



# Mediate Ohio

SPRING

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## Special Edition

### *Mediator Credentialing Proposal: The Pro's and the Con's*

This issue of *Mediate Ohio* is dedicated to providing members with a balanced evaluation of the Mediator Credentialing Proposal that will be voted on this month. Our President Nathan Witkin and a past President Jay Patterson have presented op-ed pieces on the pro's and con's of OMA's adopting a Mediator Credentialing program. The hope is that this will help members better understand the issues involved with establishing a credentialing process and what that will mean for OMA as an organization.

Because members have received at least two drafts of the proposal, have had at least one opportunity to attend a meeting to discuss the proposal, have been invited on at least two occasions to provide written feedback about the proposal, and because our business meeting is time-limited, there will not be much discussion of the proposal at the annual conference. Voting will take place on-line after the conference. Consequently, providing you with in-depth discussions about the merits and demerits of the proposal should help you make up your mind how you want to vote.

Getting to this point has not been an easy road. A committee was established in 2010-11 to explore mediator credentialing, but no proposal was put forth. Teresa Cusma tried to get the ball rolling again in 2014 when a Student Intern at her agency undertook a study of mediator credentialing in other states and drafted a proposal that was given to OMA members then. There was little interest in moving forward with it. Then, at last year's OMA Conference, a vote was taken to determine if the membership wanted to move forward with mediator credentialing. The majority of those attending favored drafting a proposal for member consideration. Then, a Mediator Credentialing Committee was established, but didn't really get moving until May 2017. Between then and now, four people, Tom McQuire, Teresa Cusma, Nathan Witkin, and Linda Norris invested at bare minimum, 200 hours in meetings, research, calls, e-mails, minutes, writing, and reading. Additionally, they logged over 2592 miles and over 38 hours going to and from meetings. This doesn't include the time Teresa's Intern invested in the very first draft that was used to begin the process. This is a lot of volunteer time, money, and energy invested in this process.

Both Nathan Witkin and Jay Patterson have taken a great deal of time to present the pros and cons for your consideration. Please give them the consideration of reading their articles. But, even more importantly, please carefully read the proposal and draw your own conclusions. You must decide if the advantages outweigh the negatives, and it is hoped that this issue will help you make an informed vote.

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#### DATES TO REMEMBER

May 19, 2017, OMA Annual Conference. All day or 1/2 day.  
Fawcett Center, Columbus, Ohio.  
Registration from 8:00—8:45 a.m.  
First speaker Dr. Tanya Menon from 8:45—noon. OMA business meeting noon to 1:30. Second speaker Jerry Weiss, 1:30—4:45 p.m.

October 11—14, 2017. ACR Annual Conference, Dallas, Texas.

LEADERSHIP

ADVOCACY

PROFESSIONALISM

EDUCATION

# The Advantages and the Pluses of OMA Mediator Credentialing

**Nathan Witkin, OMA President**

As explained below, the benefits of a mediator credentialing process include the opportunity for experienced mediators to stand out over less-trained mediators, support for newer mediators seeking professional development, stronger connections within our profession, transmission of knowledge among mediators, a measure of quality control in mediations, and public confidence in the mediation process. In comparison, the potential downsides are negligible.

First, mediator credentialing will allow you to differentiate yourself from mediators who do not have the training and experience of a full-time professional mediator. Many people want to be mediators, and there is a myth that professional mediation requires minimal training and experience. As a result, OMA members compete professionally with volunteers and professionals whose expertise is in non-mediation fields. Credentialing will thereby allow disputants to find trained and experienced mediators, improving our practices, programs, and profession.

Second, our two-tiered approach offers "Advanced Practitioner" status so that the most experienced mediators can stand out as being exceptionally qualified. With this degree of respect also comes responsibility to pass on knowledge through training, writing, or mentoring. These are activities already undertaken by many advanced mediators, and OMA will provide the infrastructure to make it easier for those who do not. This infrastructure will include a blog where you can post kernels of wisdom, a pool of lower-tiered mediators who need a quick debrief after a bad session, and training events for you to show off the tools you developed over a longer mediation career.

Third, by recognizing and encouraging the transmission of knowledge between more-experienced and less-experienced mediators, credentialing will foster closer relationships within the mediation profession. Currently, mediation is largely a field of disconnected individuals. The profession has existed long enough to see practitioners with decades of experience potentially retiring without passing on their skills to the next generation. Without imposing unreasonable action, the proposed credentialing draft prods experienced and fledgling mediators to form better connections so that the mediation profession avoids stagnation.

