

ACCREDITATION: MEDIATION'S PATH TO PROFESSIONALISM

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I. Introduction

Methods of alternative dispute resolution (ADR) have been a long time brewing, stewing, and accruing. By one account, ADR stretches as far back as 1800 B.C. to the Mari Kingdom in modern Syria, where mediation and arbitration were used in disputes with other kingdoms.² Arbitration was used extensively in the classical antiquity, where the likes of Aristotle and Cicero sung its praises.³ Even many of America's most famous figures—such as George Washington,⁴ Benjamin Franklin,⁵ and Abraham Lincoln⁶—were advocates of dispute resolution. No longer at the margins of the legal practice, ADR now thrives in the mainstream.⁷ Indeed, so great is the level of acceptance of ADR that some have remarked that “we now see ADR processes playing a role in maintaining social stability and order,”⁸ and others have even gone so far as to

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² JEROME T. BARRETT & JOSEPH P. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT* (San Francisco, Cal.: Jossey-Bass, 2004), 20–21.

³ *Id.* at 22; Aristotle said arbitration “[gave] equity its due weight, making possible a larger assessment of fairness,” while Cicero described a trial as “exact, clear-cut, and explicit, whereas arbitration is mild and moderate.” *Id.* at 8

⁴ Although emphatic about the role of the judiciary in maintaining the State, Washington was also realized that not everything ought go before that venerable institution; as such, he included an arbitration clause in his will. *Id.* at 46.

⁵ Franklin once lamented, “When will mankind be convinced and agree to settle their difficulties by arbitration?” Letter from Benjamin Franklin to Joseph Banks (July 27, 1783), reprinted in 1 *The Private Correspondence of Benjamin Franklin* 132 (3d ed., 1818).

⁶ Lincoln once wrote, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time.” *Quoted in* FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* (Littleton, Colo.: F.B. Rothman, 1986) (1906), 102-3.

⁷ Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?* 13 *GEO. J. LEGAL ETHICS* 427, 427 (2000).

⁸ Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, 63 *DISPUTE RESOL. J.* 8, 49 (2008).

suggest that there is a legal obligation for lawyers to advise clients of ADR options.⁹

If, however, ADR is truly to serve as a pillar of society, its component parts must be readily definable and identifiable. There are two issues here: firstly, ADR is a broadly-defined, composite grouping posited as including everything other than court-mediated dispute resolution.¹⁰ Such expansiveness is disarming, for ADR's component pieces are neither interchangeable nor equally load bearing. Secondly, society will allocate such weight only in the instance that the given technique is esteemed to be legitimate. To this end, ADR practitioners have struggled to win the legitimacy that comes from turning their practices into professions. However, the creation of a profession necessitates the training of professionals. But what defines the ADR professional? Different skills are required by the practitioners of each subset, and while there may be similarities there are also certain differences.

The focus of this paper will be on the central role that accreditation might play in the legitimization and professionalization of mediation. It will proceed in three parts: *First*, in loose strokes it will lay out the advantages of ADR, bearing in mind that ADR is not a cure all.¹¹ *Second*, it will be

⁹ See Breger, *supra* note 7 (noting that “[u]nder existing ethical rules, a lawyer is required to explain substantive options to their clients. It is only if one posits that ADR is outside the normal scope of legal practice that one will support an aspirational ADR consultation rule.”).

¹⁰ See, e.g., *Labor Relations: Alternative Dispute Resolution*, U.S. Department of Labor, available at <http://www.dol.gov/dol/topic/labor-relations/adr.htm> (last visited July 2, 2009).

¹¹ For instance, Carbonneau—coming from what is arguably the most arbitration-friendly country in the world, France—has written that “*L’arbitrage fonctionne bien pour certain types de conflit, spécialement les litiges commerciaux internationaux, mais l’arbitrage n’est pas une panacée ; ce n’est pas un mode de réparation à caractère universel. Certains conflits concernent des principes d’ordre public ou mettent en présence des parties dont le pouvoir de négociation et les connaissances sont fondamentalement inégaux.*” [“Arbitration functions well for certain types of conflict, especially for international commercial litigations, but arbitration is not a panacea; it is not a mode of reparation of a universal character. Certain conflicts concern principles of public order or place in presence parties whose power of negotiation and whose knowledge is fundamentally unequal.”] *quoted in* JEAN-BAPTISTE RACINE, *L’ARBITRAGE COMMERCIAL INTERNATIONAL ET L’ORDRE PUBLIC* (Paris: L.G.D.J., 1999), 179. Author’s translation.

argued that accreditation is a desirable route to professionalize mediation; various attempts to do so also will be discussed. *Third*, the importance of casting mediation as a profession, and what it means to be a profession, will be explored.

