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TO THE HIGH COST OF LITIGATION

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Mediator Certification: What Are Some Practitioners Afraid Of?

BY KELLY AUSTIN, ADI GAVRILA, JEREMY LACK, MICHAEL MCILWRATH, JUDITH MEYER, TINA MONBERG AND WOLF VON KUMBERG

In last month's lead article, "Mediator Accreditation: Is It Risk? Or Quality Enhancement?" 26 *Alternatives* 165 (October 2008), Tony Willis, a well-known and highly respected London-based mediator, voices a view opposing an initiative of the International Mediation Institute (IMI) to promote mediator certification globally.

Willis expresses a view we have heard from mediators who oppose this initiative without, perhaps, fully appreciating why so many see it as filling a genuine need. They believe mediation is an art, not a profession. Willis captures this view well when he notes in the article that it is difficult "to define in advance precisely what a mediator should do in a particular case."

The coauthors of this article agree that it is difficult to define what a mediator will do in reaction to the exigencies of any particular mediation. We agree that mediation is an art. But we have difficulty understanding the objection to regarding mediation as a profession. We occupy different roles as mediators, advocates, and party representatives of global companies involved in dispute negotiations, and we have all faced our share of stress, high stakes, and uncertainty. The professionalism in each of our disciplines directs us to the best response.

Yet we see no reason to believe that mediators are in a category different from, or

superior to, that of other professions, such as doctors and lawyers. Both of these professions started from humble beginnings, and 200 years ago, it might have been possible for anyone to make a living as a doctor or lawyer without any type of certification. Today, no reasonable person would take their

medical or legal problems to someone who was not certified to an established competency level in the fields of medicine and law. Certification 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.

OPPOSITION TO RESTRICTIONS

The main opposition we have heard expressed against certification, and Tony Willis captures this view well in his article, is concern that certification is a form of regulation that will restrict mediators and their creativity. We fundamentally disagree. We see certification as a way to help mediation grow, both domestically in the jurisdictions where we reside (the United Kingdom, Italy, Denmark, Romania, the United States, Switzerland, and Hong Kong) and globally in other countries where we have attempted to reach settlement through mediation.

And as for mediator creativity, we fail to see how high requirements for mediator training, competency, continuing education and dedicated professional commitment will restrict creativity. The most creative performers in the arts, sciences and in every profession come out of back-

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for references. Particularly in large cases, it is customary to interview potential arbitrators—not *ex parte* but jointly with opposing counsel. During these interviews, arbitrators should not be asked about issues in the case but rather about their experience, style, and managerial skills.

* * *

The flexibility of the arbitration process, including the ability of the attorneys and the parties to work with the arbitrators to tailor arbitration to fit a particular case, can be an enormous benefit to all participants. Using

these suggestions and designing others to streamline a case will lead to a just, speedy, and cost-effective resolution and to greater client satisfaction with the process, win or lose. ♣

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Mediator Certification

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grounds of intense disciplined study, training and practice. Creativity flows from preparation; inspiration is never unprepared. Louis Pasteur reflected: "In the field of observation, chance favors the prepared mind." Although mediators pride themselves on listening to and hearing all voices in the room, some have turned a deaf ear to mediation users—that is, their own clients. The IMI initiative is led by commercial mediation *users* who have many different reasons for supporting it.

First, they want to see more disputes make use of mediation as the primary form, and hopefully, the only form, of dispute resolution. For every mediation that takes place, these users note that there are at least dozens of offers to mediate that are not accepted. They believe certification would increase the acceptance of mediation as a practice, by providing greater certainty and transparency, as well assurances to the *other* party regarding the seriousness and professionalism of the dispute process being proposed.

Second, they want things to be easier than they are today. They want to know more about the mediators they use and those they may hire. They want to know if the mediator sits passively and ferries offers and demands; they want to know if they are provocative about risk analysis, and, yes, what they do in the mediation where an infamous porno-film producer arrives four hours late, barefoot, attired in sweat shorts, and screams: "We will bury you and your clients. I'm going to ruin you, your counsel and all of your ambulance-chasing partners."

