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Mediator Qualifications: The Trend Toward Professionalization

Bobby Marzine Harges*

I. INTRODUCTION

One of the most controversial issues in the Alternative Dispute Resolution (ADR) field concerns mediator qualifications. Commentators, state legislatures, courts and others in the ADR field are asking fundamental questions about the qualifications a person should possess before he may mediate. These questions include: Should anyone who completes a mediation skills training course be allowed to mediate? Should mediation training be specialized into areas of concentration? Should mediators possess academic degrees? Should mediators be lawyers? Should mediators be certified? Should mediators be licensed? And should performance and evaluation criteria be enough to qualify a person to be a mediator? The debate over these questions grows as the use of ADR techniques, particularly mediation, becomes more widespread.

States have begun using various approaches toward mediator qualifications. Some states require that individuals have certain academic degrees in order to qualify as a mediator, while others only require mediators to take a mediation training course. Still other states require individuals to have a combination of academic degrees and mediation training before they can serve as mediators. Only a few states have no educational or training requirements for mediators.

A growing trend in a number of states requires mediators in domestic relations cases, primarily those involving child custody and visitation issues, to receive specialized mediation training in family issues as well as possess certain academic degrees, licenses or certifications before they can mediate such cases. This

* Professor of Law, Loyola University New Orleans School of Law. The author wishes to thank Professors Dane S. Ciolino and Kimberlee K. Kovach for the comments on earlier drafts and Sandra Diggs-Miller and Hunteria Nelson for their valuable research assistance.
Article discusses this trend and the controversial issue of mediator qualifications, primarily in cases regarding domestic relations issues such as child custody and visitation.

Section II of this Article discusses what mediation is and how mediation is used in child custody and visitation disputes. Section III examines the growing trend among states toward mandatory or discretionary mediation in child custody and visitation cases. In granting courts the authority to send child custody and visitation issues to mediation, an increasing number of states require either specialized mediation training and/or require mediators to possess certain academic degrees, licenses or certifications before they can mediate such issues. Section IV examines each state that has regulated the qualifications of mediators in child custody and visitation cases. Section V discusses the need for such mediators to possess certain academic degrees. Section VI addresses the type of general and specialized mediation training that should be required for child custody and visitation mediators who mediate cases in mandatory and discretionary jurisdictions. Finally, Section VII looks at other views on the professionalization of mediation and concludes that the trend toward professionalization is a positive one that should continue.

II. THE USE OF MEDIATION IN CHILD CUSTODY AND VISITATION DISPUTES

Mediation is a process whereby a neutral third person assists parties to resolve their dispute in a way that is acceptable to all parties. As a neutral party, the mediator, unlike a judge or arbitrator, does not evaluate the case but simply facilitates discussions between the parties in an effort to reach a mutually agreeable solution.¹

The use of mediation to resolve child custody and visitation disputes has grown tremendously in recent years. Most courts resolve custody and visitation disputes according to the best interests of the child.² The parents in most cases, not the judge

or the lawyers, are in the position to know what is best for the child. By participating in a mediation, parents are able to work toward an agreement that meets the best interests of the child.

Mediation is particularly helpful in resolving child custody disputes. After a child custody or visitation dispute is over, parents usually remain in contact with each other for years to come due to their continuing obligations and duties toward their minor children. Mediation of child custody and visitation disputes reduces conflict between parents and helps them to communicate more effectively when they are resolving disputes and when disputes end. Mediation allows divorcing or separating parents to resolve personal and complex issues in private without the presence of outsiders or others who have no interest in the dispute. Consequently, children of mediated disputes adjust better after the divorce.

Compared to litigation, mediation provides additional benefits for disputing parties. Mediation of child custody and visitation disputes saves disputing parties time and money, whereas


5. See id.

litigation of marital disputes can be costly and time-consuming. Mediation significantly reduces the number of custody hearings and the time involved in resolving disputes. Additionally, research has shown that mediating divorce disputes produces a higher level of compliance with custody agreements than does litigating these types of disputes. This higher level of compliance with custody agreements can lead to a reduction in post-settlement litigation which is beneficial to both the parents and children.

III. THE EFFORTS OF STATES TO REGULATE MEDIATION IN CHILD CUSTODY AND VISITATION CASES

Mediator training and qualifications became significant concerns in the late 1960s when mediation was first used as a means of resolving minor criminal complaints and small claims court actions. Initially, courts referred cases to nonprofit agencies for mediation. As the mediation referrals continued, questions arose concerning the qualifications of those to whom these cases were being referred. Mediators in the early programs came from all walks of life. They were "community organizers, business persons, attorneys, social workers, teachers, senior citizens, and homemakers." To ensure confidence in the mediation system, program planners began to require that their mediators receive training. As the use of mediation increased, a large number of ADR programs became connected to state and federal court systems. These systems started using mediation to resolve a wide variety of disputes. The focus on the training and qualifications of mediators intensified. When mediation became a popular method of resolving child custody and visitation matters in divorce actions, mental health professionals became more involved in mediation and the debate over the appropriate qual-

mediation ideology and practice are incompatible with the rights and safety of victims of spouse abuse; Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991) (suggesting that mediation may be dangerous for women).

7. See Halikias, supra note 6, at 33.
8. See Gaschen, supra note 6, at 484.
10. See id. at 981.
11. Id.
12. See id. Mediation training is discussed in detail in Section VI, infra.
13. See id. at 982.
fications and training of mediators exploded. As a result, states began to regulate divorce mediation on a statewide basis.

Today, the regulation of child custody and visitation mediation takes many forms. Some states grant the trial judge sole discretion as to whether to send a child custody and visitation issue to mediation. Other states regulate such mediation by requiring that all contested child custody or visitation issues be mediated before they can be heard by a trial judge. When mediation is regulated in this fashion, the parties have virtually no choice but to attend a mediation before a trial judge will hear their case.