II. The Advantages of ADR

While the courts are the guardians of justice,¹² public policy and practicality combine to necessarily limit access to the courts.¹³ Moreover, while certain cases should be advanced in the State's official judicial fora, realistically not all can be—nor even should be—so advanced.¹⁴ Frustrations over the limits and costs that plague the courts have resulted in further feeding the currents of ADR's waxing waters.¹⁵ In many ways ADR is a classically capitalistic solution: in the instance that the state-sanctioned mechanism fails or falters, the remedy is duly sought in the private sphere. Recourse to these alternative proceedings also dovetails with a rich American tradition of independence and individualism.¹⁶ In addition to these practical and ideological

¹² JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES [MICROFORM] (Washington: Gales and Seaton, 1834-1856), 439 (Arguing that once the Bill of Rights is incorporated into the Constitution "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.").

¹³ Certain costs are associated with litigation in any court. As an explicit example of such regulatory gate keeping, consider the "threshold value" placed upon the seeking of redress in a civil case in a federal district court: excepting certain statutory provisions, the plaintiff must show that the matter in controversy "exceeds the sum or value of \$75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Moreover, not only is this threshold value not taken lightly, but it is one that the courts themselves have the power to police: in the instance that the suit does not amount to \$75,000, the court "may impose costs on the plaintiff." 28 U.S.C. § 1332(b).

¹⁴ See, e.g., Michael Pryles, *Assessing Dispute Resolution Procedures*, AM. REV. INT'L ARB. 267, 268 (1996).

¹⁵ *Id.*

¹⁶ "American Individualism" has been trumpeted as the foundational and fundamental American virtue. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (San Diego: Harcourt, Brace, Jovanovich, 1983). Some, however, consider a foundational American individualism to be a well-touted myth. See BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE

elements and reasons, it is inevitable that the “Facebook Generation”—so very-much-at-ease in an increasingly digital world—will not only demand greater efficiency in dispute resolution, but that it also will expect to resolve many of these disputes online.¹⁷ Indeed, in many ways that era has already dawned: eBay and PayPal already resolve millions of disputes online each year.¹⁸ In a world where “time is money,” ADR has much to offer.¹⁹

While ADR is taking on an ever-growing proportion of society’s disputes, it should be understood as a supplement to, and not as a replacement for, the courts.²⁰ Some cases, particularly criminal or constitutional ones, should be investigated by the courts—after all “[s]unlight,” as Justice Louis Brandeis once quipped, “is said to be the best of disinfectants; electric light the most efficient policeman.”²¹ Such an understanding is particularly cogent when one considers that ADR processes are contractual in nature: the neutral’s authority comes from the parties, not the

PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (Princeton, N.J.: Princeton University Press, 1996).

¹⁷ Ken Heare, Dana Kaplan, Nan Starr, and Wendy Vonhof, *Communicating Online: How the Facebook Generation Is Shaping the Future of Online Dispute Resolution* (January 20, 2008) (unpublished manuscript).

¹⁸ David A. Hoffman, *The Future of ADR: Professionalization, Spirituality, and the Internet*, 14 DISPUTE RESOL. MAG. 6 (2008).

¹⁹ The benefits of ADR extend foremostly to the individual parties; however, they also accrue to both the judiciary and to the community at large. Many of the often-quoted reasons that parties turn to ADR over litigation include confidentiality, reduced financial costs, decreased time for reaching settlement and resolution, tailored settlements to the needs and interests of the parties, greater access to dispute-resolution fora, increased voluntary compliance, greater control over the proceedings, greater influence in selecting the decider, specialized expertise in the decider, increased influence of the community, and maintained relationships. ADR also reduces court caseloads and costs, which, in turn, may well increase court efficiency and improve public satisfaction with the judicial system.

²⁰ See Carbonneau, *quoted in Racine*, *supra* note 11.

²¹ LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (WASHINGTON: NATIONAL HOME LIBRARY FOUNDATION, 1933), 62. Some matters, particularly those with criminal implications, ought to be brought before the eyes of the community, and under the scrutiny of the courts—an understanding endorsed by the Supreme Court. *See, e.g., Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976).

State.²² Thus, ADR serves not as a single, central pillar of society, but, rather, in an amorphous manner that, much like the flying buttresses of Gothic cathedrals, offers lateral support to the courts: operating in the shadow of the law, ADR reemphasizes, rather disperses, the courts' centrality.

III. Accreditation: Mediation's Route to Professional Legitimization

Legitimacy is important to any profession. Amongst other things, it is indicative of autonomy, an aspect which is particularly important in trying to establish a new profession where an already valid and legitimate option exists.²³ This pursuit is further complicated in the legal profession as there is not only an already-ordained route, but as that route is in fact an integral part of most state structures.²⁴

A) Toying with Accreditation

Fundamentally, parties may choose whomever they want to serve in the role of neutrals. Consequently, assuring the quality of neutrals has become a matter of concern. Although there has been

²² See generally, TIBOR VÁRADY, JOHN J. BARCELÓ III, ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (St. Paul, MN: Thomson West, 2006, 3d ed.), Chapter II.

