for a particular kind of case.*

American Bar Association Section of Dispute Resolution, Focus: Credentialing Mediators, Dispute Resolution magazine special edition (Fall 2001). *Contains several articles, including looks at the new trends (Judy Filner), use of skills-based testing (Ellen Waldman), and rosters and mediator quality (Peter Maida).*

Melissa Broderick, Ben Carroll, and Barbara Hurt, Quality Assurance and Qualifications (2001). See NAFCM website, projects, quality assurance. Explicates NAFCM's quality assurance standards, current NAFCM activities, and policy views on credentialing. http://www.ajc.state.ak.us/Reports/mediatorframe.htm

Chris Honeyman and Charles Pou, Finding and Hiring Quality Neutrals: What Every Government Official Needs to Know (1996). *Monograph based on workshops addressing issues like sources of neutrals for agency cases, conflict of interest,*

budgetary, and contracting issues.
http://www.convenor.com/madison/fh1.htm

Center for Dispute Settlement & Institute for Judicial Administration, Republished by CAADRS (Center for Analysis of Alternative Dispute Resolution Systems). *Includes model standards for court-connected mediation programs to guide and inform courts interested in initiating, expanding or improving mediation programs to which they refer cases (1993).*
http://www.caadrs.org/studies/nationstd.htm

Charles Pou, Issues in Establishing an EPA-Sponsored Roster for Neutrals' Services in Environmental Cases (1997). *This interim report to the U.S. Environmental Protection Agency explores issues in creating and running an effective roster of neutrals (including qualifications for listing neutrals, assessing their performance, panel assignments, advising parties, and complaint handling).*

CPR-Georgetown Commission on Ethics, Principles for ADR Provider Organizations (2001). *These principles advise ADR provider organizations on the delivery of fair, impartial, and quality ADR services. Includes a taxonomy suggesting the breadth and diversity of DR provider organizations.*
(June 2000 draft for comment: http://www.cpradr.org/screen2b.htm)

Deborah Laufer, "Recommended ADR Links" Extensive list of links compiled by Laufer and the Federal ADR network. *Contains, among other things, links to selected rosters of neutrals.*
Download pdf version: http://www.adr.af.mil/general/RecommendedADRLinks.doc, or contact Deborah at deborah.laufer@erols.com

FDIC, Report of the FDIC/RTC Qualifications Panel (1992). *One federal agency's effort to develop selection criteria for mediators.*

Key Bridge Foundation, An Introduction to Mediator Credentialing (2000). *Contains basic data on mediator credentialing, its background, and issues involved.*
http://www.keybridge.org/med_info/credentialing.htm.

Margaret L. Shaw, Selection, Training, and Qualification of Neutrals (State Justice Institute, Sept. 1993). *A very useful report summarizing lessons learned from research on critical skills for effective neutrals and how they are best acquired.*

Rogers, N., and Craig McEwen, Mediation: Law, Policy, Practice. In "Regulating for Quality, Fairness, Effectiveness, and Access" (Chapter 11). Clark Boardman (publisher). *Discusses some possible approaches to seeking quality, effective, fair mediation.*

Ohio Commission on Dispute Resolution and Conflict Management, "Nationwide Survey of Mediator Qualification Statutes and Court Rules," (2001). *Extensive*

summary and compilation of state laws and rules regarding qualifications, liability, ethics, and other standards relating to mediators. Compiled by Maria Mone, OCDR Director. http://www.state.oh.us/cdr/

Ohio Commission on Dispute Resolution and Conflict Management, Consumer Guide for Selecting a Trainer. http://www.state.oh.us/cdr/brochures/cgtrainer.htm

Ohio Commission on Dispute Resolution and Conflict Management, Consumer Guide: What You Need to Know When Selecting a Mediator, http://www.state.oh.us/cdr/brochures/cgmediator.htm

SPIDR Commission on Qualifications, Qualifying Neutrals: The Basic Principles (1989). *A report addressing skills necessary for competent performance as a neutral, and basic principles that should influence policy for setting qualifications for mediators, arbitrators and other DR professionals.*

SPIDR Environmental/Public Disputes Sector Committee, Environmental/Public Policy Sector--Competencies for Mediators of Complex Public Disputes (1992). *An overview developed by the Environmental/Public Disputes Sector that addresses what qualifies people to serve as a mediator in environmental and complex public disputes.*

SPIDR Second Commission on Qualifications, Ensuring Competence and Quality in Dispute Resolution Practice (1995). *Report that sets forth several questions for consideration by policy makers, practitioners, program administrators, and consumers interested in competent practice.*

SPIDR Second Commission on Qualifications, A Guide for Implementing the Seven Steps to Understanding and Ensuring Competent Dispute Resolution Practice (Draft 1997).