A number of states requiring mandatory and/or discretionary family mediation have restricted the mediation to child custody and visitation issues, thereby excluding the mandatory discussion of financial issues from the mediation sessions. This statutory separation of excluding financial issues involved in a divorce from mediation began in California. It became the first state to require mediation of all child custody and visitation disputes before the issues could be decided by the trial judge. This bifurcated scheme began in California because, by statute, mediators in child custody and visitation issues were mental health professionals who were viewed as competent enough to handle the parenting issues, but not the financial issues. It was argued that financial issues differ from parenting issues in that “financial issues take place in a short period of time, concern equity and fairness, and are governed by a whole system of rules developed through the law.” Consequently, parenting issues would

14. See id. at 983. Mediator qualifications are discussed in Section V, infra.
15. See id.
16. A typical statute granting the trial judge such discretion is LA. REV. STAT. ANN. § 9.332(A) (West Supp. 1996), which states: “The court may order the parties to mediate their differences in a custody or visitation proceeding. The mediator may be agreed upon by the parties or, upon their failure to agree, selected by the court.” See also infra note 25 and Table 1 for a list of similar statutes.
17. See, for example, Idaho Court Rules, which state in pertinent part: “All domestic relations actions involving a controversy over custody or visitation of minor children at the trial and post-decree stages in the courts of this state shall be subject to mediation regarding issues of custody, visitation, or both.” IDAHO CT. R. 16(j)(2); see also infra note 25 and Table 1 for a list of similar statutes.
18. Many states prohibit the referral of custody cases to mediation where there is a significant history of domestic abuse that would compromise the mediation process. See Fischer et al., supra note 6, at 2147-49 (discussing this practice).
20. Id.
be sent to mediation while lawyers would resolve the financial issues, such as property settlement, debts, alimony and child support, outside of the mediation through negotiation or litigation.\textsuperscript{21}

Moreover, to ensure judicial protections for women, who have traditionally been viewed as having less power in the marital relationship because of the man's higher earning power, the California legislature limited the issues in mandatory mediations to the resolution of custody or visitation issues.\textsuperscript{22} It was believed that limiting the issues would prevent the wife in a mediation from making financial concessions such as waiving child support, spousal support or certain aspects of property in an attempt to keep custody of the children.\textsuperscript{23} As a result, a mandatory mediation concerning only parenting issues would decrease the opportunity for the parties to bargain over financial issues.\textsuperscript{24}

When other states began allowing or requiring mediation in domestic relations cases, they apparently followed California's lead and separated the financial issues from mandatory mediation. Some commentators have questioned this trend toward bifurcating the issues. Opponents of the bifurcated scheme argue that notwithstanding the statutory language that limits mediation to custody and visitation issues, many mediators in such programs are likely to discuss child support issues.\textsuperscript{25}

Despite this criticism, the bifurcated method is the best approach.\textsuperscript{26} Mediation of custody and visitation issues that does not involve a discussion of the financial issues allows parents to work toward an agreement that meets the best interests of the child.\textsuperscript{27} Further, opponents of bifurcation fail to acknowledge that most of the statutes that mandate the mediation of custody and visitation issues, or that grant the trial judge the discretion to send such issues to mediation, do not prohibit the parties from voluntarily agreeing to discuss support or property issues once the mediation begins. The statutes simply govern which issues

\textsuperscript{21} See id. at 767-70.
\textsuperscript{22} See Gaschen, supra note 6, at 471.
\textsuperscript{23} See id.
\textsuperscript{24} See id.
\textsuperscript{25} See Craig A. McEwen et al., Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 MINN. L. REV. 1317, 1340 (1995).
\textsuperscript{26} See supra notes 23-24 and accompanying text.
\textsuperscript{27} See supra note 2.
may be sent to mediation by the trial judge, not the issues parties may discuss in a mediation. If parties who have been ordered to discuss custody and visitation issues realize the benefits of mediation and decide they want to discuss other issues, they should be free to do so. The resolution of the child support, alimony and property issues in a mediation can only reduce the conflict between disputing parents and help them communicate more effectively in the future. Consequently, the bifurcated scheme, which is the most popular approach being used by states today, should continue.28

IV. THE REGULATION OF THE QUALIFICATIONS OF CHILD CUSTODY AND VISITATION MEDIATORS

Once the bifurcated method has been selected, the question of mediator qualifications still remains. Currently, there is no consensus among the states as to the best qualifications or guidelines necessary to be a child custody and visitation mediator.29 Mediator qualifications vary from state to state, frequently including advanced degrees and/or specialized mediation training.30 When educational degrees are required, they are usually in the fields of law, mental health or behavioral and social science.31 Specialized mediation training usually entails training in the mediation process, family and human development, family

28. See infra note 33 and Table 1 for a list of states that have enacted either mandatory or discretionary mediation statutes which separate the custody and visitation issues from the financial issues.
29. One commentator notes:
Unlike the practice of law, which has very specific requirements for practice, mediators are not governed by a unified set of regulations. As a result of controversy within the field over who should be allowed to mediate, most of the national professional dispute resolution organizations, along with many state and municipal governing bodies, are currently developing position papers and direct legislation which addresses the establishment of mediator qualifications.

Karen A. Zerhusen, Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator, 81 KY. L.J. 1165, 1172 (1992-93); see also Paul F. Devine, Note, Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?, 12 ST. LOUIS U. PUB. L. REV. 187, 197 (1993) (explaining that uniform qualification standards have not emerged because mediation is not as institutionalized as law or medicine; many small factions exist specializing in certain areas); Stephanie Harris, Comment, Court-Connected Mediation of Parental Rights and Responsibilities in Ohio: The Impact of Interim Rule 81, 10 OHIO ST. J. ON DISP. RESOL. 105, 109 (1994) (noting that divorce mediators do not have common guidelines or rules).
30. See McEwen et al., supra note 25, at 1343.
31. See id.

