

Mediator Competency is like Truth, Beauty and Contact Lenses...

Why the fifth mechanism to assure users about mediator quality really works

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Michael L. Moffitt's¹ *The Four Ways to Assure Mediator Quality (and why none of them work)*² was described by the author as a cautionary piece. It influenced the thinking behind the mediator competency certification regime implemented by the International Mediation Institute (IMI) in terms of what pitfalls to avoid, and inspired this follow-up.

The central Moffitt observation was that, over time, one or more of four mechanisms are applied to members of every practice or profession “*whether doctors, lawyers, plumbers or tattoo artists*” in order to provide customers with some assurance about the quality of their practitioners’ services. He identified the four mechanisms as:

1. Public-Front-End Mechanisms (licensing requirement in order to practice)
2. Public-Back-End Mechanisms (governmental sanctions for misbehavior)
3. Private-Front-End Mechanisms (users applying reputation-driven choices)
4. Private-Back-End Mechanisms (exposure to malpractice liability).

His analysis asserted convincingly that not one of these four conventional quality control mechanisms works as well for mediation as they might for other professional practice areas. Mediators, he noted, currently operate outside any licensing system, are exposed to little or no governmental sanction for misconduct, risk minimal public reputational consequences as they work in privacy, and rarely encounter private malpractice liability.

Prof Moffitt predicted that this comfortable status quo would not last long in mediation. He set out what might change for each of the four mechanisms to render them more reliable and useful ways for assuring mediator quality, though none seems very likely. For example, regarding Private-Front-End mechanisms, he felt that if mediation practice were to become much less balkanized as a result of mediation service providers consolidating more intensively (which has not yet occurred), “*the firms’ reputations would then serve as proxies for the quality of their mediators*”. And then he predicted:

“It is possible that mediation consumers will begin to have access to greater information about individual mediators’ performances.... [T]he highly decentralized internet has transformed consumers’ expectations in many sectors. Today, through voluntary rating systems [in many fields] consumers have at least rough information about many previous consumers’ experiences.”

¹ Michael L. Moffitt was Associate Professor at the University of Oregon School of Law and Associate Director of the UO ADR Center. He was appointed Dean of the UO School of Law effective July 2011. He also teaches at the Program of Instruction for Lawyers (PIL) at the Harvard Program on Negotiation.

² The article was published in draft in April 2008 and subsequently in 2009 at 24 Ohio State Journal on Dispute Resolution 191.

These three sentences prompted a wave of ideas. What if users had meaningful first-hand insight into individual mediators' performances, provided by previous users in a transparently organized, fair and credible fashion through the light of the Internet? Not a rating system (too superficial and difficult to implement objectively and professionally) but independently-controlled feedback in summary format? Similar to performance appraisal systems now used to assess staff working in many different organizations such as government agencies and companies. Clients feel increasingly entitled to expect the performance, competencies and skills of professionals to be as transparent and assessable as they are in their own organizations. In fact, if done well, competent professionals would actively desire, and benefit from, a scheme where their abilities are independently recognized, celebrated, valued and capitalized upon by future clients. More effective marketing of true professionalism is hard to imagine.

Government licensing, the Moffitt *Public-Front-End Mechanism*, is intensifying in many parts of the world in nearly all sectors. Recently, a civil liberty group sued the Louisiana Board of Embalmers and Funeral Directors for banning a Benedictine abbey from selling coffins because the monks did not have a license. In some places, interior designers, dog-walkers and florists are now jobs that need to be licensed. How mediators have escaped until now is a wonder, but it's coming. Increasingly courts have created rules on who can mediate in court-connected mediations. Some "certify" these mediators but the criteria differ one court to another. It risks getting complex and mystifying for the hapless user.

Mediators emphasize that one of the benefits of mediation is that parties control their own outcome, rather than risk one imposed by an adjudicator. Likewise, mediators understandably ascribe high value on not being controlled by a public licensing authority. But in a world where anyone can currently claim to be a "mediator" - whether trained, competent, experienced or not - the emergence of Public-Front-End or Back-End mandatory licensing and regulation schemes is a certainty unless mediators take the initiative to control their own professional standards transparently and convincingly in a way that satisfies the needs of their users. The self-control system they adopt needs to be consistent across the board (indeed, the world), credible and accessible to all.

The International Mediation Institute was created precisely to achieve that goal.

International Mediation Institute. A Fifth Way – A User-Orientated Mechanism

IMI³ was inaugurated in 2007 as a joint public benefit initiative by several corporate users of mediation, including General Electric and Northrop Grumman, and several dispute resolution providers, including the American Arbitration Association, the Singapore Mediation Centre and the Netherlands Mediation Institute. IMI is based in The Hague but its Mission, part of which is to certify the competency of mediators, is global. IMI is a registered charity, funded entirely by donations from Patrons, and does not provide services in the mediation market. All members of the IMI Board, Advisory Council and Independent Standards Commission (ISC) provide their time pro bono.