National Institute for Dispute Resolution (NIDR), Test Design Project, Performance-Based Assessment Methodology for Use in Selecting, Training and Evaluating Mediators (1995). *Consensus-based report setting forth general KSAOs for mediators and offering a conceptual framework and methodology for using performance-based methods for assessing candidate mediators' likely success.* http://www.convenor.com/madison/performa.htm

Dobbins, W. L. The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market?, Florida Journal of Law and Public Policy 7 (94-95). *Overview of some approaches to quality and their potential consequences.*

Ohio State University College of Law, and the Supreme Court of Ohio Office of Dispute Resolution--Planning Mediation Programs: (2000). *Chapter Six, "Staffing*

the Mediation Program" (pp. 6-9 through 6-17) includes quality assurance http://www.sconet.state.oh.us/dispute_resolution/deskbook/ch06.pdf.

XI. INTERVIEWS CONDUCTED TO DATE FOR THIS REPORT

Greg Abel -- Washington Mediation Association

Jim Alfini -- Northern Illinois University Law School

Terry Amsler, William and Flora Hewlett Foundation

Linda Baron – NAFCM

Howard Bellman -- Madison, WI

Lisa Bingham -- University of Indiana School of Public Administration

Scott Bradley -- (formerly) Executive Director, North Carolina Community Mediation Centers

Ramona Buck -- MACRO

Chris Carlson – Policy Consensus Initiative

Lorig Charkoudian – Community Mediation Program, Baltimore, MD

Craig Coletta – NAFCM

Mark Collins -- ADR Coordinator, NYS Court System

Cris Currie -- Washington Mediation Association

Dorothy Della Noce -- Institute for the Study of Conflict Transformation

Suzanne Duvall -- Texas Mediator Credentialing Association; Texas Supreme Court ADR Advisory Committee

Donald Gifford – University of Maryland Law School

Aimee Gourlay -- Minnesota Center for Dispute Resolution

Cindy Hallberlin -- (formerly) USPS REDRESS program

Kenn Handin -- NYSDRA

Gary Hattal -- FMCS

Margaret Herrman -- University of Georgia

Lisa Hicks -- NYSDRA

Chris Honeyman -- Hewlett Theory-to-Practice Project; Test Design Project

Susan Jeghelian -- Massachusetts Office of Dispute Resolution

Marvin Johnson, Silver Spring, MD

Bob Jones – Florida Conflict Resolution Consortium; SPIDR Second Commission on Qualifications; ACR Senior Professionals initiative

Dan Joyce -- Cleveland Mediation Center

Susan M. Kalil – Circuit Court for Montgomery County

Kim Kovach -- University of Texas Law School

Martin Kranitz – National Institute for Conflict Resolution

Pam Madrieata -- Idaho Mediation Association

Steve Marsh -- Dallas, TX

Bernie Mayer -- CDR, Boulder, CO

Martha McClellan -- FDIC

Joe McDade – U.S. Air Force ADR program, ADR Specialist

Michael McWilliams, Baltimore, MD

Carrie Menkel-Meadow -- Georgetown Law School

Christina S. Merchant -- Arlington, VA

Ellery M. “Rick” Miller – University of Baltimore

Patricia Miller – National Institute for Conflict Resolution

Maria Mone – Ohio Dispute Resolution Commission

Dana Morris-Jones, Severna Park, MD

Hon. James T. Murray – Office of Administrative Hearings, Hunt Valley, MD

Mike Niemeyer -- Oregon Attorney General's Office

Pamela Ortiz – Administrative Office of the Courts, Annapolis, MD

Lisa Johnson Peet – Community Mediation Program, Baltimore, MD

Sharon Press -- Florida Dispute Resolution Center

Eileen Pruett – Ohio Supreme Court

Richard Reuben – University of Missouri Law School

Robert J. Rhudy – Maryland Legal Services Corporation

Julia Roig – (formerly) U.S. Office of Special Counsel, ADR Specialist

Mary Ryan -- U.S. Navy ADR program, ADR Specialist

Cindy Savage -- ADR Coordinator, CO Judicial Branch ADR Program

Carl Schneider -- Silver Spring, MD

Margaret Shaw – New York, NY

Bud Silverburg -- Texas Supreme Court ADR Advisory Committee

Bruce Stratton -- Texas Supreme Court ADR Advisory Committee

Sid Stahl -- Texas Mediator Credentialing Association

Donna Stienstra -- Federal Judicial Center

Anne Turner – Circuit Court for Worcester County

Hon. Melanie A. Vaughn – Baltimore, MD

Nancy Welsh -- Dickinson College of Law

Roger Wolf -- University of Maryland Law School

SUMMARY OF CONSULTANT'S REPORT ON MEDIATOR QUALITY ASSURANCE TO MACRO AND THE MARYLAND MEDIATOR QUALITY ASSURANCE OVERSIGHT COMMITTEE

THE ISSUE

- Mediators are asked to play complicated, diverse roles that may involve -- depending on the program, the parties, or the specific case -- efforts to "transform," to "facilitate," to "evaluate," or to perform a combination of these (and perhaps other) activities.

- Strong differences exist within the dispute resolution ("DR") community and among mediators' clients as to how to define and promote quality practice, and how to assess who has the attributes crucial to a quality outcome.

NATIONAL RESEARCH

- The Mediator Quality Assurance report -- by Charles Pou, a mediator and consultant in Washington, DC -- seeks to map ways in which the DR field has sought to define and assure mediator competence in theory and in practice.