Table 1 examines those states that have regulated child custody and visitation mediation by either allowing or mandating that all child custody and visitation issues be mediated before the issues are tried by a trial judge. Additionally, Table 1 surveys those same states to determine what types of academic degrees, licenses or certifications child custody and visitation mediators are required to possess before they can mediate cases. Finally, Table 1 details the type of mediation training that those states require its mediators to receive before they are allowed to mediate cases.
Table 1: An Analysis of States That Regulate Child Custody and Visitation Mediation

<table>
<thead>
<tr>
<th>State</th>
<th>Mandatory or Discretionary Program</th>
<th>Educational Degree Required</th>
<th>Mediation Training Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>discretionary</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>California</td>
<td>mandatory</td>
<td>master's degree in psychology, social work or other behavioral science related to marriage and family</td>
<td>40 hours of mediation training</td>
</tr>
<tr>
<td>Colorado</td>
<td>discretionary</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Connecticut</td>
<td>discretionary</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Delaware</td>
<td>mandatory</td>
<td>none</td>
<td>none</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th>State</th>
<th>Mandatory or Discretionary Program</th>
<th>Educational Degrees Required</th>
<th>Mediation Training Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>discretionary</td>
<td>master's degree or doctorate in social work, mental health, behavioral or social science; physician; lawyer; or certified public accountant</td>
<td>40 hours of family mediation training</td>
</tr>
<tr>
<td>Idaho</td>
<td>mandatory</td>
<td>none, if member of Academy of Family Mediators</td>
<td>20 hours of child custody mediation training</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Idaho judge, lawyer, licensed psychologist, licensed counselor, certified social worker, certified school counselor, or certified school psychologist</td>
<td>60 hours of mediation training, 20 of which must be in the field of child custody mediation</td>
</tr>
</tbody>
</table>

34. In Florida, mediation in custody and visitation cases is mandatory in circuits in which a family mediation program has been established unless there is a history of domestic violence. See Fla. Stat. Ann. § 44.102(1)(b) (West Supp. 1995). In circuits that do not have a family mediation program, mediation in custody and visitation cases is discretionary. See id. § 61.183.

35. The Academy of Family Mediators requires its practitioner members to receive 60 hours of mediation training with no less than 30 hours of integrated generic family mediation training. See The Academy of Family Mediators, Membership Standards (on file with author).

36. All child custody mediators must complete a minimum of 20 hours of additional training or education every two calendar years. See Idaho Ct. R. 16(j)(6)(C).
37. Although Illinois does not have statewide requirements for the qualifications of child custody and visitation mediators, several judicial districts in Illinois such as the 11th, 16th, 17th and 19th do have requirements for mediators of such cases. The Eleventh Judicial District Court (Ford, Livingston, Logan, McLean and Woodford Counties) requires its child custody and visitation mediators to have a law degree or a master's degree in a mental health field or the equivalent in a related discipline, two years of work experience in a professional field related to mediation, specialized family mediation training and continuing mediation education. See ILL. 11 CIR. R. D(5) app. The Sixteenth Judicial Circuit (DeKalb, Kane, and Kendall Counties) requires its mediators to complete a 40-hour specialized divorce mediation training course as well as possess a law or graduate degree in psychiatry, psychology, social work, human development, family counseling, or other behavioral science substantially related to marriage and family interpersonal relationships, or a related field otherwise approved by a Presiding Judge of the Family Court. See ILL. 16 CIR. R. 15.22. The Seventeenth Judicial Circuit (Boone and Winnabego Counties) requires its mediators to possess a law or a graduate degree in a field that includes the study of psychiatry, psychology, social work, human development, family counseling, or other behavioral science substantially related to marriage and family interpersonal relationships and complete a 40-hour specialized family mediation training course. See ILL. 17 CIR. GEN. ORDER. No. 4.14; ILL. 17 CIR. R. 6. The Nineteenth Judicial Circuit (Lake and McHenry Counties) requires its mediators to possess a law or a graduate degree in a field that includes the study of psychiatry, psychology, social work, human development, family counseling, or other behavioral science substantially related to marriage and family interpersonal relationships, and complete a 40-hour specialized family mediation training course. See ILL. 19 CIR. R. 18.04(b).
<table>
<thead>
<tr>
<th>State</th>
<th>Mandatory or Discretionary Program</th>
<th>Educational Degrees Required</th>
<th>Mediation Training Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>discretionary</td>
<td>college degree</td>
<td>40 hours of general mediation training, 20 hours of child custody mediation training and 8 hours of co-mediation training</td>
</tr>
<tr>
<td></td>
<td></td>
<td>licensed or certified attorney, psychiatrist, psychologist, social worker, marriage and family counselor, professional counselor, or clergymen</td>
<td>16 hours of general mediation training, 20 hours of child custody mediation training and 8 hours of co-mediation training</td>
</tr>
<tr>
<td>Maine</td>
<td>mandatory</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Maryland</td>
<td>discretionary</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Minnesota</td>
<td>discretionary</td>
<td>none</td>
<td>40 hours of certified mediation training</td>
</tr>
<tr>
<td>Missouri</td>
<td>discretionary</td>
<td>attorney or graduate degree in counseling, psychology, social work or a related field.</td>
<td>20 hours of child custody mediation training</td>
</tr>
<tr>
<td>Montana</td>
<td>discretionary</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Nevada</td>
<td>mandatory</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>New Jersey</td>
<td>mandatory</td>
<td>graduate degree or certification of advanced training in a behavioral or social science</td>
<td>recognized training in family mediation</td>
</tr>
<tr>
<td>New Mexico</td>
<td>mandatory</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>North Carolina</td>
<td>mandatory</td>
<td>master's degree in psychology, social work, family counseling or a comparable human relations discipline</td>
<td>40 hours of mediation training; professional training and experience relating to family issues</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Mandatory or Discretionary Program</th>
<th>Educational Degrees Required</th>
<th>Mediation Training Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>discretionary</td>
<td>bachelor's or master's degree in behavioral science, attorney or certification by national organization</td>
<td>40 hours of family mediation training</td>
</tr>
<tr>
<td>Ohio</td>
<td>discretionary</td>
<td>bachelor's degree or equivalent educational experience and 2 years of professional experience with families</td>
<td>40 hours of specialized family mediation training</td>
</tr>
<tr>
<td>Oregon</td>
<td>mandatory</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>discretionary</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>South Dakota</td>
<td>mandatory</td>
<td>none&lt;sup&gt;39&lt;/sup&gt;</td>
<td>none</td>
</tr>
<tr>
<td>Utah</td>
<td>mandatory&lt;sup&gt;40&lt;/sup&gt;</td>
<td>psychologist, social worker, marriage and family therapist or attorney</td>
<td>40 hours of mediation training</td>
</tr>
<tr>
<td>Virginia</td>
<td>discretionary&lt;sup&gt;41&lt;/sup&gt;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Washington</td>
<td>discretionary</td>
<td>mediator may be member of the professional staff of a family court or mental health services agency, or any other person or agency designated by the court</td>
<td>none</td>
</tr>
</tbody>
</table>

