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NE-ACR News

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Certification?

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NE-ACR's
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Divorce mediation
Why it could be a good testing ground

By Don Dickey

What makes a practitioner competent? If he or she does something wrong, what recourse does a client have? How can the public know that a practitioner has been adequately trained and has sufficient knowledge and practice skill?

Questions like these have led hundreds of professions and occupations to develop credentialing programs such as mandatory licensing, which is usually administered by states, and voluntary certification, which is usually conferred by an organization to recognize that someone has met certain standards set by that group.

In the field of mediation, the idea of awarding some mark of qualification or certification has been debated for decades, with some arguing that this is crucial to maintaining high standards and public confidence and others worrying that it could be costly, exclusionary, and impossible to administer.

The challenges of assessing across practice approaches
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But for one group of mediators, the time for voluntary certification may be near: The 2008 strategic plan of the Association of Conflict Resolution called for developing a voluntary certification program for family mediators that is valid, reliable, performance-based, and inclusive of all styles. And an ACR task force has been fleshing out a specific, workable proposal.

Divorce work seems a good testing ground. First, divorce mediators generally agree on what content knowledge is central to competent practice, so the main challenge may be how to define this body of information in a way that can be used to assess competence. The ACR task force has begun compiling a detailed outline of the many knowledge areas critical to divorce work, including mediation theory, developmental psychology, and legal and financial issues.

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Should states regulate the mediation profession?

By Philip J. Loree Jr.

In recent years, mediator credentialing has been a controversial subject, and many have weighed in pro or con. The Association for Conflict Resolution, through its discussion draft 2010 Model Standards for Mediator Certification Programs (http://www.acrnet.org/News.aspx?id=842), has refined the debate significantly by defining the relevant terms and explaining that mediator "credentialing" can be implemented in at least five ways (or perhaps some combination of them): licensure, certification, accreditation, rostering, and registration.

All but one of these implementation methods – licensure – would be governed and administrated entirely by the private sector and thus be voluntary.

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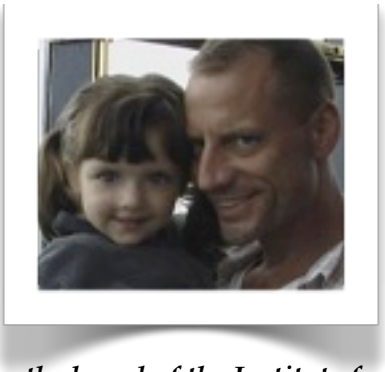
10 Questions *for* Lou Gieszl



Lou Gieszl is the current president of the Association for Conflict Resolution and deputy executive director of the Maryland Mediation and Conflict Resolution Office, known as MACRO. A mediator, facilitator, trainer, and conflict consultant, he is also an adjunct professor at the University of Baltimore's Master's Degree Program on Negotiation and Conflict Management. He holds bachelor's degrees in English, philosophy, and political science and has a master's of public policy from the University of Maryland Baltimore County. He can be reached at Lou.Gieszl@mdcourts.gov.

What are your goals for ACR?

I have some goals any president should have, such as safeguarding finances and keeping the organization healthy, but I also have four initiatives: diversity of practice; standards for mediator certification programs; higher education; and public awareness. My aim with diversity of practice is to make ACR relevant to experienced professionals as well as newly trained people and those who practice in all kinds of frameworks. We haven't always been great at this, but ACR is the umbrella for everyone. Certification involves a debate that predates my start in the field. People have tended to get stuck on what it takes to be a mediator, so we've shifted the focus onto mediator certification programs. ACR's board recently adopted a discussion draft of model standards for certification programs, emphasizing due process, reliability, validity, and clear terms. This is ACR's specialty: asking how we can harness the energy and wisdom already out there.

ACR's Family Section will be the testing ground for certifying divorce mediators. How does that fit?

I'm very supportive. I don't think it's possible to have one instrument to certify all mediators, so I think this may be a great model: start with a specific group and talk about standards for that group. ACR can lead by example.

Has your own thinking about certification changed? If so, how?

At times I've thought that we, as a field, should proceed with great caution on anything that might freeze anyone out. But I also have been persuaded over time that there are quality problems out there. Mostly I think it's important that everyone not pass through the same gate. In Maryland, we decided not to go the route of standard-setting and instead started a program for mediator excellence, which is about helping people build skills.