They want to know if the mediators are educated in their craft, have a continuing education plan, can pass a clinical role play, and have mediated more than once. In other words, they want mediation to be more predictable, and their use of it to appear successful, even when the outcome is not.

Perhaps even more important, in order to expand the global acceptance and use of

mediation, they want parties with limited or no prior experience with mediation to feel that they are engaging in a process that has some indicia of legitimacy and access to neutrally assembled information on the mediator to whom they are entrusting their dispute. There is nothing inherently wrong or offensive about asking mediators to measure up to a high bar and to show the world they know their stuff.

The Customers Speak

The gripe: IMI, a group involved in an international mediator credentialing program, 'fundamentally' disagrees with last month's critical commentary.

The rebuttal: Mediation is a definable, assessable, and measurable profession—like law or medicine. Despite past failed certification attempts, the time has come.

The status: The group's International Standards Commission is still working on the certification scheme. If you don't like it, let them know.

MEDIATORS HAVEN'T PRODUCED

In fact, the arguments against IMI, which is based in the Hague, Netherlands, are undercut by the very evidence Tony Willis provides in his article against certification. He writes that he "firmly believes mediators themselves should be taking up the challenge" and that "processes should not be developed without serious consultation with the professionals who do it day in and day out."

But the point is that mediators have not developed these processes despite

calls from users to do so, as demonstrated by the attempts in the United States that Willis uses as supporting examples. These are many of the same mediators who wish no barriers to entry, who mediate without rudimentary knowledge of negotiation theory, strategy, interest-based or power-based bargaining, or the dynamics of conflict resolution—and who reflexively and mindlessly tout the "win-win" solutions arising from the "sunlit uplands of the Harvard Negotiation Project," (sic) as Willis puts it. (The Program on Negotiation has produced cutting-edge theory in negotiation. We fail to understand Willis's swipe at Harvard.)

Mediation organizations tried twice in the United States to interest mediators in quality assurance. The response: Mediators yawned. The initiatives dwindled. The attitude is, "If it ain't broke [for us anyway], don't fix it."

Moreover, we fail to understand the criticism that mediation users should not be the parties driving a certification scheme that seeks to satisfy their needs and desires for greater transparency, greater information, and greater assurances of competency. Mediators who believe they are in a position to tell users what it is they want and what it is they need may wish to look to the example of how business is conducted. Many an unsuccessful company has learned the hard way that you don't succeed by insisting that you know better what your customers want than they do; you ask your customers what they want and then seek to deliver it. And, respectfully, the mediators who have criticized IMI do not find themselves in the users' position. They apparently don't appreciate the informational frustrations that users regularly experience in the mediation process; and they do not find themselves routinely attempting to convince adversarial parties inexperienced (continued on next page)

Mediator Certification

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in mediation to participate in a process where they feel they lack fundamental information about potential mediators.

LACKING INFORMATION

Why are parties afraid to resolve disputes in foreign jurisdictions? Apart from inconvenience, often it is simply fear of the unknown; they lack information. The same is often true for mediation. Willis points to a magazine publication as a useful informational guide, and we agree. The next question, however, should be: "How does the average or new user of mediation [rather than the experienced mediator] locate this information in an easy, reliable and consistent way?"

The answer, of course, is that they cannot. In a world dominated by the free flow of information, even the most basic information on mediator competency remains available only on an ad hoc basis. It all too often comes predominantly by "word of mouth" or from a mediator's or mediation organization's own promotional materials. If mediation is to rise to the level of a profession, far greater transparency and information flow is needed.

There is little doubt that what IMI is attempting is a bold initiative. Willis expresses concern that it will interfere with "the day-to-day life of a professional mediator" and "run a significant risk of holding

the profession back." How? It is not mandatory, and those who are well established need not sign up. Their business may not suffer. Most, though, hopefully will see it as an opportunity to hold themselves out to users as meeting the competency standards users should expect.