39. In South Dakota, the Supreme Court has the duty to adopt rules establishing the minimum qualifications of a mediator. See S.D. CODIFIED LAWS § 25-4-58 (Michie Supp. 1996). Additionally, for any mediation ordered pursuant to § 25-4-56, the court appoints mediators from a list of qualified mediators approved by the court. See id. § 25-4-57.

40. Utah established a pilot mandatory mediation program for the fourth judicial district to be administered by the Administrative Office of the Courts after January 1, 1993 and before March 1, 1995. See UTAH CODE ANN. § 30-3-2(1)(a) (1995).

41. The Virginia statute shall become effective June 1, 1998, “only if state funds are provided by the General Assembly sufficient to provide adequate resources, including all local costs, for the court to carry out the purposes of this act and to fulfill its mission to serve children and families of the Commonwealth.” VA. CODE ANN. § 16.1-272.1 note (Michie 1996).
<table>
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<th>Educational Degree Required</th>
<th>Mediation Training Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wisconsin</td>
<td>mandatory</td>
<td>none</td>
<td>25 hours of mediation training or three years of professional experience in dispute resolution</td>
</tr>
</tbody>
</table>

V. THE NEED FOR CHILD CUSTODY AND VISITATION MEDIATORS TO POSSESS CERTAIN ACADEMIC DEGREES

As Table 1 shows, an increasing number of states have begun to order, by statute or court rule, that child custody and visitation disputes may not be heard by the trial judge until after the parties have attempted mediation. As more and more states continue to regulate child custody and visitation mediation by mandating party participation, mediators in these cases should continue to be required to possess certain educational degrees for several reasons.

First, the issues that often arise in child custody and visitation disputes are complex issues that require the expertise of trained professionals in order to be resolved. These issues include: family dynamics, the local judicial system, procedures used in child custody and visitation cases, child development and the impact of divorce on development. Persons with a mental health, behavioral or social sciences background will likely have the educational training that is useful in resolving issues involving child development and family systems. Additionally, lawyers will likely have the educational training that is useful with respect to the legal issues involved. Lawyers are accustomed to resolving disputes and settling cases since most disputes are resolved through some form of negotiation. The lawyer's knowledge of the negotiation process and the legal system will greatly

42. This trend is evidenced by the large number of states listed in Table 1, supra, that require such issues to be mediated or allow the trial judge to send such cases to mediation. See supra note 33 and accompanying text; see also Ann M. Haralambie, Mediation and Negotiation: Alternatives to Litigation, FAM. ADVOC., Winter 1990, at 52.

43. See Haralambie, supra note 42, at 53.

benefit the mediation process as the lawyer assists parties to resolve their disputes. While requiring mediators to possess educational degrees will not guarantee the quality of child custody and visitation mediations, it will ensure a minimum basis of knowledge that will aid mediators as they work to resolve the complex issues that are involved in these types of disputes.45

Second, trained mediation professionals who are lawyers, psychologists, psychiatrists, or social workers will legitimize mediation in the eyes of the parties and their lawyers.46 The widespread use of mediation in domestic relations cases is a relatively new phenomenon in this country. The success of mediation in this area depends on the process being seen as legitimate in the eyes of the public. If disputing parties and their lawyers do not view the mediation process as legitimate, they may, when ordered to mediate, simply “go through the motions,” thereby wasting valuable time and money. Further, if an individual without the proper educational background were allowed to become a child custody and visitation mediator associated with a court or other entity sanctioned by the court, the credibility of mediation as a viable alternative would be undermined, thereby damaging the process.

Third, requiring educational degrees will help states fulfill a duty of providing competent mediators when mediation is mandatory. When states mandate child custody and visitation mediation, mediation ceases to be a voluntary process. Consequently, parties will have little choice as to whether they would like to mediate.47 Additionally, many states provide rosters or lists from

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45. See also Harris, supra note 29, at 127 (“The issue of maintaining mediator competence is clearly of great concern for any mediation program, but when the issues and relationships are as complex and volatile as in cases of divorce where families are involved, consumer protection needs to be at its highest.”). But see McEwen et al., supra note 25, at 1344 (“There is reason to be skeptical about whether mediator qualifications, particularly those requiring educational degrees, substantially contribute to the fairness of the process. Research on mediator qualifications has failed to show a correlation between the mediator's education and rough indicators of performance, such as settlement rates or satisfaction by the parties.”).