And your two other initiatives?

We aren't as far along on higher ed as we are on certification programs, but as conflict resolution programs proliferate, I think we can help the next generation by clarifying standards for higher education. And public awareness: it always comes down to that, doesn't it? We've done some great work, but we still don't have a message. We need a Smokey the Bear-type message for conflict resolution, and I'm really hoping some ACR member has it.

How did you get started in this work?

Right out of college, I worked in Maryland's Department of the Environment, organizing public hearings that were often contentious. I was naïve, and as I tried to change the way the organization interacted with the public, I felt as if I had discovered the field of conflict resolution. We achieved some great results: some people in the department went to a training with Larry Susskind, and later we were able to change the state statute to allow for public input much earlier in the decision-making process. Several years later, when Rachel Wohl, now director of MACRO, and Judge Bell launched a commission to build consensus for promoting dispute resolution, I worked with the commission.

You're on the board of the Institute for the Study of Conflict Transformation. Do you think of yourself as a transformative mediator?

I've had a lot of training, but I've come to believe the transformative framework is the one that best suits me and my view of this work. It all comes down to how you see your role as a mediator: some people are willing to give up control of the process, and some aren't.

What do you like best about your work?

The opportunity to take the energy people pour into conflict and channel it toward a better outcome.

What do you like least?

How difficult it is for people to find work and make a living, which goes back to the need to build awareness. There's plenty of conflict around.

Who is your dream client?

Lately I've been thinking about the US service members who've returned from Iraq and Afghanistan and are expected to just go back to their pre-service lives. I'd like to offer them the opportunity to use mediation in their families and communities. People are promoting this here, and I'm interested in finding ways to encourage it at the national level.

When you go to sleep at night, what do you think about?

I think about everything I have to do the next day and whether it can start with walking my 5-year-old daughter, Celia Rose, to school. She loves going to school, and I love walking with her.

Louisa Williams conducted and condensed this interview.
To suggest a subject, email her at admin@neacr.org

From NE-ACR's president

Building legitimacy for the field

By Ruthy Kohorn Rosenberg

This issue of our newsletter addresses the topic of certification and credentialing, something the mediation community has been struggling with for more than 30 years.

It seems we have not been able to shift the discussion away from differences and reach the consensus we are all seeking. My own view is that we need a way to provide legitimacy for the field, a way for all of us to be confident that when we say "mediation," people understand what it is, how it works, and that they can trust both the process and those who practice it. When all that's accomplished, people will see mediation as a welcome, constructive way to resolve conflicts. At the same time, of course, we are also looking for ways to guarantee that mediation is practiced well. But – and this is a big "but" -- we ourselves still aren't sure what all of this looks like, and as we grapple with these large questions, we want to ensure that we don't lose sight of our work's basic hallmarks of inclusiveness and creativity.

These are enormous issues that deserve careful consideration and discussion. NE-ACR's board, like many other groups all around the country, has decided to devote some time to talk about certification and credentialing, hoping to spark good conversations and move toward greater understanding and perhaps consensus. Last fall, two practitioners who have been following this topic for years, Susanne Terry and Ericka B. Gray, moderated a well-attended evening discussion in Wellesley, Massachusetts, that included the history of certification efforts at the national Association for Conflict Resolution, looked at the many ways of giving credibility to professionals, and addressed participants' key concerns. We hope this newsletter will shed additional light and that you will engage with us as we continue this discussion.

NE-ACR's board members spend a great deal of time thinking, talking, and brainstorming how best to meet the needs of the dispute resolution community in New England. The board will soon hold its annual daylong retreat to agree on workable goals, confirming and expanding on our credo of doing a few things well. A committee is working hard planning a dynamic and engaging regional conference for June 17 and 18 on the Brandeis campus. Our goal with this gathering is to engage a broad group of people in the field of conflict resolution: practitioners and scholars, those new to the field, those with years of experience and everyone in between. If you are interested in working with us in small or large ways, please contact me or Louisa Williams (email us at admin@neacr.org). We will be providing details soon.

If you have any suggestions for workshops, speakers, our web site, our Annual Meeting in April, the June conference at Brandeis, or any other NE-ACR event, please let us know.

We are listening.