²³ By way of example, consider, for instance, the opposition, if not outright opprobrium, that Eastern or "new world" medical treatments continue to face in the United States.

²⁴ For an illustrative discussion of the role that judiciary has played in American politics, wherein judges are described as the "a priesthood" into whose care the Constitution, America's "Sibylline Book," has been entrusted, see D. W. BROGAN, THE AMERICAN POLITICAL SYSTEM, (New York, NY: Pierides Press, 2008), Chapter 1. "*La tâche de rendre la justice relève traditionnellement des prérogatives régaliennes. Dès lors, comment l'Etat peut-il accepter que la justice soit rendue hors de ses prétoires, par des juges sans robe ? Si l'Etat est la source de tous les phénomènes juridiques, si le droit s'incarne dans l'Etat, rendre la justice est un acte de souveraineté.*" ["The task of rendering justice traditionally hearkens to regal prerogatives. Accordingly, how can the State accept that justice be rendered beyond its auspices, by robeless judges? If the State is the source of all juridical phenomena, if the State is the incarnation of the law, to render justice is an act of sovereignty."] Racine, *supra* note 11, at 1. Author's translation.

a growing demand for mediators,²⁵ mediation is mostly conducted on an *ad hoc* basis with little institutional oversight.²⁶ In the absence of a system of institutionalization—either nascent or integrated—, or of a system of credentialing, the number of self-proclaimed mediators who have hung their own roughly-hewn “open for business” sign has increased significantly.²⁷ As one analyst has observed:

The absence of any structure of procedural or substantive rules, in a process conducted without direct public scrutiny, presents the real danger of harm from inept or unethical practitioners. . . . [I]n mediation much more than in other dispute resolution processes, the quality of the process depends heavily on the quality of the practitioner.²⁸

For many, this situation has caused an understandable degree of consternation,²⁹ leading agencies and countries around the world to consider, first, whether to fill this void, and, if so, with what.

(1) Accreditation in Australia

The most substantial governmental effort to address this apparent void has been that of Australia. Alarmed by the lack of a uniform standard for credentialing mediators, and further spurred on by trends within the area of family dispute resolution,³⁰ Australia’s National Alternative Dispute Resolution Advisory

²⁵ Mandy Zhang, *To Certify, or Not to Certify: A Comparison of Australia and the U.S. in Achieving National Mediator Certification*, 8 PEPP. DISPUTE RESOL. L.J. 307 (2008).

²⁶ *Id.*

²⁷ *Id.*

²⁸ ROBERT A. BARUCH BUSH, *THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS* (Washington D.C.: National Institute for Dispute Resolution, 1992) 3.

²⁹ *Id.* See also Judith Meyer, *Mediators’ Alert: Now, Certification Goes Global*, 26 ALTERNATIVES 57 (2008).

³⁰ The *Family Law Act 1975* developed an accreditation system to “ensure the provision of high quality dispute resolution services, and to recognise the professionalism of the sector.” Information for Family Dispute Resolution Providers, *available at* [http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/\(4341200FE1255EFC59DB7A1770C1D0A5\)~accreditation-of-family-dispute-resolution-practitioners.pdf/\\$file/accreditation-of-family-dispute-resolution-practitioners.pdf](http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(4341200FE1255EFC59DB7A1770C1D0A5)~accreditation-of-family-dispute-resolution-practitioners.pdf/$file/accreditation-of-family-dispute-resolution-practitioners.pdf) (last visited July 2, 2009). See also Canberra, Attorney-General’s Department, Information for Family Dispute Resolution Providers, *available at* <http://www.ag.gov.au/fdrproviders> (last visited July 2, 2009).

Council (NADRAC) proposed one in 2006.³¹ The final version of the report is now available.³² Pursuant a new reference from Australia's Attorney-General,³³ NADRAC recently issued an Issues Paper *ADR in the Civil Justice System* to consider broader questions surrounding incorporation of ADR services, including whether ADR processes should ever be mandatory, changes to civil procedures and costs structures, potentially problematic cultural barriers, ADR as a supplement to tribunal processes, and increasing private and community-based ADR services.³⁴

(2) Accreditation in the Netherlands

The Dutch approach has involved very little legislation, the government preferring a “bottom-up” approach to developing mediation.³⁵ The Netherlands Mediation Institute (NMI) provides the national platform for mediation; interestingly, although closely monitored by the Research and Documentation Centre of the Ministry of Justice, NMI is a private organization and left largely

³¹ National Mediation Conference Party Limited Accreditation Sub-Committee, Report to the 8th Australian National Mediation Conference in Hobart, Tasmania: Mediator Accreditation in Australia (May 2006), <http://www.mediationconference.com.au/html/Accreditation.html> (last visited July 2, 2009).

³² Australian National Mediation Accreditation System (Sept. 2007), <http://www.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf> (last visited July 2, 2009).