46. See Paquin, supra note 3, at 1140; see also McEwen et al., supra note 25, at 1345 n.163.

47. Under most mandatory mediation programs, parties must participate in the process unless there exists a history of domestic abuse or violence. For example, in Florida, where the trial judge has the discretion to send child custody, visitation, and other parental responsibility issues to mediation, the trial judge may not refer cases to mediation when there is a history of domestic abuse which would compromise the mediation. See Fla. Stat. Ann. § 44.102(2)(b) (West Supp. 1995).
which the parties must choose mediators. When states mandate that mediators be chosen from certain lists maintained by the courts or other state-sponsored entities, states thus have a duty to ensure that the mediators are competent. 48 Requiring certain educational backgrounds and specialized training is a first step toward ensuring this competency.

As long as parties are voluntarily participating in mediation and given a choice as to whom their mediator will be, they should be allowed to choose anyone that they see fit. The free market will then regulate who will continue to be an effective mediator. In this instance, the states should have no part in regulating the qualifications of mediators. Even when parties are required to participate in a mediation and are given the opportunity to select a mediator of their choice, there is no need to ensure mediator competence because the parties retain the responsibility for the ultimate choice of a mediator. 49 However, when states begin to regulate child custody and visitation mediation by either mandating party participation or by providing lists from which mediators are chosen, mediator competence should be of primary concern.

VI. THE NEED FOR SPECIALIZED TRAINING FOR CHILD CUSTODY AND VISITATION MEDIATORS

While requiring certain educational degrees provides the benefits discussed above, mediator training is also necessary to teach trainees the mediation process and the basic skills that they need to be effective and successful mediators. The mediation process referred to here is a facilitative process whereby a neutral third party, the mediator, assists disputing parties to resolve the dispute in a way that is agreeable to all parties. In the mediation model discussed in this Article, the mediator does not evaluate the case; the mediator simply acts as a facilitator. 50 Although mediators sometimes disagree about the best way to conduct a mediation, there are several common steps or stages

48. See, e.g., Florida Rules for Certified and Court-Appointed Mediators 10.010-10.290 (enacting comprehensive guidelines for mediator certification), reprinted in Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 694 So.2d 764, 765 (Fla. 1992); Devine, supra note 29, at 206.
49. This view is consistent with that of the Society of Professionals in Dispute Resolution Commission on Qualifications. See infra notes 86-91 and accompanying text.
50. See Kovach & Love, supra note 1, at 31.
The mediation process is described as follows under this model:

The introduction and explanation of the process is the first opportunity the mediator has to gain the trust of the parties involved. He must create a neutral environment and establish the confidential nature and positive tone of mediation. Because mediation is usually voluntary and non-binding, it is important to get a commitment from the parties to the mediation process. Unwilling participants are unlikely to enter into an agreement or live up to an agreement to which they were not committed or felt coerced into entering.

Once the process has been explained and the parties have agreed to mediate, the mediator must allow each person to tell his "story." The mediator should ask questions to be certain of each person's perspective on the conflict and goals. "The mediator must determine the nature of the participants' underlying and manifest conflicts by using the following evaluation criteria: immediacy of the conflict, duration of the conflict, intensity of feelings about the conflict, and rigidity of positions." By rephrasing each person's story, the mediator can be sure she understands the party's position, investment in that position, and ranking of the importance of the issues.

The next phase of the process ranks the most important issues and begins the actual negotiation and generation of options. Issues are framed in a "how to" manner. "How can you do what you want to do in the most effective way?" The main burden of creating options is on the parties, but the mediator can facilitate this by suggestion or supposition.

Once the parties reach an agreement, it should be formalized by the parties and the mediator. Although not all agreements need to be reduced to writing, the formality of a writing may be beneficial in long term compliance. Also, as memories fade, a written record of the mediation agreement may prevent renewed conflict on the same issues. The terms should be written as a draft that "outlines clearly the participants' intentions, their decisions, and their future behavior." Both parties should thoroughly review the agreement and, in some cases, have the agreement reviewed by an outside source. The mediator may also wish to "balance" the agreement—point out the positive framing or "win/win" aspect of the solution. When the parties have reviewed and are satisfied with the agreement, signing the document completes the mediation process.

Id. at 192-93 (citations and footnotes omitted).

In divorce mediation, the parties are usually required to obtain outside review of the agreement to ensure protection of legal rights, while the parties in education and environmental mediations may require outside review of the agreement to ensure adherence to public policy. See id. at 192. See Nancy T. Gardner, Book Note, 84 MICH. L. REV. 1036, 1037 (1985-86) (reviewing JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984)), for a discussion of the following seven-stage model that is used in divorce mediations: "(1) introduction . . . ; (2) factfinding and isolation of issues; (3) creation of options and alternatives; (4) negotiation and decision-making; (5) clarification and writing a plan; (6) legal review and processing; and (7) implementation, review and revision."
In order to teach mediation trainees the mediation process and the skills necessary to assist the mediation participants, the mediation training should include: instruction on the stages of the mediation process; instruction in the use of the joint session and caucus, communication techniques, the negotiation process, mediator neutrality, confidentiality and ethics; and lecture, simulation and role-playing. The simulation and role playing will give the participants a "feel" for what it is like to participate in an actual mediation.

This training is referred to as general mediation training and should provide trainees with basic information about the mediation process. In mediation training programs for individuals who will conduct child custody and visitation mediations, specialized training in child custody and visitation mediation should accompany the general mediation training. The specialized training should include instruction in such matters as family dynamics, child development and the impact of divorce on development, the local judicial system, and the procedures used in child custody and visitation cases. The specialized mediation training should also include instruction on areas such as child abuse, spousal abuse and the availability of other resources in the community to which clients can be referred for assistance. Instruction in these areas will assist the child custody and visitation mediator in handling the complex and emotional issues that arise in parenting disputes accompanying a divorce or separation. The specialized mediation training should adapt what was learned in the general mediator training to child custody and visitation cases.

