

INSTITUTIONALIZATION OF MEDIATION

Forrest S. Mosten

Mediation has evolved, grown, and been accepted within our society from preschools to doctoral programs and in courts, legislatures, and private industry. The passage of the Uniform Mediation Act, the birth of the Association of Conflict of Resolution, and the involvement of government bodies in the regulation of mediators indicate the importance of the institutionalization of mediation within every aspect of our society. This article focuses on a few of the hot issues currently swirling in the field raising questions for practitioners, researchers, and others involved in shaping access to conflict resolution policy and the future of the mediation profession.

Keywords: *institutionalization of mediation; conflict resolution; mediation; legal access; unbundling of legal services*

The field of mediation is changing and evolving rapidly. In China, mediation has been the primary method of resolving conflict for thousands of years. Historically in the United States, we have generally used the court system to settle disputes. As a society, we are coming to recognize that this system is not working to our advantage, and we are turning to mediation as a far superior method of resolving conflict. Within the past two decades, mediation has grown exponentially and continues to become entrenched in our schools, courts, businesses, and governmental agencies—in every area of our lives (see Bush, 1989/1990; Ravinda, 2002).

As a young and evolving profession, change can occur at a fast rate and through the confluence of many sources. Some institutionalization has started from within existing institutions (courts, legislatures) and has spread into the private sector (Mosten, 1999). Other changes in institutions began with experiments by practitioners and burgeoning organizations and are trickling up to adoption by institutions. This symbiosis of private and public innovation has fertilized the institutionalization of mediation.¹

In discussing institutionalization of mediation in her groundbreaking article “Institutionalization: Savior or Saboteur of Mediation” (1997), former Professionals in Dispute Resolution (SPIDR) President Sharon Press defines institutionalization as

any entity (governmental or otherwise) which, as an entity, adopts [Administrative Dispute Resolution (ADR)] procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR procedures, and government agencies that incorporate ADR processes in developing rules and regulations. (p. 904)

Author’s Note: I appreciated the opportunity to observe a videotape of the 2003 Association for Conflict Resolution Family Section Closing Plenary in Denver, Colorado, on this topic and the helpful comments made in this program by Robert Benjamin, Gregory Firestone, Nina Meierding, Sharon Press, and Cynthia Savage, some of which are incorporated in this article. I also wish to acknowledge the efforts of Robert Smith of Fort Collins, Colorado, who personally videotaped the Closing Plenary and made it available as a resource for this article. Finally, I wish to thank my friend and colleague, Gregory Firestone, Family Court Review Guest Editor, for his extraordinary efforts in arranging and moderating the inspirational Closing Plenary in Denver, coordinating the input of the participants of the plenary for this article, and providing his ideas and support throughout the writing and editing process.

FAMILY COURT REVIEW, Vol. 42 No. 2, April 2004 292-303
© 2004 Association of Family and Conciliation Courts

The present article shall expand that definition to also include the development of mediation as a profession within society.

This article will focus on a few of the hot issues currently swirling in the field. Some of the issues are being debated and decided exclusively within the mediation community itself. However, most changes within the mediation world are being driven by forces outside the mediation field such as legislatures, the courts, the legal profession, consumer groups, and the media as well as within the mediation community.

MEDIATION AS A PROFESSION

When I first started mediating in 1979, very few of us called ourselves mediators. We were therapists who mediated, lawyers who mediated, and people with various other backgrounds who mediated. Our identities were with our professions of origin—mediation was a professional activity that we did—it was not our primary profession.

In her brilliant work on the emergence of mediation as a profession, Cheryl Picard (2000) of Carlton University in Ontario, Canada, describes general attributes of professions: systematic theory, professional authority, sanction of the community, regulative codes of ethics, and a professional culture. Although many in the field believe we are already a profession, under Picard's criteria, mediation is still in the infancy stage as a profession—yet the trends of institutionalization that follow indicate that the emergence of mediation as a profession is picking up momentum. Citing Deborah Kolb, Picard intimates that becoming a profession is important to mediators:

A mediator's work is not based solely on scientific knowledge or technically specialized skills. Instead their knowledge is largely tacit and their skills potentially available to others. This means that the basis upon which they claim authority to practice is regularly open to challenge. Thus, mediators are forced to gain credibility by projecting an impression of professionalism. They try to foster that impression that they are experts, they manage their rapport to build trust with the parties, and they legitimate their efforts by mobilizing data.