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About this newsletter

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A glossary of certification terms

Last October, NE-ACR sponsored a lively panel discussion on mediator certification led by Susanne Terry and Ericka B. Gray. Terry, a Vermont-based mediator and consultant, is active in ACR's work on certification. Gray, a former NE-ACR board member, mediator, and trainer based in the Boston area, has followed the topic for years. This glossary, compiled by Terry and Gray, helped guide the discussion.

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Credentialing covers the process of establishing the qualifications of individuals in a profession or trade. Credentialing encompasses many ways of doing so, including certification and licensure.

Certification is voluntary, conferred by some type of organization rather than the state. Certification is generally granted in recognition of attainment of standards that have been established by the organization. Standards for certification may include, for example, educational degrees, completion of training, completion of supervised practice, taking and passing a test, and experience requirements.

In Massachusetts, the Massachusetts Council for Family Mediation has established a certification program for family and divorce mediators who apply, pay the fee, and meet the standards established by MCFM for certification by that organization. The New Hampshire (Court) Family Mediator Certification Board certifies mediators to accept court cases. Requirements for certification include education, training, and internships.

Licensure is mandatory for practicing in a particular profession or trade and is granted by the state in which the person works. It regulates both the use of the title and the ability to work in that state. Licensure can be revoked for cause. Standards for licensure may include, for example, educational degrees, completion of training, completion of supervised practice, taking and passing a test, and experience requirements. No state currently licenses ADR practitioners, although a number of courts have certification programs for those who wish to receive referrals of cases from the courts (e.g., Florida, Indiana, New Hampshire, to name just a few)

Certificates are provided upon completion of a training program or a series of courses to indicate that a person has completed the requirements of that program or course. In the mediation world, receiving such a certificate has often been confused with certification because the strict definition of "certification" includes receiving a certificate of completion of a course of study. In mediation, though, saying someone is certified simply because he or she has completed a course is considered misleading and unacceptable, since that conveys a level of competency that may be unwarranted.

Membership on a roster or panel can be viewed as a form of credential if the roster uses standards to choose the members. Standards may include amount of training, type of education, level of experience, and other matters.

In some organizations, certain levels of membership are achieved by meeting specified standards, for amounts and types of training, experience, and others. ACR's Advanced Practitioner is one such level.

Model Standards. These are standards of practice accepted by the Association for Conflict Resolution, the Association of Family and Conciliation Courts, and the American Bar Association that guide ethical decision-making and practice.

Paper credentialing. Any credentialing process that relies primarily on documentation of training received.

Practice area. The setting in which a mediator works – family, public policy, civil, environmental and commercial are all examples of practice areas requiring different knowledge and emphasis on different skills.

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Should states regulate the mediation profession?

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Each of the other four could be a component of a loosely-integrated self-regulatory system in which various local and national organizations would compete to be a leading standard-bearer for mediator competence and ethics. This self-regulatory system would also permit a specialty market to flourish, with smaller, private organizations or subgroups within larger organizations representing industries that purchase dispute resolution services or specializing in particular types of disputes such as divorce and family mediation.

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But licensure, and the corresponding regulatory authority that states would (or at least could) exercise to implement it, would be government administered and involuntary. It would probably not be geared to serve the needs of specialty markets, and geographic considerations would dictate its scope.

Private-sector efforts to credential mediators are in their infancy, and states have yet to impose licensure requirements or otherwise regulate private mediators. Yet some in the field apparently believe that states should license and regulate mediators, irrespective of whether the private-sector implements voluntary credentialing or other self-regulatory measures on a wide scale. This group believes that state regulation would elevate the status of the profession and make it easier for competent mediators to develop business and better serve the public.

But proponents of state licensure should be careful what they wish for.

No boon to business

One argument advanced for state regulation is that it would decrease competition by excluding mediators who lack adequate skill and experience, thereby enhancing the business-getting ability of competent and ethical mediators and helping ensure that mediation services meet minimum quality standards. But state regulation would not be the boon to business some

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Framing the debate: a glossary of certification terms

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Modality. This is the placeholder term for different approaches to mediation. As time marches on, the over-simplified description of the three types of mediation isn't holding up, and many forms of mediation are evolving. Baruch Bush, a longtime leader in Transformative Mediation, has pointed out that today there is more than a difference in styles; there are fundamental differences in core values and principles.