As to feared "layers of bureaucracy and cost"—the initiative will cost mediators virtually nothing and the small amount of bureaucracy will be internal to IMI. What are mediators who oppose IMI afraid of? We honestly do not know, but they do appear to be increasingly in the minority. Over the past six months, IMI's Independent Standards Commission has worked hard to simplify and streamline the competency certification scheme while rendering it adaptable worldwide. The commission has taken on board many comments, from its own 40-strong international membership as well as from countless others who have offered views during two consultation processes conducted by IMI since April 2007.


Interestingly, numerous professional mediators and some providers, though asked for their views, declined to comment at the time. Many are the very mediators who now, rather late in the day, seek to influence the outcome, slow down the initiative's progress, or curtail its impact. Thankfully, however, many other mediators in the best-of-breed category did engage throughout. More than half of the commission members are experienced practicing commercial mediators.

As a result of this work, the scheme that has emerged from the commission's deliberations does not "mandate" anything—it is a purely voluntary scheme (it was so designed from the start). It does not define how mediators should develop their practices or how training should be configured, and offers a great deal of scope for adaptation—certainly not a "one-size-fits-all" approach. A full print-out of the scheme runs to 22 pages, half of which contain the Code of Professional Conduct and the Complaints Process. The IMI Scheme can be downloaded from www.IMIMediation.org.

At this stage, the testing standards are still being discussed. They will be set at a high level and assume a significant degree of mediator experience. Mediation institutions, trainers and assessors will all be engaged in the design details prior to the commission's finalization.

For now, a six-month fast-track window is offered to certain experienced commercial mediators for becoming "IMI Certified" without undergoing a test. This window will close on June 30, 2009. Far from being something that mediators should fear, IMI certification offers experienced mediators compelling opportunities. It will raise standards by setting them high, enabling users to rely on the competency of those certified. Mediators' profiles, backed up by an advanced, open-access search engine, will enable users worldwide to find the best and most suitable mediators with a few keyboard strokes.

A Feedback Digest, included in every profile, will not only provide vital information to users, but will constitute brilliant marketing for Certified Mediators. And the scheme will cost Certified Mediators almost nothing—just a nominal contribution to help defray the cost of maintaining the search engine.

There is still time to talk if mediators wish to have input into the IMI scheme, which is destined in any event to adapt and change over time, as mediation emerges as a global profession. IMI is listening. The executive director is Michael Leathes and the operations director is Irena Vanenkova—please offer them the benefit of your views and comments by contacting them at Michael.S.Leathes@IMIMediation.org and Irena.Vanenkova@IMIMediation.org. This is an excellent opportunity to influence the development of mediation as a global profession. 

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Credits and Background

Kelly Austin is in-house litigation counsel for the General Electric Co. in Hong Kong. Adi Gavrila is president of the Mediation Centers Union of Romania, in Craiova, Romania. Jeremy Lack is a lawyer specializing in mediation advocacy in Geneva, Switzerland. Michael McIlwrath is in-house litigation counsel for GE Oil & Gas in Florence, Italy; he produces the *International Dispute Negotiation* podcast for the website of the CPR Institute, which publishes this newsletter. Judith Meyer is a Philadelphia mediator who wrote about the IMI initiatives in "Mediator's Alert: Now, Certification Goes

Global," 26 *Alternatives* 57 (March 2008). Tina Monberg is the director of mediationcenter A/S in Copenhagen. Wolf von Kumberg is Assistant General Counsel for the Northrop Grumman Corp. in London, and is a member of the CPR Institute's European Advisory Committee. Meyer and McIlwrath are vice-chairs of IMI's Independent Standards Commission, and von Kumberg is chairman of the organization's board of directors. In addition, Kathleen A. Bryan, *Alternatives'* publisher and president and CEO of the CPR Institute, is a member of the IMI Independent Standards Commission.

Tony Willis Responds:

Not for the first time, IMI misstates my objections to their scheme. Moreover, their response comprehensively misses the point. It is difficult to know where to begin but I will confine this response to only a few of the more obvious points.