There is still little agreement about core values or knowledge areas, there is also not a system of language that is generally understood by those who work as mediators. Thus far, legislative restrictions have not been sensitive enough to the various mediation approaches currently being used in the field. This in turn, constricts rather than enriches mediation practice.

The desire to become a peacemaking profession, separate and distinct from professions of origin, is affecting the way mediators are trained and the work that we do. The culture of an Association for Conflict Resolution (ACR) conference dedicated to conflict resolution feels, and is in fact, different in kind than conferences on mediation sponsored by the American Bar Association (ABA), private industry, or government officials. Some tangible features of mediation conferences include an emphasis on conflict resolution theory and skills, interdisciplinary approaches, lobbying for mediation interests, and career building in the mediation. Other, less concrete differences include the collaboration and inclusion in planning conferences, the generosity in welcoming aspiring mediators, and the consumer and individual empowerment orientation of the programs and interaction. Research is required to establish whether these differences remain over time and have an impact on the services and impact that establishing a separate mediation profession will have on society.

REGULATION OF MEDIATORS

Permitting “a thousand flowers to bloom” has been mediation’s history. The proliferation of different styles and backgrounds has been a blessing and a curse for consumers. The trade-offs between regulations, creativity, accountability, and quality control have generated a vigorous dialogue that is currently raging through and around the mediation community.

Generally, most professions have regulations that control entry and monitor quality. In return, qualified members of that profession are granted virtual monopolies to practice by the state—those who do not demonstrate proficiency to enter those professions are often barred by civil and criminal penalties from practicing those professions.

Professions such as law, mental health, architecture, teaching, and real estate generally have licensing procedures to ensure minimum qualifications for admission and continuing education and discipline systems to ensure quality and protect the public from incompetent or unscrupulous practitioners.

Despite some public criticism of licensed professionals, a license is designed to generate public confidence in the profession. Licensure is the ultimate institutionalization of a profession in our society. Mediators and supporters of this process of dispute resolution, management, and prevention would like to believe that mediation is viewed and treated as a profession by societal institutions and consumers. Yet not one jurisdiction within the United States requires a license to practice mediation. Why? There are several arguments against increased regulation of mediators:

- Mediation is a young profession and is not as widespread as more established professions such as dentistry or car repair. Mediation’s growth has been due to creative experimentation unhampered by state regulation—licensure might impede mediation’s growth or have it captured by the legal profession, legislature, courts, or other institutions with missions and values that are not consonant or even may be antagonistic toward mediation.
- Mediation’s foundation is based on empowerment of participants and freedom from controlling societal institutions and other licensed professions.
- Although started by professionals, mediation has a populist culture—mediators are learners and the parties are in charge of determining the curriculum. Many view licensure as creating a professional elite—and elitism is the antithesis of mediation. Under licensure, who would be let in to practice mediation—who would be left out? Who makes these decisions?

Mediation exists in a myriad of roles and flourishes in a variety of contexts. Do 12-year-olds who perform peer mediation in school conflicts need a state license? Do community mediation programs that depend on citizens with differing educational backgrounds and life experiences need to limit their volunteers to licensed mediators? Ombudspersons and other institutional facilitators and complaint processes provide conflict resolution services daily—are they immune from licensure?

- If licensed, mediators become truly part of the system—and could be viewed as agents of the system sacrificing mediator independence and credibility as outlets for citizens who are dissatisfied with or otherwise want to handle their conflicts outside of existing institutions.
- There are currently lawyer-mediators, therapist-mediators, lay-mediators, and mediators from virtually every discipline serving in governmental and private sector work. If regulation were to occur, the challenges of overseeing all the separate disciplines are monumental, potentially imposing an institutionalized value system on mediators coming from outside “favored” professions.

- Consumer satisfaction is high with mediation, and malpractice lawsuits against mediators are nearly nonexistent. If mediation is serving the needs of the public without licensure, why impose unnecessary and costly regulation? If it ain't broke, why fix it?
- Due to the problems and cost of regulation, there is a countertrend for deinstitutionalization. Legal technicians and documentation services are performing traditionally licensed lawyer work, and herbalists are helping consumers that traditionally utilized licensed pharmacists. If licensure has been restrictive in other professions, why use it with mediation?²

CERTIFICATION

Many states have instituted certification of mediators as a compromise between no regulation and licensure. Florida and Virginia are the leading states with comprehensive certification programs. Certification generally does not bar noncertified mediators from practicing in the marketplace—rather, it accentuates the competence and credibility of certified mediators and gives them an advantage in the marketplace by allowing them to call themselves “certified.”