52. See Stulberg, supra note 9, at 995. Instruction includes the mediator's opening statement or introduction, the parties' opening statements, identification of issues, generating options, negotiating or bargaining, reaching agreement and the drafting of the agreement. See id.

53. See id. For a comprehensive treatment of the mediation process and a text that combines the theory, law and practice of mediation see Kimberlee K. Kovach, Mediation, Principles and Practice (1994).

54. One commentator states:

The interpersonal dynamics of divorce are more complex than most civil cases and will typically involve two unsophisticated negotiators who may have low self-esteem. Due to such vulnerabilities, the mediator must be careful not to use more directly manipulative or heavy-handed tactics in the divorce mediation. The specialized training seeks to adapt what was learned in the general mediation training to domestic relations cases.

Paquin, supra note 3, at 1142 (describing the two-day domestic relations mediation training in the Mediation Center of Kentucky that family mediators receive in addition
The specialized mediation training should provide the child custody and visitation mediation professional with the additional substantive knowledge that will allow the professional to function effectively as a mediator. Substantive knowledge of child custody and visitation issues, the court system, and domestic relations case procedures is essential to the success of the child custody and visitation mediator. The knowledge a mediator needs to help disputing parents resolve their child custody and visitation dispute is completely different from that which is needed to help parties to resolve other types of disputes.

With the specialized training and knowledge of child custody and visitation matters, the child custody and visitation mediator is said to be an “industry specific” mediator. The industry specific mediator should be contrasted with the “generic” mediator. The generic mediator is said to be one who is such a skillful mediator that he can perform well in any setting although he may not have specific knowledge of the subject matter at hand. While some generic mediators may possess the unique ability to mediate effectively in other substantive areas, generic mediators will not generally be effective child custody and visitation mediators. The issues that arise in child custody and visitation cases are different from those that arise in other substantive areas.

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55. Dr. Stulberg agrees:

The screening process ensures some participant familiarity with the subject matter jurisdiction of the cases referred to mediation. Such knowledge is essential, because the goal of providing mediation as an alternative is to enable disputing parties to settle their controversy, if possible; the mediator cannot handicap the discussions through ignorance of the substantive milieu in which the controversy occurs. The knowledge a mediator needs to help neighbors address interpersonal disputes over the use of a common driveway is different from that which is relevant to the discussion of a disputed workers’ compensation claim or the allocation of pension benefits among partners in a divorce proceeding.

Stulberg, supra note 9, at 990.


57. See id.; see also Edward F. Hartfield, Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes, 12 Seton Hall Legis. J. 109 (1988).

58. But see Hartfield, supra note 57, at 109 (disputing argument that mediators in other fields such as family/divorce, community, environmental and labor are different than generic mediators).
Specific knowledge of child custody matters is vital to the success of child custody and visitation mediators.59

Although most mediators agree that some form of mediation training should be required and most mediation programs do require some type of training, there is disagreement over the appropriate length of these programs.60 Some mediation programs require nothing more than a three-to-four hour orientation to the mediation process, while other programs require training programs ranging from sixteen to forty hours.61 Additional training hours are generally required for mediators in family matters.62

Some states that regulate the qualifications of child custody and visitation mediators do not require any mediator training.63 When states do require mediation training for child custody and visitation mediators, the most common requirement is forty hours of mediation training.64 A few states require less than forty hours,65 while other states require more than forty hours.66 Additionally, the Academy of Family Mediators, a well-known private group of family mediators, requires its practitioner members to receive sixty hours of mediation training67 as well as

59. See Douglas & Maier, supra note 56, at 32 (discussing the Academy of Family Mediators' support of specific knowledge training for divorce mediators).
60. See Kovach, supra note 53, at 207.
61. See id. at 207-08. Professor Kimberlee K. Kovach believes that the requirement of forty hours of training, which has been adopted by a number of states, came from the neighborhood justice movement. Apparently, the forty hours resulted from no other reason than the fact that the organizers could only get the hotel rooms for a certain number of days. "Not a very good way, I think to determine education." John Feerick et al., Standards of Professional Conduct in Alternative Dispute Resolution, 1995 J. Disp. Resol. 95, 116.
62. See Kovach, supra note 53, at 208.
63. For example, Alaska, Colorado, Connecticut, Delaware, Iowa, Maine, Maryland, Montana, Nevada, New Mexico, Oregon, Rhode Island, South Dakota, Virginia, and Washington do not statutorily require any mediator training. See supra, Table 1.
64. For example, California, Florida, Minnesota, North Carolina, North Dakota, Ohio and Utah require 40 hours of mediation training. See supra, Table 1.
65. For example, Idaho requires 20 hours of mediation training for certain licensed or certified professionals, Wisconsin requires 25 hours while Kansas requires 24 hours. See supra, Table 1.
66. For example, Idaho requires 60 hours of mediation training for individuals possessing only a bachelor's degree, while Louisiana requires such individuals to receive 68 hours of mediation training. See supra, Table 1.
67. The sixty hours of training must include thirty hours of an integrated generic family mediation training. The integrated mediation training must include the following core areas and at least six hours of role playing: (1) information gathering skills and knowledge; (2) relationship skills and knowledge; (3) communication skills and
twenty hours of continuing education every two years after meeting the initial training requirements.68

In enacting statutes or rules detailing the number of hours required to become a qualified child custody and visitation mediator, states should require at least forty hours of general and specialized mediation training. Forty hours of mediation training should be sufficient to teach professionals who already have knowledge of either the legal system, family dynamics or child development issues, the mediation process as well as the skills and the additional specialized knowledge needed to be effective mediators. The forty hours of general and specialized mediation training should consist of lecture, discussion and role-playing.

In addition to requiring general and specialized training for child custody and visitation mediators, states should require the mediation trainees to co-mediate with an experienced custody mediator before they are allowed to mediate cases. The co-mediation component of the training experience will give the mediation trainees a first-hand view of a real mediation, adding to the knowledge and skills of the custody mediator. The co-mediation requirement can be a specific number of mediations with an experienced mediator or a specific number of hours as a co-mediator.