³³ Letter from Attorney-General, The Hon. Robert McClelland, MP to The Hon. Justice Murray Kellam AO, Chair, NADRC (Jun. 13, 2009). [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)~Letter+of+Reference+from+the+AG+for+NADRAC+website.PDF/\\$file/Letter+of+Reference+from+the+AG+for+NADRAC+website.PDF](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~Letter+of+Reference+from+the+AG+for+NADRAC+website.PDF/$file/Letter+of+Reference+from+the+AG+for+NADRAC+website.PDF) (last visited July 2, 2009).

³⁴ Alternative Dispute Resolution in the Civil Justice System, NADRAC, *available at* [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)~NADRAC+Issues+Paper.pdf/\\$file/NADRAC+Issues+Paper.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~NADRAC+Issues+Paper.pdf/$file/NADRAC+Issues+Paper.pdf) (last visited July 2, 2009). NADRAC welcomes comments on its proposals. *See ADR and Civil Proceedings References, Issues Paper, NADRAC, available at* http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference (last visited July 2, 2009).

³⁵ John Bosnak, *Court-annexed Mediation in the Netherlands: the Dutch approach*, ABA-net, *at* http://www.abanet.org/dispute/hague_session.htm (last visited July 2, 2009).

alone.³⁶ Although also operating in the private sector, a particular focus of NMI has been on court-annexed mediation.^{37, 38} Quality control and group identity are maintained through trademark registration and by offering training through a network of accredited mediation training institutes. As of 2007, there were 3,668 registered mediators, 876 of whom were certified.³⁹ Its apparent success aside, this private-public partnership, so to speak, is an interesting phenomenon unto itself.

(3) U.S. Attempts at Accreditation

While the issue has been debated and considered in the United States, there has been no attempt to launch a uniform accreditation system. With an eye towards establishing an appropriate nationwide accreditation system, the Association for Conflict Resolution (ACR)⁴⁰ and the American Bar Association's Section of Dispute Resolution (ABA-DRS)⁴¹ each launched investigatory task forces. The ACR proposed setting the standard for a system of accreditation that was somewhat higher than that proposed in Australia, but one which by no means approached the requirement levels set by some of the most stringent states. Following very mixed feedback,⁴² however, the ACR shied away from actually implementing its system of accreditation. Overall,

³⁶ *About NMI*, the Netherlands Mediation Institute, at http://www.nmi-mediation.nl/english/about_nmi.php (last visited July 2, 2009).

³⁷ See John Bosnak, *Court-annexed Mediation in the Netherlands: the Dutch approach*, ABA-net, at http://www.abanet.org/dispute/hague_session.htm (last visited July 2, 2009)..

³⁸ See *About NMI*, the Netherlands Mediation Institute, at http://www.nmi-mediation.nl/english/about_nmi.php (last visited July 2, 2009).

³⁹ *Id.*

⁴⁰ ACR Task Force on Mediator Certification, Report and Recommendations to the Board of Directors, 2004 A.C.R. Rep. 1, available at <http://www.acrnet.org/pdfs/certificationreport2004.pdf>.

⁴¹ ABA Section of Dispute Resolution Task Force on Credentialing, Discussion Draft: Report on Mediator Credentialing and Quality Assurance, 2002 A.B.A. Sec. Dispute Resolution Rep. 1-2, available at http://www.abanet.org/dispute/taksforce_report_2003.pdf (last visited July 2, 2009).

⁴² The ARC and the ABA-DRS jointly launched an online Feasibility Study of their proposed system. The thirty-two question survey drew a broad range of responses. When asked whether a national certification program is needed for the mediator profession, only 39% agreed, while 19% disagreed, and 41% had mixed feelings.

the “turf battles” or “credentialing wars,” as the debates have been dubbed, have been partisan and divisive.⁴³ Those divisions have been caused largely by the diversity of ethical, social, and professional backgrounds which presently color the field.⁴⁴ Although a diversity of opinion potentially presents certain riches, in this instance it has resulted in division, a loss of cohesiveness, and a veritable stagnation. Rather than focus on the mediators, the ABA’s Task Force on Improving Mediation Quality proposed recommendations for improving mediation practice.⁴⁵ Incidentally, the ABA-DRS is the only ABA section which admits non-lawyers, and, accordingly, has called for the participation of “all individuals who have the appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers” in “court connected ADR programs and other dispute resolution programs.”⁴⁶

(4) International Attempts at Accreditation

Recently, an effort has also been launched to create an accreditation standard on the international level. The International Mediation Institute (IMI) is a response to the concerns of large corporate *users* of international mediation.⁴⁷ It is an attempt, born of frustration, to set a reliable, international comprehensible standard.⁴⁸ As the International Academy of Mediators recently noted, while large conglomerates that use mediation may have their own lists of dependable mediators, they want and need to be able to call upon equally dependable and capable mediators on a

⁴³ Tania Sourdin, *Avoiding the Credentialing Wars: Mediation Accreditation in Australia*, 27 *ARBITRATOR & MEDIATOR*, 21, 22 (2008).