Common core approach – an assumption that all mediators across practice areas and regardless of the values and principles which informed the training and practice of the mediator.

Performance-based certification This differs from relying on documentation of training in that it provides for methods of having the mediator demonstrate his or her proficiency in knowledge and skills.

Reciprocal agreement. An arrangement whereby organizations agree to accept the certification of a mediator in whole or part due to the understanding that the certifying organizations have similar high standards in their processes, although they may have somewhat differing expectations of their mediators.

Reliability. This is a measure of the consistency of the measuring instrument or procedure. For example, each time someone takes the same test to measure IQ, the outcome should be statistically similar.

Inter-rater reliability. This measure is used to assure that there would not be wide variations between how different evaluators would rate one mediator being assessed. Inter-rater reliability is most often dealt with through clear mediator job definition, identification of items being assessed, criteria for assessment, and training of raters.

Validity. Validity is concerned with the extent to which a test measures what it claims to measure. For example, does an IQ test actually measure intelligence, or a driver's test measure knowledge of the driving laws?

Should states regulate the mediation profession?

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mediators apparently think it could be and would not, in all likelihood, significantly improve the quality of mediation services that the public receives under the current, unregulated regime.

For one thing, a state license to mediate would not be a meaningful marketing tool. If licensure is imposed, mediators who obtain licenses before others might enjoy a brief, temporary competitive advantage, but before long, all mediators who satisfy requirements and want to practice openly would get official state sanction, making a license to mediate no more valuable a marketing tool than a license to practice law.

Second, licensing would not materially decrease the competition pool, at least for local business. State-regulation proponents argue that only "serious" mediators will obtain licenses and that competition will be limited to this group. That may well be true, but it's beside the point: the business-getting ability of serious mediators has presumably never been threatened by the not-so-serious, so removing casual mediators from the pool will not materially reduce competition.

Finally, assuming licensing could create a smaller and more skilled local market for mediation services and enhance the status of the profession, state regulation is simply not necessary to achieve those goals. In weeding out incompetent and unethical mediators and protecting and enhancing the profession's status, private sector credentialing would be at least as effective – and probably much more so – than public-sector efforts.

Inter-jurisdictional problems

Advocates of state regulation should think, too, about what this would mean about mediators' ability to work and compete across state lines. If a significant number of states – particularly contiguous ones – impose licensing, many, if not all, of them will probably exclude unlicensed mediators from mediating disputes within their borders and perhaps from mediating in any state a dispute that is pending before a court or arbitration panel in their states. To practice in any one state, licensed mediators, like many lawyers, might well be required to live or maintain an office there.

Suppose, for example, New York and Massachusetts both decide to regulate mediators. Suppose, also, that both states impose residency or office maintenance requirements and require that mediators who mediate cases pending in either state be licensed by that state. Let's assume that, as sometimes happens, parties to a suit pending in Massachusetts want to hire a well-known, highly-regarded mediator who is licensed to mediate in New York but not in Massachusetts. Unless the parties are willing and can afford to pay a Massachusetts-approved neutral to act as co-mediator, they will not be able to use the New-York-licensed mediator. Everyone will lose: the parties won't get the mediator they want, and the New York mediator won't get the case or the income.

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The only winners will be mediocre mediators, those who do well in a market limited to in-state competition and are good candidates for the perhaps well-paying – and perhaps not very taxing – role of the local co-mediator.

A self-regulatory system would, by contrast, ensure minimum quality standards for mediators – and thus protect the public – without imposing geographically-based restrictions on competition.

Non-lawyer mediators might be targets

Mediation is a dispute resolution process, and both public and private dispute resolution is one of the key roles of our legal system, which, of course, is dominated by lawyers. But in the current, unregulated regime, having a license to practice law is generally not a prerequisite to practicing as a mediator, and

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The case against state regulation of mediators

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many mediators today, including some extraordinarily talented and effective ones, never went to law school.

In today's mediation profession, most practitioners believe that non-lawyers should not be excluded from acting as mediators, just as non-lawyers are generally not excluded from acting as arbitrators. In fact, non-lawyer mediators and arbitrators can and do play invaluable roles in resolving disputes, whether by dint of having expertise in the subject matter of the dispute or simply by being great negotiators, facilitators, or problem solvers.