Certification plays a more restrictive role in determining participation in court panels and rosters of mediators and qualifying for state funding. In Florida, mediation has been institutionalized as an element of the court's mission. Florida's comprehensive mediation certification program has led to an increase in initial training and continuing education requirements for mediators, leading to an increased use of mediation inside and outside the courthouse (Folger, Della Noce, & Antes, 2001).

Questions remain, however: What price has mediation (and the public) paid for the institutional acceptance that certification has provided? Again, there are several views.

The questions begin by asking, Who selects the model of mediation that is required for certification? and Will the model selected improve the field or restrict the competence of mediation services options for consumer choice? Also, mediation is a broad and diverse field. If certification is adopted within a jurisdiction, should certification standards be the same for community and organizational mediators as they are for commercial mediators in litigation-oriented contexts? Should certifications differ depending on the substantive field? Should family mediators be required to have knowledge of such areas as divorce research, domestic violence, child support guidelines, and family legislation and case law?

Equally provocative are questions around who should determine certification evaluation criteria and who should examine whom. Many mediators have successful practices, but may not fit into the “model” around which certification standards may be based. For example, despite the familiarity with many Michigan lawyers of “late-stage evaluative mediation,” the Michigan Supreme Court has adopted a rule that now requires facilitative training for inclusion on court mediation panels (Michigan Court Rule §3.216).³ The U.S. Postal Service mandates an even less directive transformative approach for the training of mediators in its nationwide mediation program. As a variety of models expand and are adopted by institutions throughout the world, consumer and academic research will contribute to a better understanding of the impact of various models and requirements.

Questions also remain as to the type of testing required. Is a written exam sufficient to determine competence in a profession requiring skill in dealing with people? Are performance exams too expensive or too subjective? Are extensive co-mediation requirements (e.g., Virginia⁴) too time consuming for mediators and assessors, or is the increased supervised experience a reasonable entry barrier to increase quality and competence in the mar-

ketplace? Or are these entry barriers just another form of elitism and anticompetitive advantage for current mediators creeping into the mediation marketplace? Does it improve the profession and protect the public to require mediators with many years experience to be required to take basic mediation courses and/or be evaluated by less experienced mediators to obtain certification? On the other hand, would it be fair to “grandfather” these veterans granting certification and exempt them from some or all of newly promulgated certification standards? These and other questions remain.

VOLUNTARY STANDARDS

Colorado and other states have opted for a high level of voluntary standards to ensure competence and protect the public. Rather than have a state-run certification program, the state and the mediation profession have partnered to promote voluntary standards, training, and certification for individual programs. Although this approach does not have the disciplinary hammer of licensure system or the market imprimatur that certification provides, this approach balances the need for quality assurance with the freedom to innovate relatively free from governmental interference.

Nationally, mediation organizations have provided certification programs for their members that attempt to meet many of the same goals of licensure and certification. The ACR maintains an Advanced Practitioner membership for family mediators that meet its high standards for training and continuing education and peer supervision.⁵ ACR regulates its family mediation training providers with stringent qualification screening—each training provider must have materials reviewed and new programs approved for ACR continuing education credit.⁶

Private closed panels of mediators have their own qualifications that use quality as a marketing tool. Judicial Arbitration and Mediation Service (JAMS), American Arbitration Association, National Mediation Centers, and regional and local mediation companies have qualifications and ongoing training requirements for mediators who wish to benefit by association with them.

MANDATORY COURT-CONNECTED MEDIATION

Courts in every jurisdiction have initiated programs that require litigants to participate in mediation at some stage (sometimes during several stages) prior to trial. Procedures vary as to how litigants sign up for mediation, the timing of the process, the qualification of the mediators, whether the mediators volunteer or are paid, and numerous other ways.

Mandatory programs supplement voluntary mediation and other ADR options offered inside and outside the courthouse. Knowing that mediation will be court ordered at some stage in the process, litigants can choose to mediate early with a mediator of their own choice rather than be limited by court restrictions. This has an ancillary benefit as research has demonstrated that consumer satisfaction increases the earlier that mediation occurs (Beck & Sales, 2001).⁷

The growth of court-connected mediation programs has catalyzed a symbiosis between court mediation and mediation in the private sector (Shaw, Singer, & Povich, 1996). The cross-fertilization positively affects both sectors. Litigants and lawyers who experience mediation when they are court referred become familiar with its use and are often more likely

to utilize mediation in the private sector for their next dispute—particularly when staff limitations in court programs require long waiting periods for an appointment and/or limited time with litigants once they arrive. Court training programs produce future savvy private practitioners. Innovations in the private sector such as client libraries and confidential mini-evaluations “trickle-up” to the court system and are adapted within the court environment.

