



# Is mediation a profession?

## A look at the regulation of mediation

BY NANCY NEAL YEEND

The mediation process has been around for centuries. Most cultures have processes similar to mediation, such as the Native American Peace Councils; and mediation has been used in China for over 4,000 years. Centuries ago the five major religions, Hinduism, Buddhism, Judaism, Christianity, and Islam, all developed and utilized processes, much like mediation, as we know it today.<sup>1</sup> In addition, this process was used in commerce, as early as the Middle Ages, where disputes between vendors were resolved through mediation, and mediation was widely used in England by the early

1100s. In fact, Shakespeare referred to mediation as “loveday.”<sup>2</sup> With this extensive history and universality of the process, a fundamental question exists: Has mediation achieved the status of “profession”? If not, what has prevented mediation from becoming a profession?

### Fundamental elements of a profession

There are numerous dictionary and statutory definitions for the word “profession.” Most link the word to a practice, vocation or calling that needs a “particular skill,” using phrases and terms like “advanced training,” or “specialized study”; anything that requires “exacting

education,” has an “accreditation process” or requires “specialized knowledge and experience.” Also, professions identify goals for providing expertise, competence and skill proficiency, and at the same time, protecting the public served by addressing accountability to a credentialing, licensing or certifying entity, establishing ethical standards of practice, and removal of those individuals not maintaining its standards and goals.

In addition, professionals need to not only possess a body of specialized knowledge and extended practical training, but also must participate in continuing education and demonstration of skill proficiency. A profession clearly defines



membership and is committed to enhancing the qualifications of its designees and increasing public awareness and protection.

With the above summary of what is included in the term “profession,” it appears that, by and large, the practice of mediation in the United States has not met the fundamental elements of the definition. So, what needs to happen to elevate mediation from a “cottage industry” to a “true” profession?

### Background

There have been numerous attempts to, if not make mediation a profession, at least create some common or even universally accepted definitions and concepts associated with the process. Some of the earliest efforts evolved from community-based mediation programs in the late 1960s that established training standards, including subjects covered, methods of teaching, involving interactive roleplays, and qualification criteria for the trainers.

By the 1980s individual courts were beginning to take a serious look at the process as a significant case management device, and began developing definitions, policies and procedures. In 1986 the state of Florida established the first statewide mediation-credentialing program under the auspices of its Supreme Court. In 1990 the federal government instituted regulations for mediation to be used in all of its agencies.<sup>3</sup>

In 1994 the American Bar Association’s Section on Dispute Resolution, American Arbitration Association, and Association for Conflict Resolution jointly developed standards for mediators. This initial effort was revised and ratified by all three groups and the Academy of Professional Family Mediators in 2005. These standards only have the force of law, if adopted by a court or other regulatory body.

### Public perception of mediation

A profession establishes goals and standards of practice for its members. In addition to addressing the training,

skills and competency of the regulated individuals, there is a commitment to the protection of the public being served. Standards of practice are supported by codes of conduct, ethical standards, and have a mechanism for reviewing complaints and, if necessary, removing an individual from the profession.

Not only is it difficult for members of the public to distinguish mediation from other forms of dispute resolution, but also some attorneys and other court personnel interchange words like mediation and arbitration. It is imperative that the users of any dispute resolution process be provided with information about the process and distinctions from other dispute resolution processes, especially those defined by someone making a decision as opposed to mediation, which empowers the parties to make the final determination.

At present there is no uniformity regarding educating participants prior to the start of the mediation; specific and distinguishing characteristics of the process; key elements like confidentiality with its possible exceptions; disclosure of potential conflicts of interest; fees; cancellation policies; etc. Without consistency regarding the mediation process, confusion results, and as has been noted over the past several years by some courts, resistance to participating in the process has started to increase.

### Mediation and the elements of a profession

Minimal requirements for establishing any profession include: defining the process, uniformity of terminology used, training requirements, trainer qualifications, continuing education requirements and code of conduct for the individuals who want to be designated as professionals. There are certainly other elements, but these fundamental prerequisites have presented significant challenges to those attempting to make mediation a profession.