³ www.IMImediation.org

IMI Certification

How to Become IMI Certified on the IMI portal explains how mediators can qualify for IMI Certification via a Qualifying Assessment Program (QAP). To gain the approval of the ISC to a QAP, an educational, training, service provider or professional institution needs to prepare a program meeting Criteria set by the ISC.

In order to be IMI Certified, a mediator must, in addition to being qualified via a QAP, put together an online Profile that has a number of obligatory and optional parts. These are explained in a Wizard that helps mediators compile their Profile.

An obligatory part of the Profile is the Feedback Digest, an independently-prepared summary of user feedback collected by the Mediator or Reviewer - what Prof. Moffitt might classify as a Private-Front-End Mechanism. The feedback is collected using either the IMI Feedback Request Form or similar, and once completed by users this feedback is anonymized and turned into a cumulative summary by an independent Reviewer selected by the mediator. The Reviewer follows Guidelines set by IMI and uploads the Feedback Digest onto the mediator's Profile, which is then included on the IMI Search Engine. The credibility of the Feedback Digest has much to do with that of the Reviewer, and Reviewers' identities are revealed on the Feedback Digest section of the Profile.

Another obligatory part of the Profile is a declaration by the mediator of which Code of Conduct she or he ascribes to, and the applicable complaint mechanism in case of breach (a Private-Back-End Mechanism). As IMI Certified Mediators are confident in their skills and professionalism, many have chosen the IMI Code of Professional Conduct and the IMI Professional Conduct Assessment Process (a disciplinary process administered by the ISC where one possible sanction for breach is loss of IMI Certification).

An IMI Inter-Cultural Mediator Competency Certification is now in development by a Task Force of the ISC.

IMI also has a global Young Mediators Initiative to assist new mediators gain experience with master mediators and ultimately become IMI Certified.

IMI Certification is a key element of the wider IMI mission to promote quality assurance and professionalism in mediation and to share relevant tools for mediators and users.

Why The Fifth Way Works

IMI Certification works because it is user-orientated, transparent, simple, and jurisdictionally and culturally adaptable while maintaining a consistent high standard; it leverages the reach of the internet; it is implemented not by IMI but by provider, professional, educational and training institutions holding QAPs meeting the criteria set by the Independent Standards Commission; the Guidelines for the Feedback Digest mechanism protects mediators' professional reputations from unfairly adverse comments while highlighting their true competencies as experienced by multiple prior users.

The IMI search engine helps users find not only the most competent mediators who are genuinely experienced, but also the most suitable mediators for their cases. Mediator competency and suitability are two of the main drivers behind successful mediations.

IMI Certification is also credible and memorable – as a user-driven initiative, it is one that convenes all stakeholders⁴ around a common, easy to execute high standard established by a non-service provider and professional institution operating worldwide.

Any initiative to improve the standing of a field must first be well designed. IMI was designed around one core element – mediation professionalism. By approaching the mission from a demand-side perspective, holding transparency and high quality as paramount, the IMI Certification scheme was shaped, refined, tested and applied.

In the formative stages of mediation's development, quality was defined by what the mediator, the provider and the trainer contributed. This remains important but is no longer the secret to growth of the profession and the use of mediation. What will make mediation expand in the future is the value users extract from it – in terms of access to highly competent and eminently suitable mediators, and the value mediators gain from having their skills much more widely appreciated and understood.

The success of the IMI scheme depends on the willingness of mediators, providers, trainers and others engaged in the highly fragmented and competitive practice of mediation to rally round to really make it work. The Fifth Way, unlike the others, actually works. In the first National Mediation Conference in Perth, Western Australia, following the introduction of the Australian National Mediation Accreditation System, Justice Murray Kellam, Chair of the Government-sponsored National ADR Advisory Council, elegantly and poignantly captured the need for proactive stakeholder collaboration on this important issue: *I believe it is time for mediators from all walks of life to look to the common goal first, and to their individual goals and positions second. We all have to give a little so we can reap the benefits.*

Although competent mediators don't have to give a lot, a lot of them have to give a little to become the fifth way to assure mediator quality: apply to a QAP to be IMI Certified; pull together a Profile; invite feedback from parties to mediations; and appoint an independent Reviewer to convert the feedback into a Digest that will render their skills more transparent. The cumulative view of parties is a unique window on every mediator's skills and suitability to benefit other users. Professor Lawrence J. Peter observed in Chapter 1 of *The Peter Principle* (1968): ***Like truth, beauty and contact lenses, competence is in the eye of the beholder.***

⁴ Mediation's main stakeholders are: users and their professional firms, mediators, service providers, trainers, educators, adjudicators and governments. And because mediation generates more sustainable outcomes than conflict-orientated process, societies and economies are stakeholders.