Recent research in Florida (Folger et al., 2001) indicates that many private-sector mediation organizations and practitioners want to be connected with court programs due to increased credibility as well as more referrals. Courts benefit from a supply of well-trained mediators to handle referrals—and many peacemakers increasingly depend on the flow of cases from the courts to stay in private practice.

This trend toward institutionalizing mediation within court programs also has a darker side that includes the following:

- If judges have the power to supply needed business to mediators, can that power abuse the mediation process? For example, because the administration of justice sometimes conflicts with traditional mediation attributes such as confidentiality, in some jurisdictions mediators are required to break confidentiality to report on inflated claims, inadequate settlement authority, admissions of liability, obstructive behavior, or other disclosures of mediation communication. Are mediators who report taking care of the parties who trust them, or are they abusing their trust? Also, if consistency and predictability are elements of institutionalization, how is the public affected if approximately half the counties of a state maintain confidentiality and half do not? This is the current situation in California. If a citizen lives on the south side of Westlake Boulevard (Los Angeles County), that citizen would file in a court that maintains confidentiality. The citizens on the north side of Westlake (Ventura County) have a system where mediators are required to report to a judge if the matter results in an impasse. These types of differences affect the public’s understanding and acceptance of mediation.

In the recent California Supreme Court case of *Foxgate v. Bramalea* (2001),⁸ mediation communications were ruled to be confidential regardless of behavior of the participants. However, as discussed above, the *Foxgate* blanket protection of confidentiality in mediation contrasts with the overwhelming majority of court family mediators in California who are required to break confidentiality by making recommendations directly to the judge in custody and visitation cases that do not settle in a mediation process mandated by the court. Are mediators becoming agents of the court system rather than peacemakers for the parties?

- Courts can exploit mediators as well. Knowing that there is a pool of trained and talented mediators all dressed up with nowhere to go, some court programs “coerce” private mediators to work for free or for reduced rates.⁹ Mediators who are hungry for work and legitimacy provide a pool of “volunteers” for parties that often can afford to pay market rates. In such situations, mediators are subsidizing the cost of mediation that benefits the courts.
- In addition to low or no fees, dependence on the courts is seen by some as resulting in high-volume, unsatisfying work for mediators and parties. Time limitations, resistance caused by being compelled to attend, and court-imposed deadlines and paperwork often make court referrals the managed care of the mediation industry.
- Court rules and procedures may control the mediation process. In the 2001 Florida case of *Vitakis-Valchine v. Valchine* (2001), the court held that “mediator misconduct can be the basis for a trial court refusing to enforce a settlement agreement reached at court ordered mediation.” In that case, the mediator allegedly threatened to report a party to the judge for failing to agree to a reasonable settlement offer and allegedly told the party that if she signed the agreement that she did not like, she could protest those provisions at a court hearing.

- An overriding problem of court mediation is the coercive pressure on the mediators to clear dockets by settling cases. Rather than being selected for the benefits of citizen empowerment and satisfaction of result, many court programs are encouraged and supported by the judiciary to relieve them of staggering caseloads. The RAND Report of 1996 analyzed some of these benefits (Kakalik et al., 1996; Ohio Supreme Court, 2000) and let some authorities question whether the benefits to the court are worth the costs to the public (Bush, 1989/1990). Court mediators, particularly staff mediators, receive the not-too-subtle message that settlement rates and low time spent per case are the criteria for job retention and advancement. This pressure to settle can trickle down to mediation participants. Appointments become scarce, time to mediate is limited, and issues available for mediation are restricted. These pressures are more than growing pains of the acceptance of mediation: They may result in widespread dissatisfaction and fear of this otherwise consumer-friendly process.¹⁰

COURTS AS INSTITUTIONS OF CLIENT EDUCATION

In a 1979 article arising out of the historic Pound Conference on Perspective on Justice in the Future, mediation pioneer Professor Frank Sander of Harvard dreamed of a Multi-Door Courthouse. In his prophecy, Sander argued that courts should serve society by offering a number of choices at intake: negotiation, conciliation, mediation, and arbitration, as well as traditional courtroom litigation.