⁴⁴ *Id.*

⁴⁵ ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, Final Report, available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf> (last visited July 2, 2009).

⁴⁶ Resolution Calling for the Inclusion of People from Multiple Professions in Court-Connected Mediation Programs, American Bar Association Section of Dispute Resolution, adopted Apr. 28, 1999, available at <http://www.abanet.org/dispute/webpolicy.html> (last visited July 2, 2009).

⁴⁷ *About IMI*, International Mediation Institute (IMI), at http://www.imimmediation.org/about_imi.html (last visited July 2, 2009); *id.* at 1.

⁴⁸ As the IMI notes, “Nothing is more powerful than an idea whose time has come.” *Quote Unquote*, IMI, quoting Victor Hugo, at http://www.imimmediation.org/quote_unquote.html (last visited July 2, 2009).

worldwide basis, and to do so quickly and efficiently.⁴⁹ As a non-profit organization, IMI's role is not to provide mediation services itself, but, first, to provide an effective, internationally-applicable process of mediator credentialing,⁵⁰ and, second, to maintain a database of IMI-accredited mediators, complete with redactions of user-reviews that offers insight into individual poise and style. Crucially, the IMI standards are consciously being crafted so as to preserve the mediator's art of creativity and adaptability,⁵¹ a matter which has caused no small degree of consternation among those weighing the pros and cons of accreditation.⁵²

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Of all of the accreditations attempts discussed, the IMI initiative appears to be both the most promising and ambitious. To be sure, its method is not perfect. Mediation is a very personal practice, and the techniques that work well for one mediator may not be so successful for another mediator.⁵³ Also, the great diversity of subject matter expertise complicates and muddies defining the foundational basis a mediator should have, while also making it difficult to gauge sufficiency of experience and expertise.⁵⁴ Furthermore, even alertness to cultural nuances cannot completely obviate their complicating effect, particularly on an international stage. In sum, it is not completely unfounded to say that "mediator competency is in the eye of the beholder."⁵⁵

At the same time, while the process of mediation is not a one-size-fits all-process, there is a certain structure that can be generalized. Indeed, other professions have done as much: for instance, medicine, notwithstanding its relatively recent spurt of

⁴⁹ IAM, *Report on the International Mediation Institute Certification Initiative*, at 2.

⁵¹ *Id.*

⁵¹ *Id.*

⁵² See *infra* notes 252–61 and accompanying text.

⁵³ IAM, *Report on the IMI Certification Initiative* (Feb. 2009), 4.

⁵⁴ *Id.*

⁵⁵ IAM, *Report on the IMI Certification Initiative* (Feb. 2009), 4. Perhaps criticism and caution on the part of the IAM should be taken in stride: after all, the IAM also opposed the Uniform Mediation Act. Robert A. Creo, Report in Support of IAM Resolution Opposing Adoption of UMA, *available at* http://www.iamed.org/pub_Creo2.cfm (last visited July 2, 2009).

technological sophistication, is still often considered more of an art than a science;⁵⁶ nonetheless, there are certain fundamentals to its practice which are taught worldwide. While setting an appropriate bar for the level of credentialing may be difficult, what to include and how to expand should not be a matter of such substantial debate as to derail the process. IMI's initiative is a response to the apparent intransigence or uncertainty that largely has been attributed to the "balkanization of practice and professional interest groups."⁵⁷ Its global database can be understood as a direct attempt to use "empirical research [to] . . . clearly and reliably illuminate disputants' aggregate preferences" in order to make mediation procedures more effective.⁵⁸ Shying from the callous notion of *caveat emptor*,⁵⁹ IMI's product is not one for the purposes of self-identification but rather for creating a system that will facilitate exchange and expansion. Although not perfect, it is an admirable and necessary start. The potential implications—especially if this initiative were to be rejected—are significant.

⁵⁶ Sir William Osler, alluding to classical Greek understanding, famously said that "The practice of medicine is an art, not a trade; a calling, not a business; a calling in which your heart will be exercised equally with your head. Often the best part of your work will have nothing to do with potions and powders, but with the exercise of an influence of the strong upon the weak, of the righteous upon the wicked, of the wise upon the foolish." WILLIAM OSLER, COUNSELS AND IDEALS FROM THE WRITINGS OF WILLIAM OSLER, Boston: Houghton Mifflin Co., 1908), 104. Such words remain no less true today. See, e.g., Creighton W. Don, *Catharsis: On the Art of Medicine*, 297 JAMA 1002, 1003 (2007) ("The art of medicine is to resist the complete rationalization of life and its rich experiences and to see medicine woven into the deep myths of our culture and resonate true within the human spirit."). For an thoughtful discussion on the essence of medicine as a healing art, see BERNARD LOWN, *THE LOST ART OF HEALING* (Ballantine Books: New York, 1999).