Conversely, a license to practice law hardly qualifies one to be a mediator or an arbitrator. While there are many great mediators who are also licensed to practice law, these individuals tend to have dispute resolution skills that other lawyers do not, and those skills are not traditionally considered essential to law practice.

But advocates of state regulation should not forget that the majority of state legislators and executive-branch officials and all (or virtually all) members of the judiciary are licensed attorneys. Presumably most of these folks are not private mediators, let alone ones involved in private-sector credentialing efforts. And from the perspective of most state governments, the closest analog to mediator regulation is attorney regulation.

All this creates a meaningful risk that state regulation of mediation will principally focus on non-lawyers. State government decision makers will likely conclude that the best way to regulate mediators is through the already existing regulatory framework designed to regulate attorneys – the state bars. And whether or not a state decides to delegate regulatory responsibility for mediation to the state bar or a separate agency, regulators will probably deem a license to practice law sufficient proof of competence to mediate. Indeed, certain court-ordered mediation programs have exempted licensed attorneys from certification requirements imposed on non-lawyers. Alternatively, states may exempt members of the bar from at least some of the licensure requirements.

This probable institutional bias in favor of the legal profession is harmful in at least three ways. Exempting lawyers from licensure requirements will do little or nothing to ensure mediator competence. A good many mediators are lawyers, and so a good many licensed mediators would not have to demonstrate competence to mediate. Also, imposing more stringent requirements on non-lawyers discriminates against non-lawyer practitioners. Many non-lawyer mediators are objectively more competent and experienced than most members of the bar as a whole. But they would be required to demonstrate their competence as mediators even though a member of the bar with no experience in dispute resolution at all, let alone experience in mediation, would be presumed competent, and thus worthy of a license.

Finally, giving members of the bar a free pass to practice as mediators would likely skew the competition pool in a way harmful to the profession and the public. Attorneys who never before held themselves out as mediators could view an easily obtainable state license as a business opportunity, joining a profession they probably know or care little about simply because the state is willing to confer upon them the privilege of doing so at a relatively low cost. The number of mediators in the competition pool – especially the number of incompetent or marginally competent ones – could therefore swell.

* * *

Mediation is a nuanced profession that's part art and part science. Although many mediators believe that the public still doesn't fully understand the benefits of dispute resolution outside the court system, mediators have made a good start of explaining what they do and how they do it. The profession is now doing a very good job of laying a foundation for a workable and comprehensive framework of self-regulation, and mediators should think long and hard before advocating or supporting any state regulation of their field.

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The challenges of assessing

ACR's 2008 strategic plan envisioned that a voluntary certification program for family mediators would be both "performance-based" and "inclusive of all styles." The discussion forum at ACR's annual conference in Chicago last September explored an essential question raised by these twin policy goals: Can you imagine a way to assess divorce mediators' practice skill that takes into account the many different approaches and styles in use today?

First came practical questions and concerns. Can assessors who have been trained in one school or approach competently assess the skills and behaviors of a mediator trained in another? To account for different approaches, does the skills assessment instrument need to have different performance criteria, or could it just be scored differently?

As the members of ACR's task force know, colleagues elsewhere, including those in Maryland, New York, Canada, and Australia, have faced perplexing questions concerning how to accommodate different mediation approaches when developing skills-based assessment systems. What, participants at the discussion forum asked, can we learn from their experiences?

To what extent can divorce mediation practice vary in process and technique and still be considered "competent practice?"

Then came the deeper questions. To what extent can divorce mediation practice vary in process and technique and still be considered "competent practice?" Where should the boundaries of acceptable practice be drawn?

The September discussion surfaced a divide among practitioners that has remained unsettled for two decades. Some mediators believe that there is a "common core" of practice and that competent practitioners blend strategies and techniques from different mediation styles and approaches to suit the practitioner and the needs of a particular case. Others believe that mediation practice tends to cluster around points on a continuum of distinguishable approaches, ranging from a directive "settlement-oriented" emphasis (sometimes called "evaluative") to a non-directive "parties control the process" emphasis ("transformative").

Leading transformative mediators such as Baruch Bush and Dorothy Della Noce have convincingly argued the latter point, maintaining that differing core values among mediation approaches result in distinct differences in practice norms and thus competency indicators. For example, while many facilitative mediators view certain ways of controlling mediation process as a critical skill set for encouraging constructive conversation, Bush and Della Noce believe that such efforts to control process limit party self-determination. Facilitative mediators may use reframing to change a party's position statement into a statement of interest. Or, they may shift the topic to change how the parties are talking to each other. But those same mediator moves are considered "bad practice" for purposes of the performance-based competency testing of transformative mediators, according to Bush and Della Noce.