Just defining the term “mediation” has been elusive. There is general

agreement that mediation is a *confidential*<sup>4</sup> process, where the individual(s) managing the process (mediators) are *impartial*, and that mediation is based on participant *self-determination*. Impartiality, although generally accepted, is beginning to slowly erode with the introduction of the concept of a “mediator’s proposal,”<sup>5</sup> along with other variations to the process, where the mediator’s opinion is offered.<sup>6</sup>

These relatively recent changes to the historic and fundamental definition of mediation have created confusion for many using the process for the first time. Are these changes making mediation look more like a settlement conference, neutral evaluation, or is another new dispute resolution process evolving? Also, if the parties know in advance that the mediator is prone to making a recommendation, then the parties are actually less likely to prepare or actively participate in the process. These issues weigh down the process of making mediation a profession.

Other areas of discussion include: competence and experience of the mediator; ethics, and fees. Florida has identified and defined five mediation case types, and created separate rules, training and experience standards, policies and procedures for each.<sup>7</sup> In addition, Florida not only created a credentialing process for all categories of court-connected mediators, but also developed specific course topics and time frames for some subjects, such as ethics and mediation statutes. Standards and qualifications were developed for its mediation trainers, depending on the case type being taught: civil, family, community and appellate.

### Differing state requirements

At present there is a wide spectrum of training requirements; however, the majority of states require 40 hours of mediation training.<sup>8</sup> Maine has the highest training requirement for civil and family mediators: 100 hours of specialized training. Ohio, Mississippi and Missouri have some of the lowest training requirements: 12, 14 and 16 hours respectively.<sup>9</sup> There



are a handful of states<sup>10</sup> that require 30 hours. Not only is there no consistent standard for topics included in a course, or teaching methods, including roleplay time, but also there is only one state, Arkansas, that requires taking an exam.<sup>11</sup>

Even developing a universal ethical standard of practice has been hard to pin down. In some states there is no uniformity within their own court-connected mediation programs. If mediation programs have established ethical standards, there can also be differences between mediator ethical requirements and those of another profession. For example, lawyers, CPAs, social workers, and other professionals who may also mediate, may find conflicts between the various ethical guidelines.

It is not unusual for the topic of compensation to be linked with ethics. For example, it is unethical for a mediator to take a percentage of the amount in dispute or of the settlement for the fee. Fees must not be based on whether a case settles. Some courts require a certain number of hours to be mediated pro bono or they may set the mediator's fee, while other courts may allow the mediator to determine the fee. Not all courts or other entities providing mediation services require advanced disclosure of fees, cancellation policies or related financial issues.

### Management of mediators

Even if everyone could agree on mediator qualifications, definitions, etc., there still is no agreement on who manages or monitors the process or the practitioners: state, court or non-profit. Not only are there divergent views on what entity should manage mediators, but also, whether the process would be based on actual observation and investigation, or on the "self-reporting" model.<sup>12</sup>

Most community-based mediation programs have addressed all of the above-mentioned elements, and have detailed policies and procedures for the management or regulation of its mediators. Courts, both state and federal, with

mediation programs have dealt to varying degrees with most of these issues as well. Although there is no uniformity, a significant number of courts have policies and procedures in place to define and regulate their mediators and the process.<sup>13</sup> Some states have mediation programs managed by a governmental branch, such as a court.<sup>14</sup> In other states, non-profits, such as local mediation or bar associations, manage the credentialing process.<sup>15</sup>

The biggest gap is associated with those mediators in private practice. Again, Florida has established standards for mediators handling court-connected cases. Although anyone in Florida may call him/herself a "mediator," they cannot use the term "certified mediator." Without the specific designation of "certified" a person would be hard pressed to find work as a mediator. The Florida DRC<sup>16</sup> has expended significant effort and resources to educate the public regarding mediator qualifications and competency.