- The report explores the landscape of activity relating to mediator competence, briefly summarizing research, policy advice, and available resources as to (1) the kinds of knowledge, skills, abilities, and other attributes ("KSAOs") that have been deemed important to effective performance and (2) how those attributes are best acquired.

- It also explores how legislatures, courts, agencies, professional groups, and others in various jurisdictions have employed credentialing and other approaches to try to promote mediator quality.

- Based on program reviews, literature, and interviews with about 80 experienced administrators, practitioners, and academics, the report explores some practical issues and options that quality assurance ("QA") efforts may raise, including:

    - The range of approaches to mediator quality assurance and credentialing now being employed (e.g., performance-based testing, paper credentials, free market)

    - Who is credentialing, or otherwise managing, mediators

    - How requirements are being imposed (e.g., certification, licensing, roster listings, association membership requirements)

    - What we have learned about mediators' behavior, clients' needs, and the political realities involved in addressing mediator quality assurance

- Challenges for the field (and for policy makers in Maryland) -- defining quality; who decides who is qualified; the roles of substantive knowledge, training, continuing education, mentoring activities, and other factors; feedback, grievance, and ethics enforcement methods; and processes for developing acceptable QA systems and standards.

WHAT WAS FOUND

- Even as mediators and researchers have labored over the past decade or so to define "what mediators do" and better understand "who does it well, and how," thousands of programs and parties seeking neutrals have had to make day-to-day choices. These include disputants, their lawyers, judges, court administrators, government agencies, and others establishing rosters or means of "vouching for" the competence and reliability of their mediators.

- While ADR's growth has led some to argue for competency standards to protect consumers and promote integrity, many still prefer consumer education and market approaches; they doubt that we know enough to predict quality or understand the full ramifications of credentialing.

HURDLES AND MAINTENANCE

- The attached chart summarizes some of the more interesting or innovative "vouching" strategies, which generally include some combination of "hurdles" (i.e., standards mediators must meet to begin to practice) and "nurturing" or "maintenance" (i.e., activities to enhance skills over time). Obviously, where a program lies on this "QA grid," and the manner in which it implements its choices, have implications for its credibility, as well as for the professionalism, ethics, and diversity of the field; the report seeks to summarize the strengths, weaknesses, and consequences of each generic combination of hurdles and maintenance.

- While occasional "high hurdle" programs (e.g., Family Mediation Canada) require many hours of training, experience, and/or observation, most authorities have set fairly undemanding QA standards that do not involve licensing -- typically expecting minimal training (20 to 40 hours) and some mediation experience (seldom more than a few cases) of applicants.

- "High maintenance" programs offer mediators nurturing based on co-mediation, follow-on training, coaching, filming sessions, in-service discussions, and opportunities for reflection and improvement. Outside community programs, "maintenance" requirements have generally been modest, with little oversight -- tending toward some commitment to periodic continuing education and adherence to generalized ethical standards.

WHO ADMINISTERS THE PROGRAM

- The sites of quality assurance programs and decision making vary; they include individual judges, court administrators, state supreme courts, advisory groups authorized by courts, executive agency and other roster administrators, other official

entities, and private mediator associations. These activities may be centralized, with a single entity setting standards and accepting applications, but are often decentralized.

CONTINUING EDUCATION

- A recurrent theme in interviews was the importance of continuing development – e.g., training, mentoring, and continuing education. There was less agreement as to what kind and how much, but considerable support for a framework that would encourage, or even require, regular exposure to other mediators, styles, and experiences to promote a broader awareness and "reflective practice."

- Many people saw feedback and complaint handling procedures as key elements of a QA system, but relatively little attention appears to have been paid to specifics so far. In particular, grievance and enforcement processes may raise confidentiality and fairness challenges.

- A recent trend appears to call for placing greater focus on accrediting mediator training programs and putting some duties on trainers to advise trainees of their strengths and weaknesses or provide mentoring or continuing feedback.

OTHER OBSERVATIONS

- Finally, the report recognizes that QA activities do not occur in a vacuum, and discusses some political, professional, and other aspects, including these:

    - In many ways, the process an entity employs to arrive at a QA system can be as important as the ultimate substantive choices made. Not surprisingly, inclusion works better than exclusivity. On the other hand, efforts to achieve a broad consensus of all stakeholders have been marked by limited success.

    - An obvious key for successful QA systems – albeit easier to identify than to achieve -- is the extent to which provider organizations or users of mediation employ, or at least heed, standards that are established; i.e., will Judge X, Attorney Y, or Roster Manager Z view these requirements as important in, or at least relevant to, his/her listing or selection decisions?

    - Good mediators come from a variety of backgrounds, and many have developed skills through means other than "approved" training. Any effort to address quality that is exclusive, as opposed to inclusive, risks reducing diversity and eliminating potentially excellent mediators.

    - It may be valuable for QA system developers to try to bridge the gap that is often perceived to exist between attorney-mediators and other mediators.

    - QA system developers should try involving users of mediation services, as well as mediator provider organizations, to the extent possible.

    - Whatever QA strategy is adopted, educating users of mediation services about what to look for in a DR process and in a mediator, as well as the limits of "hurdles" or any other credentialing approach, will be important.