⁵⁷ Letter from Michael Leathes, Executive Director, IMI to author (Mar. 4, 2009). One practicing mediator concluded "that the main barrier [to mediator certification] is the mediators themselves. They are in sales mode all the time and apt to behave in a generally selfish manner." IMI Consultation Process Feedback Digest, IMI, available at http://www.imimmediation.org/feedback_digest.html (last visited July 2, 2009).

⁵⁸ Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. DISPUTE RESOL. 549, 551 (2008).

⁵⁹ Latin: "Buyer beware."

IV. “What’s in a Name?”: the Implications of Self-Naming

While we have it on excellent authority that “a rose by any other name would smell as sweet,”⁶⁰ there can be no doubt that the process of naming is itself a crucial component in the creation of identity.⁶¹ This reality is as true for a profession⁶² as it is for a person⁶³ or for an organization.⁶⁴ Though perhaps slightly tangential, the other trappings of identity are of comparable importance. Mediation is in the process of creating itself,⁶⁵ and doing so as a bona fide profession, no less. Among other things, professions enjoy autonomy, a veritable principle of validity.⁶⁶

⁶⁰ “’Tis but thy name that is my enemy;-- / Thou art thyself, though not a Montague. / What's Montague? It is nor hand, nor foot, / Nor arm, nor face, nor any other part / Belonging to a man. O, be some other name! / What's in a name? that which we call a rose / By any other name would smell as sweet; / So Romeo would, were he not Romeo call'd, / Retain that dear perfection which he owes / Without that title:--Romeo, doff thy name; / And for that name, which is no part of thee, / Take all myself.” William Shakespeare, *Romeo and Juliet*, Act 2, scene ii, lines 40–51 (emphasis added).

⁶¹ “Let us speak plain: There is more force in names than most men dream of.” *A Glance Behind the Curtain*, in JAMES RUSSELL LOWELL, *THE POETICAL WORKS OF JAMES RUSSELL* (New York: Thomas Y. Crowell & Co., 1892), 3. Consider, for instance, the significance attributed to naming rights and rituals, as well as the Western tradition of a wife taking her husband’s surname, or a child’s taking that of her father’s. In some countries, such as France, the process of “filiation” has significant legal ramifications: it does not refer simply to the biological link between parents and child but legally recognizes the child. For a discussion of these legal ramifications, see JANINE REVEL, *LA FILIATION* (Paris: PUF, 1998); CATHERINE LABRUSSE-RIOU, *DROIT DE LA FAMILLE* (Paris: Masson, 1984). Also, consider the vociferous objections raised by Greece against when Macedonia took its name and flag. See Paul Kirby, British Broadcasting Corp., *Two countries at odds over a name*, BBC.CO.UK (Mar. 6, 2008), at <http://news.bbc.co.uk/2/hi/europe/7278023.stm> (last visited July 2, 2009).

⁶² Take, for example, the disputes between the medical profession and the chiropractics regarding the latter’s use of the caduceus as its symbol.

⁶³ See James Wong, *What’s in a Name? An Examination of Social Identities*, 32 J. THEORY SOC. BEHAV. (2002), 451.

⁶⁴ Take, for example, the substantial discussion surrounding the Royal Ulster Constabulary GC, now, pursuant the Police (Northern Ireland) Act 2000, rechristened as the Police Service of Northern Ireland (PSNI). See British Broadcasting Corp, *‘New era’ as NI police change name*, at http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/1636780.stm (last visited July 2, 2009).

⁶⁵ Kelly Austin et al. *Mediator Certification: What Are the Practitioners Afraid of?*, 26 ALTERNATIVES 188 (2008).

⁶⁶ Racine *supra* note 11, at 183.

Crucial to that process is the creation of a set of standards.⁶⁷ The International Mediation Institute (IMI) has presented a robust and practical understanding of what it is to be a mediator. Moreover, in keeping with the openness of mediation—or, as it has been described, its “democratic ideals”⁶⁸—it is a set of standards that is not based upon prior training or professionalism but upon certain proficiencies.

Credentialing, as the means of defining who is a practitioner or professional, is the first obvious step to identifying mediation as a profession. The creation of a professional identity serves at least two vital purposes: firstly, it serves to alert and inform the public about the profession’s existence and its scope, and, secondly, it sets implicit standards for the profession’s uniform and unified self-improvement. These aspects go to the heart of legitimizing a profession.

Professions are by definition service industries. At the same time, however, a profession is much more than a service: it entails a group identity, and it implies mastery and proficiency of specific knowledge and skills.⁶⁹ Derived from the Latin, *professio*, “to swear (an oath),”⁷⁰ professions, of which there were traditionally three,⁷¹ were considered a vocation, a higher calling.⁷²

⁶⁷ See Austin, *supra* note 65.