Finally, states regulating the qualifications of child custody and visitation mediators should require mediators to receive continuing mediation education and training each year. The continuing mediation education and training will allow mediators to keep abreast of developments in the field of mediation as well as in the area of law governing child custody and visitation matters.

VII. OTHER VIEWS ON PROFESSIONALIZING MEDIATION

Although there are many views on the professionalization of mediation,69 the following discussion presents a representative

68. See id.
sample of two of the most common views on the professionalization of mediator qualifications.

One ADR commentator, Professor Kimberlee Kovach, has noted the trend toward the professionalization of mediation and suggests that the trend is headed in the right direction.\(^7^0\) Professor Kovach also states that entities that enact mediation codes have a duty to ensure the competency of mediators. Professor Kovach advocates four requirements pertaining to the qualifications of mediators necessary to ensure the competency of mediators.\(^7^1\) These requirements are "the initial qualifications needed in order to go to the second level, which is training and education, or what I call mediator school. The third consideration is one of testing and evaluation, and the fourth is the need for continuing professional development."\(^7^2\)

According to Professor Kovach, before a person is allowed to receive mediation training, he should first be required to have a four-year college degree, or an equivalent, such as work experience. While recognizing the possibility that this requirement may preclude individuals from becoming mediators, Professor Kovach nevertheless recognizes that the line must be drawn somewhere and advocates that the minimum requirement of a four-year college degree or equivalent work experience is necessary to ensure mediator competency.\(^7^3\)

Professor Kovach's next component is training and education. Instead of the forty hours of mediator training required by many states, Professor Kovach promotes the concept of a one-year long mediation school where the curriculum would "combine both educational qualifications may carry a variety of costs such as mediators who lack diversity and who charge higher fees); Andree G. Gagnon, Ending Mandatory Divorce Mediation for Battered Women, HARV. WOMEN'S L.J., Spring 1992, at 272, 293 (recommending that family mediators be required to have an undergraduate degree in psychology, family studies, or social work, and a background in case work with families); McEwen et al., supra note 27, at 1344-45; Zerhusen, supra note 29, at 1173-74 (suggesting that requiring educational degrees would bar entry into the ADR field and not ensure competence).

70. See Feerick et al., supra note 61, at 116. It should be noted that Professor Kovach's comments were made relative to the qualifications of mediators in general, not specifically to the qualifications of mediators in child custody and visitation cases.

71. See id.

72. Id.

73. See id. It is not certain what is meant by Professor Kovach's statement relative to the phrase "equivalent, such as work experience" before one should be allowed to receive mediation training. Perhaps experience in the substantive area that is the subject of the mediation is what is meant.
theory and law, along with skills training and development.\textsuperscript{74} Subjects that would be taught in the mediation school include the theory of mediation, skills development, conflict analysis, the law of mediation, confidentiality and liability.\textsuperscript{75}

The third requirement suggested by Professor Kovach concerns testing and evaluation. Before someone is competent to practice mediation, he should have to take and pass a one-day examination on the theory and law of mediation, much like a bar examination.\textsuperscript{76} Additionally, the competency of a person to actually perform as a mediator would be tested by either “direct observation of the student by the instructor, . . . the student’s own self assessment by the use of videotaped live or simulated sessions,” or the use of a video exam whereby the student is quizzed about specific situations that hypothetically arise in a mediation.\textsuperscript{77} Once students pass the various components of testing, they would become professional mediators.\textsuperscript{78} Finally, Professor Kovach has suggested that professional mediators should continue their professional development by upgrading their skills and knowledge each year through continuing education classes.\textsuperscript{79}

Professor Kovach’s approach to general mediator qualifications is laudable. The Kovach approach to mediator qualifications would bring legitimacy to the mediation process because then all mediators would at least have a college degree or equivalent experience. Additionally, the year-long mediation school would ensure that mediators are trained in mediation skills, tactics and techniques and the law of mediation. Further, the testing component of the Kovach approach provides a means to evaluate the competency of persons to mediate cases, while the continuing education component will keep professional mediators abreast of the latest mediation developments.

However, the need for a year-long mediation school and the testing component of Kovach’s approach are questionable and perhaps unnecessary. While a four-year college degree is a useful

\textsuperscript{74} See id.  
\textsuperscript{75} See id.  
\textsuperscript{76} See id.  
\textsuperscript{78} See Feerick et al., \textit{supra} note 63, at 117.  
\textsuperscript{79} See id.
beginning, it does not go far enough in ensuring mediator competency in child custody and visitation cases. Because of the intricate issues involved in child custody and visitation cases, specialized knowledge of family issues, divorce dynamics, children, the legal system or procedures used in domestic relations cases are necessary to ensure competency. Hence, requiring any four-year college degree may not be enough to ensure mediator competency. A college degree in the field of law, mental health, behavioral or social sciences should be required before a person is allowed to receive mediator training. A year-long mediation school seems unnecessary in the child custody and visitation area if individuals with the appropriate educational backgrounds are being trained as mediators. While specialized mediation training is a must for child custody and visitation mediators, it should not take a year to adequately train such persons with the appropriate educational backgrounds.

Furthermore, the testing component of the Kovach approach would also be unnecessary because, again, if the proper professionals are selected for child custody and mediation training and if the specialized training in child custody and mediation issues is performed correctly, at the conclusion of the one-week training program, these individuals should be qualified to mediate child custody and visitation disputes without a test. The appropriate forty hours of general and specialized family law mediation training along with the co-mediation component should be sufficient to train professionals to mediate child custody and visitation matters.