Several states, such as Texas, have a "credentialing" program for mediators. Texas Mediation Credentialing Association's (TMCA) stated goals are to promote public confidence in the mediation process, protect the consumer through a grievance procedure and further the process through annual education programs for its mediators. A major issue associated with these types of programs – they are not state or court regulated. As with TMCA, most are typically managed by a non-profit and credentialing is voluntary. Unlike the legal, medical, psychological or other true professions, mediators have no universal regulatory entity monitoring the practitioners.

### Existing elements

The Uniform Law Commission, following years of discussion and hearings throughout the U.S., developed the Uniform Mediation Act in 2001. Approximately 25 percent of the states<sup>17</sup> and the District of Columbia have ratified the UMA and another five states are still

evaluating adoption of the statute. Seven more states, including Florida, have created their own, but similar legislation. Although there are no statewide mediation statutes for general civil cases in most states, a few have enacted statewide rules for mediating issues relating to family matters.<sup>18</sup>

According to distinguished arbitrator and mediator, Harry Mazadoorian, the time might be right to once again explore uniform regulations associated with mediation. He bases his thoughts on the recent and rapid adoption by twenty states of the Revised Uniform Arbitration Act and suggests that the Uniform Mediation Act deserves a second look.<sup>19</sup> Although the article focuses on the situation in his home state, the issues facing Connecticut are universal.

The UMA emphasizes three primary elements: confidentiality of the process, encouraging party participation in the mediation process, and establishing "integrity of the mediation process." The act was intended to apply to courts as well as to individuals in private practice. The UMA does not establish specific requirements for mediation training. "Peer mediation" programs were specifically excluded from the act, since most have long-established policies and procedures regarding the process and mediation competency.

As mentioned previously, the Model Standards of Conduct for Mediators were designed to serve as the ethical guidelines for all mediators, no matter their area of practice. It addresses three primary goals: "to guide the conduct of mediators, to inform the mediating parties, and to promote public confidence in mediation" process.<sup>20</sup>

### Need for and resistance to a profession

Clearly there is a need for establishing competency and ethical standards for mediators and defining mediation-related terminology – why else would a large number of mediation trainers tell



people who have taken their courses that the students are “certified”? In fact, the student has only gotten a piece of paper, stating they took a course that was not approved by a credentialing entity – they got a certificate!

With courts referring or even mandating that disputants participate in mediation, some fundamental standards could reduce resistance. Mediation is a primary case management mechanism that reduces the number of cases going to trial. Mediation programs are found in most small claims, trial and many appellate courts. Florida is a “mandated mediation” state, requiring that all litigants in civil cases attempt to resolve their differences through mediation before a court date will be provided.

According to Steve Erickson, in his article, *The Time Is Now*, most credentialing entities, including bar associations, focus on individuals who are already members of their organization.<sup>21</sup> Some have pointed out that often courts and related entities blur the lines or do not make clear distinctions between mediation and other ADR processes, such as Early Neutral Evaluation and settlement conferences.

A wide disparity exists regarding mediator training requirements, not only among states, but also within states. Some individuals claim to be mediators based on experience from another profession. In some instances they are lawyers or retired judges who have not taken any specific mediator training. The skill sets for other professions are not the same as those of a mediator. A credential in one profession does not qualify an individual for another profession. Florida’s rules prohibit linking a former profession to the title of “certified mediator.”<sup>22</sup>

Historically, regionalism has been a major obstacle to establishing agreement on the fundamental elements necessary for creating a mediation profession. During the initial drafting of the UMA, determining specific training requirements for mediators was widely debated. Each state, court, mediation or bar association

felt that their existing requirements were appropriate. That is the primary reason the UMA does not address specific training requirements.

In addition, for those already mediating, especially those in private practice, there is a concern regarding their ability to qualify if new or more stringent requirements are established for training or continuing education. Florida faced this same resistance nearly 35 years ago, and yet was able to overcome the resistance by placing the public interests above all others.