- (1) For some years now, I have argued in public and in private that mediation is a profession and so should act as such. Yet in the first paragraph, IMI [representatives] say I believe mediation is not a profession but an art—a view they say is the basis for my objections to the scheme. Their assertion is nonsense.
- (2) I have never criticized Harvard's work on negotiation which I and most experienced mediators hold in the highest regard. Yet, IMI describes my last piece in *Alternatives* as a "swipe at Harvard." That assertion too is nonsense.
- (3) IMI concedes that its scheme is unlikely to attract the well-established

mediators. I have then to ask: What is the point of their initiative?

- (4) IMI says "there is still time to talk." I and many others have been talking to IMI since these proposals emerged late last year. We have explained our concerns. We have invited further discussion. I agree there should be time to talk and I hope IMI will finally listen—but the continued megaphone insistence that the scheme will go ahead in a couple of months does not inspire me with confidence that it really wants to listen to what should be the most important constituency of all, the many hundreds of experienced full-time mediators in the United States, the United Kingdom, and elsewhere who have spent the last 10 to 15 years hard-growing this profession, and who really understand what it is, what it should be and how the users (without whom we are nothing) could be helped to achieve their aims.

The point they miss so completely is this: I have for some time argued in public that [members of] the mediation profession should work together to raise standards and make the practice more transparent to users, judges, and policymakers. A number of organizations and groups have been doing outstanding work along those lines. My objection to the IMI scheme is not (as IMI misstates it) a belief that there should be no form of regulation or organization, but that the IMI attempt will not achieve its objectives and, worse, will actually impede the growth and transparency the [IMI representatives] say they believe in.

I do hope they will finally listen before it is too late. As they know, I do not wish their initiative simply to fail and so damage us all. They have assembled an important constituency which I and others have been trying to talk to for about a year. I invite them yet again to talk and listen *before* going ahead as proposed. ■

ADR BRIEF • ADR BRIEF • ADR BRIEF

NEW SECURITIES ADR PILOT LAUNCHES, ALLOWING INDUSTRY ARBITRATOR REMOVAL

A program that addresses criticisms about the fairness of securities arbitration processes kicked off successfully last month, with a solid initial response from disgruntled investors seeking to opt into the pilot processes.

Officials at the Financial Industry Regulatory Authority Inc. are cautious in their early assessments, and say they will need to see not only the sign-ups, but the results of the arbitrations that come out of the two-year pilot program before permanent changes are proposed and adopted.

The authority, better known as Finra, is the oversight firm formed last year via a merger of the regulatory arms of the NASD Inc. and the New York Stock Exchange. Finra administers the arbitration and mediation for securities disputes at the markets.

Securities dispute resolution systems have been criticized for years for the alleged coziness of industry arbitrators with the broker-dealers defendants in cases where individual and business customers complain about the way their accounts were handled. The exchanges have maintained that the outcomes are fair, but the pilot program's establishment, as well as other changes, acknowledges the appearance issue regarding the so-called non-public arbitrators.

The pilot program allows plaintiffs to remove all non-public, industry arbitrators from their cases.

Critics still say it is too little, and not fast enough. "The present method of qualifying and selecting [self-regulatory organization] arbitrators is broken beyond repair and needs a complete overhaul," according to Constantine N. Katsoris, a founder of the 31-year-old Securities Industry Conference on Arbitration. SICA is a group of industry, public, and self-regulatory organization representatives that developed a

model arbitration code for broker/dealers' disputes with their customers.

In fact, the limited program doesn't address the arbitrators' qualifications, but how they constitute panels. The pilot currently allows a small number of cases to be taken by each of 11 major industry players.

Just four days after the Oct. 6 launch, the full pilot slate of 10 cases for the first year for Charles Schwab & Co. investors had been filled, according to George Friedman, a Finra executive vice president and director of arbitration. Finra is updating the number of investor complaints opting into the pilot for each provider on the program's FAQ page, accessible via the notices at www.finra.org. Some of the other participating broker-dealers include Edward Jones, which is taking 18 cases for each of the first two years, Merrill Lynch & Co. and Morgan Stanley, each of which will put 40 cases into each pilot year, and TD Ameritrade Clearing Inc., which will take 10 cases each year.

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