In the near quarter century since the Pound Conference, courts are beginning to understand Sander's wisdom. Many states now require neutral courthouse facilitators to serve as counselors and ombudspersons to citizens in helping them select options to litigation to resolve their disputes. The Maricopa Superior Court (Phoenix, Arizona) has devoted an entire floor of its courthouse to a Self-Service Center. In this consumer-friendly environment, litigants are referred to as "customers" and are provided information (in both English and Spanish) in easy-to-read pamphlets, videos, and accessible computer programs (Mosten, 1997; Sharp, 1994). For example, videos such as *Children, the Experts of Divorce* (Hickey, 1994), *Mediation Works: Make It Work for You* (Firestone & Press), *Children in the Middle* (Arbuthnot & Gordon), and *You're Still Mum and Dad* (Family Courts Association of New Zealand) create a climate of awareness and conflict resolution readiness within a court jurisdiction.¹¹ Customers are offered community resources of mediators, lawyer coaches, and social agencies. In other courthouses throughout the country, client libraries (Arizona and Sydney, Australia) and dispute resolution offices housed in the courthouse (Los Angeles) serve as symbols and resources for citizens to make informed choices in how to resolve their disputes. As judges and court personnel become more mediation-friendly, this attitude symbiotically supports the growth in the private sector as well.

NATIONAL MEDIATION LAWS

The passage of the Uniform Mediation Act (UMA) in 2001 by the Commission on Uniform State Laws marks a watershed in the national institutionalization of mediation. This model law deals with issues such as the definition of mediation, the affirmation that a mediator need not be a lawyer, and extensive confidentiality provisions. Nebraska and Illinois have each already passed its version of the UMA, and other states may likely follow in the coming years.

The UMA was adopted with collaboration with the ABA, the largest professional group in the world. The newly merged ACR was an official observer to the proceedings that resulted in the UMA, along with two of its predecessor organizations: the Academy of Family Mediators and the Society of Professionals in Dispute Resolution. The ACR conditionally endorsed the UMA.¹² This collaboration and involvement of national organizations on issues affecting mediation lends national acceptance and follows the lead of Association of Conciliation Courts and ABA in adopting the Model Standards of Practice for Family and Divorce Mediation.

Such national standards and laws will lead to more uniformity within the field. Also, national mediation organizations such as ACR and the Association of Family and Conciliation Courts (AFCC) and private provider organizations may adapt their standards to meet national guidelines. Such uniformity should provide increased predictability and confidence in the process leading to greater acceptance.

Despite the importance of the UMA, it has some limitations as well. The focus of this national act is rather limited. It focuses on privilege and evidence admissibility and offers very little real confidentiality protection. The UMA protects information developed for mediation from being brought into court but does not give mediation participants protection from disclosures outside a proceeding such as going to the media, an employer, or to extended family.

Finally, the UMA may have an unexplored downside. By creating uniformity, a national law may limit innovation on a local level and rob mediation of some of its most beneficial attributes.

Robert Benjamin (2001), prominent mediator and trainer, expresses concern that the UMA truly marries the future of mediation with the legal profession:

This is about how the revolutionary notion of mediation, whereby individuals, organizations, and communities seize the opportunity to effectively manage and self-determine their own issues and conflicts, is now becoming absorbed by the legal system and the established order. . . .

Originally envisioned as an alternative to the traditional legal system, mediation is now the object of a leveraged take-over by the legal profession and is quickly becoming just another cog in that system. The proposed Act in name, purpose and design is clearly a legal affair.

The American Bar Association is not the enemy, but their size and power can nonetheless twist and contort mediation practice into unrecognizable forms.

The UMA may have an unintended effect of stifling the growth of mediation—only time and actual experience under the UMA in its future iterations will tell the whole story.

INVOLVEMENT OF LAWYERS IN MEDIATION

During mediation's infancy, mediation professionals yearned for the acceptance of lawyers and the legal profession. Today, the ABA's Section of Dispute Resolution is the largest membership organization of mediators and ADR providers. The Section's annual conferences draw the highest attendance in the field. In addition to this Section, other ABA Sections promulgate ADR resolutions, publish materials, put on training programs, and participate in drafting and review of legislation and other developments affecting the field.

The question that arises is whether the legal profession is taking over the conflict resolution field (Brazil, 1995; Lande, 1984; McAdoo & Welsh, 1997; Sander, 2000). Initiatives

against nonlawyer mediators and increased enforcement of Unauthorized Practice of Law with criminal and civil violations chill involvement of nonlawyers in drafting agreements and court forms. Will lawyers ultimately define what the appropriate practice of mediation is? As this article goes to print, the California State Bar, through its ADR Consulting Group (of which I am a member along with mediators Jay Folberg, Gregg F. Relyea, and Michelle Katz, as well as collaborative law experts Pauline Tessler and Chip Rose, among others), is considering whether to establish a certification for attorneys who mediate within its established legal specialization program (www.californiaspecialist.org/; Mosten, 2000, 2002).¹³ Whereas the ABA and other lawyer organizations invite membership by nonlawyer mediators, many panels of mediators sponsored by courts and other organizations are limited to lawyers. Also, many mediators who do join the ABA but are not attorneys are limited in their participation in the ABA sections and ultimately decisions made by the ABA are made by the attorney members in its House of Delegates. Some argue that despite their membership, nonlawyers may be second-class citizens within the organized bar.