## Conclusion

Without some agreement on the need for certification; who sets the standards; what mediator proficiency and skills are necessary, which recognize the differences in practice areas and drives the need for different standards; what entity conducts periodic reviews and has the authority to remove an unqualified mediator, etc., the word “profession” is not valid. In fact, the term may even be misleading when associated with mediation. Using the word “certified” or implying a credential, when there is no legitimate forum to regulate mediators, especially those in private practice, is also disingenuous. If there are “certified” personal trainers, irrigation installers and dog care providers, then how can states, courts and mediators resist developing a legitimate credentialing process, so that mediation can finally become a true profession?

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<sup>1</sup> The New Testament refers to Jesus as mediator between God and man.

<sup>2</sup> Roebuck, Derek, *Mediation and Arbitration in the Middle Ages*, Holo Books, Oxford, 2013.

<sup>3</sup> The Administrative Dispute Resolution Act, ADR Act of 1990, not only defined various ADR processes, but also created standards for the neutrals and defined confidentiality. It was further strengthened with the passage of ADRA of 1996.

<sup>4</sup> Most entities have created certain, limited exceptions to confidentiality, such as criminal activity, abuse and related issues. Exceptions tend to vary depending on case type: i.e., family, other civil matters and community issues.

<sup>5</sup> Yeend, N. N., *The Mediator’s Proposal* (August 2016) Plaintiff Magazine.

<sup>6</sup> Fruchter, Joshua, *Mediator’s Proposal Best Practices*, (June 2019) JDSupra.

<sup>7</sup> The five case types include: County, Circuit, Family, Dependency and Appellate. See flcourts.org for a complete list of mediator and mediation trainer requirements, applicable statutes and rules.

<sup>8</sup> A few states are starting to require more training for those who mediate family cases. For example, Utah requires an additional 32 hours; Virginia and Maryland require an additional 20 hours; Georgia requires 14 hours of training in domestic violence; and in January 2018, Texas increased the training time for family mediators by an additional 24 hours.

<sup>9</sup> Alaska appears to be the only state that is silent on mediator training requirements. One individual in Alaska is promoting an on-line, 2-hour mediation course.

<sup>10</sup> States requiring only 30 hours of training include Maine, Minnesota, North Dakota and Wyoming. Oregon requires 36 hours.

<sup>11</sup> Some require a practicum or a certain number of observations of a newly trained mediator.

<sup>12</sup> Self-reporting, as the name implies, leaves disclosure of incidences and issues up to the person who provides the service. This model has significant flaws, as recently demonstrated by the actions of various financial, sports, academic and other institutions.

<sup>13</sup> In addition to Florida, there are a number of non-UMA states with highly regulated court-connect mediation programs, including California, Kansas, Maine, Michigan and Nevada.

<sup>14</sup> Some examples are New Hampshire, Connecticut and Rhode Island that maintain mediators as employees of the judicial branch.

<sup>15</sup> Nebraska, like many other states, uses local dispute resolution centers to establish mediation standards.

<sup>16</sup> The DRC, Dispute Resolution Center, operates under the auspices of the Florida Supreme Court. It is self-supporting through the credentialing fees paid by mediators and trainers.

<sup>17</sup> States that ratified the UMA include: Nebraska, Illinois, New Jersey, Ohio, Iowa, Idaho, South Dakota, Washington, Utah, Hawaii and Vermont.

<sup>18</sup> New Mexico, South Dakota and New Hampshire have statewide mediation statutes for family cases.

<sup>19</sup> Mazadoorian, H. N., *Revisiting the Uniform Mediation Act in Connecticut* (March 14, 2019) Connecticut Law Tribune.

<sup>20</sup> American Bar Association, *Model Standards of Conduct for Mediators*, (2005).

<sup>21</sup> Erickson, S., *The Time is Now* (February 2017) APFM.

<sup>22</sup> Florida mediation rule 10.610: “d) *Prior Adjudicative Experience*. Any marketing practice is misleading if the mediator states or implies that prior adjudicative experience, including, but not limited to, service as a judge, magistrate, or administrative hearing officer, makes one a better or more qualified mediator.”