⁶⁸ Chip Stewart, *Triumphs and Challenges: The Section’s Chairs, Past and Present, in a Virtual Roundtable*, 14 DISPUTE RESOL. MAG. 33, 36 (2008) (quoting James J. Alfini).

⁶⁹ Asa Kasher, *Professional Ethics and Collective Professional Autonomy a Conceptual Analysis*, 12 ETHICAL PERSP., 67, section 1 (2005).

⁷⁰ “*Professio* open declaration, avowal; . . . vocation or occupation that one publicly avows.” OXFORD ENGLISH DICTIONARY.

⁷¹ The three traditional “learned professions” were Theology, Medicine, and Law; see, e.g., R.W. PERKS, ACCOUNTING AND SOCIETY (London: Chapman & Hall, 1993) (listing twenty-two characteristics of a profession); while there is some controversy surrounding Perks’ positions on the role of accounting in society, his discussion of the learned professions, and their associated attributes, is quite sound. See, e.g., William H. Sager, *Characteristics of a profession*, NAT’L PUB. ACCT. 1 (March 1995). There is, however, evidence to indicate that, although it is not traditionally included, the Military may, too, have been considered a profession: its members also swore an oath and the government could be considered as its client. See, e.g., SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND PRACTICE OF CIVIL-MILITARY RELATIONS (Cambridge, Mass.: Harvard University Press, 1957) (identifying

It is axiomatic that their practice should involve proficiency over a particular and systematized knowledge.⁷³ Credentialing plays a unique and important role in the process of “professionalization”: it speaks to the scope of practitioner’s knowledge, defining what particular systematic knowledge the practitioner holds while also encouraging specialization.⁷⁴ Moreover, “[c]ertification is a way of telling members of the public that they can trust the competency of the person providing a particular service, even if they themselves lack the ability to make such an assessment.”⁷⁵ Substantive knowledge lends credibility, which in turn builds trust, a value which is invaluable in any mediation or negotiation. Certification is a method of risk reduction, both for consumers⁷⁶ and for practitioners.⁷⁷ Consequently, certification is both part of the identity-making process and a public service announcement.

Furthermore, credentialing sets up implicit standards for the profession’s uniform and unified self-improvement. Professions are typically monitored and regulated by professional bodies, whose members are appointed from within, and that govern how and who may call herself a professional in that discipline. These bodies usually prepare both methods for certification or licensing as well as establishing ethical codes of conduct.⁷⁸ Without a

three criteria for a profession, and noting that the military met all three: expertise, responsibility, and corporateness).

⁷² *Id.*

⁷³ See Asa Kasher, *Professional Ethics and Collective Professional Autonomy a Conceptual Analysis*, 12 *ETHICAL PERSP.*, 67, section 1 (2005).

⁷⁴ *Id.*

⁷⁵ See Austin, *supra* note 65, at 188.

⁷⁶ MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? (Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, 2006) (noting that *licensing* is a method of consumer risk reduction). Further on, Kleiner differentiates between licensing and certification, concluding that “certification may provide many of the same benefits of licensing without the costs of restricting the supply of practitioners or limiting choice for consumers. *Id.* at 7. Licensing is a supplemental process to credentialing which is generally enforced by governments in order to protect against undesirous effects and the potentially “larger social implications” that may result from poor quality. *Id.* at 1. Critics, however, contend that there is little, if any, empirical evidence to suggest that licensing actually increases quality. *Id.* at 7–8.

⁷⁷ See *infra* note 124 and accompanying text.

⁷⁸ The medical and legal professions both regulate entry through formative training products, and also monitor the conduct of their members. With regard

uniform and reviewable process of credentialing it is impossible to guarantee responsible and uniform quality assurance.⁷⁹ Uniformity, however, does not necessarily amount to homogeneity. As the world becomes increasingly globalized and interconnected, it is important that standards remain reliable and responsible at any corner of the world. Thus, credentialing is a means of maintaining the reputational equity of both practice and practitioners.⁸⁰

Nor need credentialing interfere with either mediation's "wonderful capacity for self-criticism,"⁸¹ or its much-lauded creativity.⁸² The structure of mediation allows for an inherent degree of creativity in its solution to disputes that neither arbitration nor litigation can match.⁸³ Despite contentions otherwise,⁸⁴ the absence of certification is not what has made mediation flexible and creative. Rather, that absence is indicative of mediation's nature, a nature which, if it is "to be truly a valuable alternative to a strong, accessible trial system" will need "to remain a flexible, adaptive, and 'spectacularly innovative'."⁸⁵ As mediation does not require a specific professional background, credentialing, so long as it does not prevent the continued entrance of all walks into the field, will not stymie mediation's vital gift for either creativity or self-criticism.

to the realm of theology or religion, the Roman Catholic Church provides the most structured example: around the world, its priests receive nearly uniform training and formation, and are duly regulated by means of an intricate hierarchical and systematic process.