After wrestling with this basic challenge of defining practice competencies across different approaches, designers of a pilot project in Maryland have ended up establishing separate assessment processes for facilitative and transformative mediators.

At both fall 2010 discussions, participants brought up perhaps the deepest question of all: How might divorce mediators define the boundaries of acceptable practice? Can leaders in divorce mediation agree on a common set of indicators for assessing mediator skills, or will each approach or style have to develop its own criteria? Participants cited examples of both, from the professions of teaching and psychology, which also involve dynamic interactive skills that are difficult to measure objectively: The Bill and Melinda Gates Foundation recently launched a project that aims to identify measures of effective teaching by, in part, videotaping actual classroom work, essentially saying that some core skills and techniques stretch across teaching philosophies. Therapists, on the other hand, have defined competence within specific approaches, where distinct variations in practice standards exist between client-directed versus therapist-driven approaches.

So where does this leave ACR in general and divorce mediators in particular? A major benefit of live-action, skill-based assessment programs is that they engage communities of practitioners in specifically defining what "effective" mediation is – and is not. At the same time, the nitty-gritty of assessment compels concrete attention to differences in values and practice norms that many years of debate suggest may not be reconcilable. It is difficult to see how any one set of performance assessment criteria can bridge stark differences in practice norms, and there remain more questions than answers about how the margins of acceptable practice may be drawn to enable performance-based assessment to be truly inclusive of all styles.

-- Don Dickey

Why divorce mediation may be a good testing ground

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In addition, divorce mediators have long looked for a valid, reliable way to assess a practitioner's capacity for competent performance. Most of today's credentialing programs for mediators, such as roster programs in state courts, cite hours of training and hours of experience as proof of competency, with some also including a relatively short period of supervised practice, but many leaders in the field of divorce mediation believe competence can be defined more accurately and reliably. These leaders say that a skills-based assessment of performance, involving observation by trained, experienced assessors of mediators doing real case work or role plays, would provide a more direct and consistent measure of skill and proficiency.

By narrowing certification to a well-established practice area that deals with specific content and in considering performance-based as well as knowledge-based assessment of these mediators, ACR may at last have a workable pilot project. A remaining sticking point, though, is the question of how any one set of performance assessment criteria can cover styles and approaches as different as facilitative, transformative, and evaluative.

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At ACR's annual conference in Chicago last fall, my colleague Dianne Carter and I organized an informal workshop discussion on the topic of certification for divorce mediators. The thoughts, comments, and questions of the participants are outlined below, along with additional perspectives brought forward by participants at an evening program on certification sponsored by the New England chapter of ACR in October 2010, a month after the Chicago meeting.

* * *

Here's how we framed the question for discussion: "How might a certification system for divorce mediators support continual learning and growth in the next generation of practitioners and advance the field as a whole?"

Talking about the potential for positive effects on practitioners, participants agreed that an effective, voluntary certification system could provide clearer goals and guidelines of knowledge and skills needed for competency; clarify what should be taught in trainings and educational programs; help students and less-experienced practitioners understand what "competent practice" means; and provide useful feedback to candidates about their individual strengths and weaknesses. People noted that such a system should also underscore the importance of mentoring, continued learning, and self-assessment.

Talking more broadly about the potential to advance the field as a whole, people at the two events noted that a voluntary program could strengthen accountability and raise standards while promoting understanding among other professionals and the general public of what divorce mediation is and what divorce mediators actually do. All this, participants agreed, could have the welcome effect of boosting public confidence in the profession's standards and building legitimacy of divorce mediation.

What about unintended consequences, especially negative ones? Any testing system, participants noted, could drive up the cost of mediation services and thus limit the availability of services for people of limited means. Some present also noted that a stand-alone process for individual certification could devalue the services of volunteers at community mediation centers, where the focus has traditionally been on center-based competence.

As in most discussions, broader questions popped up: How high should the bar be set? Should there be a basic certification level, perhaps for newly trained mediators, and then higher levels of specialty, as there are for physicians, who must pass a state license exam to start practicing and can later achieve the advanced status of "fellow" or "board certified?"