Concerns are raised about whether lawyer culture will begin to dominate a field that many entered to escape from that very same lawyer culture of the adversary system, competition, and professional dominated interaction with clients.

On a more positive note, because the lawyer's office remains the gateway to most conflict decision making, proponents of mediation have long believed that if lawyers just initiated a conversation with clients about mediation and how it compares to other alternatives, clients would use mediation more often.

State legislatures, bar associations, and courts are now encouraging or requiring lawyers to tell clients about mediation before ever filing a court action. This early client education is consistent with the benefits of use of mediation early in the life of a conflict. In Texas, for example, in their first court appearance, all litigants must file an affidavit indicating that they have been informed of mediation and have made an informed choice to nevertheless proceed with litigation (Texas Family Code, 1996). The Colorado State Bar has a rule requiring such advice by lawyers with the Colorado Rules of Professional Conduct (<http://www.cobar.org/static/comms/ethics/rulesprof/counselr.htm#21>; see also Mosten, 1997). Other bar associations such as the Beverly Hills Bar Association have voluntary ADR pledges that encourage lawyers to use mediation whenever it is appropriate, and many trade associations (such as the Better Business Bureau) and individual corporations have also developed mediation pledges.¹⁴

CONCLUSION

The trends affecting institutionalization highlighted in this article are not exhaustive of development in the fields. Nor are they static. New developments and initiatives to make mediation accessible to the public spring up every month. As initiatives gain acceptance and contribute toward institutionalization, long-held interests involved in the mediation field are subject to compromise. For each contribution to the field, new questions arise as to whether the public is helped or hurt by such development. It is clear that mediation as a profession is valued by those whose lives have been helped by the process. It is also clear that mediation as a profession is growing in national acceptance and validation and will continue to evolve as a crucial method of resolving conflict. It is hoped that many of the questions raised in this article will lead to considerable discussion, research, and planning to focus on answers to the

questions that will ensure the greatest contributions for this growing and important field to serve the public.

NOTES

1. Professor Jonathon Hyman offers another perspective on this symbiosis:

You shouldn't rely on any institutions to make changes . . . changes have to come from the bottom up—from the people on a more micro level. The proper role of the courts seems to be more in making those kind of changes possible, understanding them, welcoming them, providing room for them, encouraging them, but not trying to institutionalize them. (Alfini et al., 1994, p. 332)

2. For an illuminating study of how Canadian mediators view these emerging issues, see Picard (1998, 2000). In her 1998 survey, Picard categorizes responses into eight categories: lack of work, incompetence, domination by the legal profession, regulation, training, underuse, style, and inappropriate use. Mediators in the family sector were most concerned about unqualified and incompetent mediators. In contrast, community mediators were most concerned about the lack of attention to cultural issues and inappropriate use caused by institutionalization.

3. "The applicant must have completed a training program approved by the State Court Administrator providing the generally accepted components of domestic relations mediation skills." With some exceptions, the Michigan rule follows the facilitative model promulgated by Association for Conflict Resolution (ACR) for Advanced Family Practitioner Membership.

4. See Certification Rules and Forms, Office of Executive Secretary, Supreme Court of Virginia.

5. *Practitioner* is defined as an individual who has completed 40 hours of conflict resolution training or continuing education courses and has been practicing in the conflict resolution field for a minimum of 3 years. (Note: Members who have not done 40 hours of formal course work but can demonstrate other forms of education such as conference workshops, mentoring, and so forth can apply for equivalency status. Members with more than 200 hours of practice but less than 3 years of experience can also apply for this category of membership [see www.aresolution.org].)