⁷⁹ See *supra* note 75 and accompanying text. This matter is a hotly debated topic, however. See, e.g., Tony Willis, *Mediator Accreditation: Is It a Risk? Or Quality Enhancement?*, 26 ALTERNATIVES 165 (2008).

⁸⁰ ART KLEINER, WHO REALLY MATTERS, THE CORE GROUP THEORY OF POWER, PRIVILEGE, AND SUCCESS (New York, NY: Random House, Inc., 2003) (defining equity as "any share of accumulated wealth, including such intangible forms of 'social capital' as relationships and reputation"), 139–40.

⁸¹ See Stewart, *supra* note 68, at 36 (quoting James J. Alfini).

⁸² See Austin, *supra* note 65, at 188. See also Jeffrey Krivis & Naomi Lucks, HOW TO MAKE MONEY AS A MEDIATOR (AND CREATE VALUE FOR EVERYONE): 30 TOP MEDIATORS SHARE SECRETS TO BUILDING A SUCCESSFUL PRACTICE (2006) (Krivis, who has mediated several thousand major cases, notes, "It seems as though everyone wants to jump on the mediator bandwagon these days.").

⁸³ See Carper & LaRocco, *supra* note 8, at 59.

⁸⁴ See, e.g., Willis, *supra* note 79.

⁸⁵ See Stewart, *supra* note 68, at 36 (quoting Pamela Enslin).

Indeed, credentialing may well serve to further communication on three fronts, therein encouraging further creativity, self-criticism, and improvement. Firstly, it may further an “internal” dialogue amongst mediators by giving mediators a common plane upon which to build and to communicate amongst themselves, just as other professions have done. As mediation is, in many ways, a solitary practice, the furthering of a dialogue can serve as invaluable means of personal sustenance, of encouraging continued learning, and of maintaining one’s freshness. Secondly, credentialing will allow mediators to better respond to the needs of users.⁸⁶ The communication inspired by discussion of user-specific needs may even advance the creation of diverse competencies and sub-specialization,⁸⁷ already evident in the various models of mediation,⁸⁸ by creating the professional organs for supportive and creative systems of vetting, complete with peer-review. Thirdly, mandating continuing education in order to maintain one’s credentials would help to ensure that a gulf does not develop between subsequent generations of mediators by creating dialogue and hopefully piquing interest in new aspects of mediation.⁸⁹ In short, rather than detract from the creativity and insight of mediators, credentialing programs, properly implemented, create uniformity not homogeneity, commonality not conformity.

V. Conclusion

Hastened by globalization, the world is passing into a new era of increasing integration and interchange, and with it, so, too, is mediation emerging as an increasingly valuable form of dispute resolution. In a world where time is money, where judicial proceedings are long, onerous, and expensive, and where value is recorded as much in the bottom line as it is in continued working

⁸⁶ See Austin, *supra* note 65, at 188.

⁸⁷ See Hoffman, *supra* note 18, at 6.

⁸⁸ Just as ADR has branched out and created and created different models, so, too, has mediation branched out. Generally speaking, there are three different models: facilitative, transformative, and evaluative. See, e.g., BERNIE MAYER, *STAYING WITH CONFLICT* (San Francisco, Cal: John Wiley, 2009). In each of these models, the mediator plays a slightly different role, applying her craft in slightly varying ways.

⁸⁹ See, e.g., Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L. J. 1091 (2007).

relations, mediation has much to offer. However, while mediation already plays a substantial role in supporting social stability and order, both its part and its authority are relatively limited: if mediation is truly to come into its own, the practice must transform itself into a profession. True to this transformation is the setting of standards—the accrediting and credentialing of professionals.

In mediation the parties work together to reach a mutually-acceptable agreement. Consequently, the skills required to sensitively reveal underlying concerns and to bring about a workable, mutually-acceptable agreement are of foremost importance. Most fundamentally, a uniform standard of credentialing serves to alert and to inform the public to the profession's sphere, to set up minimal mediator standards upon which to work, and to unify and to improve the profession and its members. Such a foundation engenders a presumption of trust and confidence in the mediator's impartiality, expertise, and professionalism. Moreover, accreditation need not stymie the field's creativity; indeed, the opposite is equally plausible: firstly, mediators would be uniformly educated in first principles, therein preventing a recurrent reinventing of the wheel; secondly, credentialing is an excellent means to encourage development and specialization; and, thirdly, maintaining one's credentials can be made contingent upon continuing education programs.

In sum, accreditation and professional standing are as significant for those who utilize the profession as it is for those who belong to it: for the former, it helps furthers knowledge, awareness, and confidence, while for the latter it is the surest path to self-naming. Given the evident frustration among clientele which has resulted in the IMI initiative to bring such a standard into existence, it behooves the mediation community to cooperate and to improve the standard so as to make it a reality.