Because discussion of certification often moves all too quickly to the significant challenges and potential negative impacts, the September and October discussions were both framed to focus on the positive potential and benefits of certification for the next generation of divorce mediators. Challenges and trade-offs merit attention, but at the outset they should not eclipse the many positive benefits that may come from qualifying practitioners based on the knowledge and skills considered essential for competent divorce mediation.

Don Dickey practices mediation in New Hampshire and Vermont and conducted research on certification of divorce mediators while earning a master's degree in mediation and applied conflict studies at what is now the Woodbury Institute of Champlain College in Vermont. Dianne Carter, a fellow graduate of Woodbury College, organized and co-conducted the discussion at ACR's 2010 conference, where issues in this article were discussed.

Bookmark: *On being certain and being certainly wrong*

By James E. McGuire

"Some things are open for discussion, but not this one. I know what I know. On this point, I am certain."

Every mediator has heard such statements, sometimes from one party and sometimes from both parties speaking about the same point. Some facts we do just know: the name of the place we grew up, the birthdays of our parents and children, whether the Red Sox play baseball or basketball. We also have had the true "aha" moment when we learned something, maybe a math concept we struggled to understand until suddenly the light bulb went on, and we got it: We knew that we knew it.

So we understand that sometimes when people say, "I am certain," they can be right. But we also know that other times, people can be certain and certainly wrong.

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Embedded in the title of "On Being Certain: Believing you are right even when you're not" by Robert A. Burton, MD (St. Martin's Griffin 2008) is the book's core question: When we have the feeling of knowing, is this merely a feeling, or the end of a thought process? If it is just a feeling, is it one we can trust? Burton, a neurologist, suggests some answers and in the process, gives us a good understanding of current developments in brain science.

Central to his presentation is the concept of the "hidden brain," the idea that we can generally identify (but are truly aware of only some of) the inputs that influence our sense of knowing something. And we can certainly be aware of the output, our conscious thought or the feeling that we know. What we can never understand is how our mind weighed all the various data in the course of coming up with our answer.

Most of us regularly visit web sites that suggest books based on our browsing and buying habits. But even Amazon's programmers cannot predict exactly what recommendations their search engine will generate. Similarly, our vastly more complex human brain, responding to a simple bright flash of light, will draw on our entire life experience to determine whether the flash is harmless or should be reported to our conscious brain as a possible hazard. We won't know that we saw the flash until we know which way our brain has decided -- and we can never know all that went on inside beforehand.

Of course individuals think and process information in different ways based on many factors, including literally how their brains are wired. When I was much younger, with all the arrogance of youth, I dismissed as trivial word play the philosophical question of whether the color "red" I see is the same "red" you see. Then I married, had children, and discovered that my wife and my daughter both see the days of the week in color, a brain curiosity called synesthesia. Today, thinking of Burton's work and considering my own colorless days, I understand more broadly that we all think and see the world from our own private island of perception.

When we say "I know," we really can't be sure that what follows is true, so we would do better to start such statements with "I believe. . ." Mediators should keep this in mind – and perhaps remind parties, at the right time, of this humbling truth of the human condition.

Another great book on this subject is "Being Wrong: Adventures in the Margin of Error," by Kathryn Schulz, which starts with a quote from Moliere that we can all identify with: "It infuriates me to be wrong when I know I am right." Yet the path to wisdom proceeds from being wrong.

Schulz decided to explore why we get things wrong, what it feels like when we are wrong, and why and how we should embrace those occasions when we are. There are many layers to the simple question of how we can ever be wrong. Some sources of error: all our senses; how our brain works; and our fallible memories. I can't do justice to the book and its wonderful detail in these few words, so I will give just one anecdote.

One day after the space shuttle Challenger exploded in 1986, a professor asked his students to write an essay describing the event and their thoughts and feelings. Three years later, he asked them to write about what they remembered of the event and then to compare the two essays. More than 90% of the essays written years later failed to match the students' original "facts." Reading his own three-year old essay, one student protested, "I know that is my handwriting, but I couldn't possibly have written that." (Most mediators can think of a case in which one of the parties said something very similar.) Citing such gaps, Schulz uses the fallibility of memory and similar characteristics of the human brain as the beginning point for her exploration of being wrong.

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