6. Mediation Training Programs approved by the ACR Family Section should ensure that participants can demonstrate the following knowledge and skills:

1. Ability to explain what mediation is (within the dispute resolution context) and what a mediator does.
2. Awareness of theories and current research and literature underlying conflict and its resolution, and their application to family mediation.
3. Ability to contract for mediation services.
4. Ability to screen for appropriateness of mediation, including knowledge and ability to screen for domestic violence and an awareness of appropriate responses when domestic violence or its potential has been identified.
5. Ability to assist the parties in surfacing and framing the topics to be discussed in mediation.
6. Awareness of the consequences of separation/divorce for adults and children.
7. Ability to work with the substantive information encountered in separation/divorce mediation.
8. Ability to build a working relationship and a constructive process with the parties.
9. Ability to facilitate communication between the parties by using specific skills (e.g., active listening, reframing).
10. Ability to facilitate problem solving between the parties, especially in the areas of divorce including, but not limited to, parenting, support, division of assets/liabilities, insurance, tax filing, and so forth.
11. Knowledge of conflict management skills.
12. Understanding concepts of mediator influence and neutrality.
13. Knowledge of standards of practice and how ethical issues are resolved.
14. Ability to recognize when the assistance of other professionals might be helpful to the mediation process and to facilitate this discussion with the parties.
15. Awareness of what additional knowledge/skills/experience/supervision may be necessary for the successful practice of mediation and how to get it. (See www.acresolution.org.)

7. This book is an invaluable compilation of research on mediation by the coauthors of the seminal work on Pro Se Representation in Divorce Cases.

8. The California Supreme Court relies on the strong legislative preference for confidentiality embodied in the comprehensive statutory scheme in California Evidence Code Sections 1115-1128. See also *Rojas v. Los Angeles County Superior Court* (2002) for a discussion about admissibility of otherwise discoverable evidence utilized in mediation.

9. The Los Angeles Superior Court requires its panel mediators to provide the first 3 hours of mediation on a pro bono basis—mediators are permitted to charge their customary hourly rates if the parties agree to go beyond 3 hours.

10. See comments of Professor Liebman:

The California and New York experiences teach critical lessons about institutionalizing ADR. The higher the volume, the more routinized and de-humanized the process is likely to become, the more important the doorkeeper to the multi-door courthouse becomes and the harder that door keeping job is. . . . It is difficult to maintain quality when you get mediators, sometimes paid, sometimes getting expenses, sometimes, volunteers, who are doing a number of these every day, with little or no supervision. . . . If what you want is a quick fix, faster/cheaper mediation and that's all you want, mediation can be a very serious problem in terms of cutting off people's rights and pushing them out of the system without their getting a fair process—whether it's in a fair hearing or a fair mediation. (Alfini et al., 1994, pp. 311-313)

As a counterpoint in the same article, Sharon Press underscores the benefits of settling cases within a court mandated system: "I think it helps people to understand what is going on and I think it leads to better settlements as well" (Alfini et al., 1994, p. 318).

11. In Alaska, Susan Dipietro developed a user's guide to mediation, which can be visited at <http://www.ajc.state.ak.us/Reports/medguide99frame.htm>.

12. See www.acresolution.org for the ACR conditional endorsement of the Uniform Mediation Act (UMA). See also "An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act" (Firestone, 2002) for a discussion of the ACR principles and the UMA.

13. See for a discussion on the role of new lawyering roles and legal access reforms and the growth of mediation.

14. CPR Institute for Dispute Resolution (www.cpradr.org) has the most widely used ADR Voluntary Pledge in the world—its subscribers feature the largest companies in the world (Senger, 2004).

REFERENCES

- Alfini, J., Barkai, J., Bush, R. B., Hermann, M., Hyman, J., Kovach, K., et al. (1994). What happens when mediation is institutionalized? To the parties, practitioners, and host institutions. *Ohio State Journal on Dispute Resolution*, 9, 307-332.
- Arbuthnot, J., & Gordon, D. A. *Children in the middle* [Video]. Athens, OH: Center for Divorce Education.
- Beck, C. J., & Sales, B. D. (2001). *Family mediation: Facts, myths, and future prospects*. Washington, DC: American Psychological Association.
- Benjamin, R. (2001). *The uniform mediation act: A Trojan horse?* Retrieved January 28, 2004, from <http://mediate.com/ethics/ethicsforum2.cfm>
- Brazil, W. D. (1995). Role of lawyers in mediation and negotiation/institutionalization of court-annexed ADR. *Negotiation Journal*, 11, 329.
- Bush, R. A. B. (1989/1990). Mediation and adjudication, dispute resolution and ideology: An imaginary conversation. *Journal of Contemporary Legal Issues*, 3, 1-35.
- Family Courts Association of New Zealand, Auckland (Producer). (1990). *You're still mum and dad* [Video]. Available at <http://www.afccnet.org/catalog/content.asp?ParentTopicID=2>
- Firestone, G. (2002). An analysis of principled advocacy in the development of the Uniform Mediation Act. *Northern Illinois Law Review*, 22, 265-286.
- Firestone, G., & Press, S. *Mediation works: Make it work for you* [Video]. Florida Supreme Court. Available at <http://www.flcourts.org/osca/divisions/adr/brochure.html>
- Folger, J. P., Della Noce, D. J., & Antes, J. A. (2001). *A benchmarking study of family, civil and citizen dispute mediation programs in Florida* (Conducted for Florida's Dispute Resolution Center). Available from the Institute for the Study of Conflict Transformation. Available from <http://www.transformativemediation.org/publications.htm#Publications>
- Foxgate Homeowners Ass'n v. Bramalea California, Inc., 25 P.3d 1117 (2001).
- Hickey, E. (1994). *Children, the experts of divorce* [Video]. (Available from Family Connections Publishing Company, 575 East 4500 Street, Salt Lake City, Utah 84107)