In contrast to Kovach's position, the organization that has gained the most attention in opposing professionalizing mediator qualifications is the Society of Professionals in Dispute Resolution (SPIDR), a well-known association of ADR neutrals. In 1989, the SPIDR Commission on Qualifications, a commission formed to examine the question of qualifications of mediators and arbitrators, rendered a report on the best way to promote

80. See supra notes 43-49 and accompanying text.
81. See supra Section VI regarding specialized mediation training.
82. See, e.g., McEwen et al., supra note 27, at 1344-45 (citing the Commission's report and suggesting that enhanced educational qualifications may carry a variety of costs such as mediators who lack diversity and who charge higher fees); Zerhusen, supra note 29, at 1173-74 (citing the Commission's report and suggesting that requiring educational degrees would bar entry into the ADR field and would not ensure competence).
competency and quality in the practice of dispute resolution. The Report was subsequently approved by the SPIDR Board. After studying the issue of qualifications of mediators and arbitrators, the Commission adopted three central principals:

A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;

B. 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

C. that qualification criteria should be based on performance, rather than paper credentials.

With respect to the qualifications of neutrals, the Commission concluded that a college degree should not be required as a prerequisite for service as a neutral. This conclusion was based on a number of concerns. First, the Commission found no evidence that formal academic degrees are necessary for competent performance as a neutral. Second, the Commission was concerned that requiring a college degree would create a significant barrier to the entry of many competent individuals into the profession. Finally, the Commission was concerned that requiring a college degree would foreclose avenues of demonstrating dispute resolution competence. Instead, the Commission concluded that qualification criteria should be based on performance-based testing and/or experience, emphasizing knowledge and particular skills necessary for competent practice.

The Commission’s Report is praiseworthy in its effort to establish criteria for the qualifications of neutrals in general. While the Report is an adequate beginning, the Commission’s Report is insufficient in suggesting qualifications for child custody and visitation mediators in the mandatory or discretionary

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84. See id.
85. Id. at 345.
86. See id. at 346.
87. See id.
88. See id.
mediation programs that have been established in the United States over the last fifteen years. As previously discussed, the prevalent trend among the states is to allow or mandate that trial judges send custody and visitation issues to mediation before such issues will be heard by the trial judge. In sending these issues to mediation, states have a duty to ensure mediator competence. While the professionalization of mediator qualifications is a controversial issue, professionalization is necessary to ensure the competence of custody and visitation mediators. Allowing persons without a college degree to mediate issues in a mandatory or discretionary child custody or visitation mediation program may result in unqualified individuals handling the sensitive issues involved in a separation or divorce.

Requiring child custody and visitation mediators to have certain college degrees will not guarantee that each mediator is competent. However, it does insure a minimum level of competence that, coupled with the general and specialized mediator training discussed earlier, will provide the individual with the knowledge and skills necessary to function effectively as a mediator. Additionally, the continuing mediation education and skills training will allow the mediator to continually update his skills and knowledge of mediation techniques and changes in custody laws. Another benefit to the continuing mediation education and skills training is that it gives the mediator legitimacy in the eyes of the parties.

The performance-based testing for neutrals will be a cumbersome task that cannot be effectively implemented at this time. As acknowledged by the Commission,

[performance-based testing is relatively new to dispute resolution but not to other skills (those of athletes and pilots, for example). To do it well can be time consuming, expensive, and subject to human error. Thus, it may not currently be feasible

89. In opining a view different from the conclusion of the report of the SPIDR Commission on Qualifications as it relates to child custody and visitation mediators, the author offers no opinion on the report as it relates to the qualifications of mediators in other disciplines. The view expressed in this article relates only to the qualifications of mediators in states that either allow or mandate that custody or visitation issues be sent to mediation prior to such issues being decided by the trial judge.

90. See supra note 2.
to expect all organizations or programs to rely on actual performance measures.91

Performance-based testing for child custody and visitation mediators is not something likely to be adopted by many states in the near future. Such testing, as acknowledged by the Commission, is new to dispute resolution, time-consuming and expensive.92 If performance-based testing is not likely to be adopted soon, it would be a mistake for states to adopt such criteria. Furthermore, the author simply finds that performance-based testing is not sufficient for custody and visitation mediators.

Additionally, the Commission’s alternative, the experience of the neutral, is likewise not a suitable substitute. With respect to experience, the Commission states:

As an alternative, experience can be a useful screening tool to identify those who can mediate or arbitrate and those who would benefit from further training. Criteria such as the amount and diversity of prior dispute resolution experience, the complexity of previous cases handled, and the amount and diversity of experience as a negotiator in similar cases all may be useful. Well designed training and apprenticeship programs, with significant personal observation and feedback, also may be able to provide an equivalent of competency testing. In addition, neutrals may improve their performance by seeking feedback from clients.93

The fact that an individual has hung out a “shingle” in a state where mediation was unregulated and has handled a large number of similar cases is no guarantee that he is qualified to be a child custody and visitation mediator. While well-designed training programs are necessary to ensure mediator competency,94 such training programs are only a small aspect of the criteria necessary to ensure mediator competency. Requiring mediators to possess certain college degrees is another critical aspect.95

92. See also Dobbins, supra note 69, at 102 (advocating the use of performance tests as the best way to measure qualifications; however, author acknowledges that such testing has some disadvantages of being time consuming and expensive).
94. See discussion supra Section V.
95. See discussion supra Section VI.
VIII. Conclusion

As the use of mediation becomes more widespread, the debate over mediator qualifications will continue. The trend among the states is to mandate or allow the trial judge to send child custody and visitation disputes to mediation. Consequently, states have a duty to ensure the quality of the individuals who serve as mediators. Requiring child custody and visitation mediators to possess certain academic degrees and receive general and specialized mediation training in family issues are steps toward ensuring the quality of mediators. Additionally, requiring such mediators to receive continuing mediation education and skills training will allow mediators to remain abreast of new developments that affect the issues that arise in child custody and visitation disputes.