- Kakalik, J., Dunworth, T., Hill, L. A., McCaffrey, D., Oshiro, M., Pace, N. M., et al. (1996). *An evaluation of mediation and early neutral evaluation under the civil justice reform act* (Document No. MR-803-ICJ). Santa Monica: RAND Corporation.
- Lande, J. (1984). Mediation paradigms and professional identities: Can mediators activate a new movement for justice? *Mediation Quarterly*, 4, 19.
- McAdoo, B., & Welsh, N. (1997). Does ADR really have a place on the lawyer's philosophical map? *Hamline Journal of Public Law and Policy*, 18, 376-391.
- Mosten, F. (1997). *The complete guide to mediation*. Chicago: Law Practice Management Section, American Bar Association.
- Mosten, F. (1999). Mediation and the process of family law reform. *Family and Conciliation Courts Review*, 37, 429-445.
- Mosten, F. (2000). *Unbundling legal services: A guide to delivering legal services a la cart*. Chicago: Law Practice Management Section, American Bar Association.
- Mosten, F. (2002). Unbundling legal services and unrepresented family court litigants papers from the national conference on unbundling. *Family Court Review*, 40, 15-18.
- Ohio Supreme Court. (2000). *Mediation institutionalization project*. Retrieved January 28, 2004, from www.sconet.state.oh.us/dispute_resolution/mip
- Picard, C. (1998). *A survey of mediation in Canada*. Retrieved January 28, 2004, from <http://www.carleton.ca/cpicard/dissertation/Appendix-survey.pdf>
- Picard, C. (2000). *Emergence of mediation as a profession*. Retrieved January 28, 2004, from <http://www.carleton.ca/cpicard/dissertation/Chapter%203.pdf>
- Press, S. (1997). Institutionalization: Savior or saboteur of mediation. *Florida State University Law Review*, 24, 903-917.
- Ravinda, G. (2002) Institutionalizing mediation in India. *Resolutions*, 10. Retrieved January 28, 2004, from <http://www.courts.state.va.us/drs/resolutions/june2002/institutionalizing.html>
- Rojas v. Los Angeles County Superior Court, 126 Cal. Rptr. 2d 97 (Cal. Ct. App. 2002).
- Sander, F. E. A. (2000). The future of ADR: The Earl F. Nelson memorial lecture. *Journal of Dispute Resolution*, 2000, 3-10.
- Senger, J. M. (2003). *Federal dispute resolution: Using ADR with the United States Government*. San Francisco: Jossey-Bass.
- Sharp, N. L. (1994). Creating win-win for the public and the profession. *Arizona Lawyer*, 31, 12-15.
- Shaw, M., Singer, L., & Povich, L. (1996). National standards for court connected mediations. *Family and Conciliation Courts Review*, 31, 156-225.
- Texas Family Code Annotated 3.522 (Vernon 1996).
- Vitakis-Valchine v. Valchine, 793 So.2d 1094 (Fla. 2001).

Forrest S. Mosten is on the faculty of the UCLA School of Law and trains mediators and lawyers worldwide. A Certified Family Law Specialist and family mediator since 1979, he is the author of Complete Guide to Mediation, Unbundling Legal Services, and Mediation Career Guide and has published numerous articles on conflict resolution and legal access. He is a frequent contributor to Family Court Review, has been guest editor for special issues on training mediators (January 2000) and unbundling legal services (January 2002), and is a popular presenter at Association of Family and Conciliation Courts (AFCC) Conferences. He can be reached at www.MostenMediation.com.