Fourth, by recognizing excellence in the field of mediation, credentialing will also allow OMA to provide a degree of quality control over mediators. With a manageable complaint process, OMA will be able to potentially revoke the credentials or recommend training when necessary. Texas has applied mediator credentialing for 15 years, and their experience is that complaints about mediators come in frequently, but they are never about mediators who are credentialed by their organization. By providing a benefit that can be suspended, credentialing will therefore allow OMA to provide a degree of quality control to the mediation profession in Ohio.

This process would foster public trust in our profession without creating entry barriers to non-credentialed mediators. Remember, non-credentialed mediators will be in the same position whether or not our credentialing process is available. And, if you do not currently meet the proposed standards, do not be disheartened—a person with no mediation background should be able to attain these standards by the time the public will be demanding that their mediators be OMA credentialed.

Now, consider the potential downsides of mediator credentialing. One criticism is that credentialing will be difficult to manage. We have addressed this problem with a series of objective, yet meaningful measures of mediator competence. Because the credentialing process is objective, considering applicants will be as easy as reviewing applications and potentially checking on the information reported. Independent mediators, interns, or graduate students could be hired to review applications for a decent hourly wage. Though simple, our credentialing draft remains meaningful by requiring logs of training and experience, an associate to write a "best practices" letter about the applicant, and an open-book test on mediator ethics.

Thus, the difficulty of credentialing was largely undertaken in drafting the credentialing process (a hurdle we have already vaulted). Implementation is as easy as voting yes for this proposal.

As a related criticism, some may argue that credentialing would be better managed by the government, as opposed to an all-volunteer professional association. There are a number of flaws with this perspective. First, if the government could better manage mediator credentialing, the courts or legislature would have already acted.

The truth is that OMA is quicker, more flexible, and more purely staffed by professional mediators than any existing government body. We are therefore fully qualified to undertake this credentialing effort. Second, the government has not proven to be more organized in regulating the mediation profession. Though the Ohio Uniform Mediation Act copied the national uniform model, a typo existed in the law from 2005 to 2014. Finally, and this is crucial, every profession has regulated itself first. Before governments regulated who could practice law or medicine, these professions issued their own professional standards. Waiting for non-expert government officials to formulate standards for us would not only be unnecessary and counterproductive, it would also be unnatural.

Another criticism is that credentialing will be imprecise. Mediation occurs in private settings, and mediator quality may be a matter of debate even among experienced members of our field. As a result, any efforts to measure mediators against each other will be fraught with difficulties. However, this is the very reason that our credentialing efforts use objective measures rather than subjective assessments.

Critics may also argue that applicants may be dishonest in reporting their mediation experience and training. This is, again, why objective measures are preferable—they are more easily verifiable. To some degree, every established profession requires its members to truthfully report their qualifications. The credentialing proposal also addresses this flaw by requiring applicants to have another professional verify their skills with a brief letter. Also, our complaints process and mentor/mentee relationships will

provide ongoing oversight of credentialed mediators.

Finally, some critics will argue that mediator credentialing opens OMA to liability. As the argument goes, if a mediator we credential is sued for negligence or malpractice, then we could be joined as a co-defendant. OMA considered this risk, and even took steps to create a separate organization to administer Ohio's mediator credentialing (the Ohio Mediation Credentialing Organization). Though this course of action would protect OMA from risk, it would also prevent OMA from obtaining the benefits of administering Ohio's mediator credentialing.

The OMA Board considered this tradeoff and found the benefits to outweigh the risks. The risks are minimal because mediators are rarely sued, and when they are, it is difficult to prove proximate cause to damages in order to establish liability. Again, Texas's mediator credentialing organization has operated for 15 years and has never been involved in a lawsuit. Thus, the chance that a mediator (especially a credentialed mediator) would be sued is small, and the chance that we would be brought into a lawsuit is even smaller. Regardless, we are shopping for insurance, though mediator credentialing is not a product that has been created and tested by insurance companies. Also, our credentialing process includes an open-book test that is designed to be a refresher on mediator ethics, and we are looking into purchasing insurance for our credentialing efforts.

If you, personally, do not believe in mediator credentialing, you do not have to participate. Because this is a voluntary process, not applying for credentialing will maintain the current status quo of your mediation practice. Though this process may not be for you, there are trained and experienced mediators who are looking to stand out with any additional badge of expertise. OMA aims to meet this need as part of its efforts to promote the professional practice of mediation in Ohio.

As a final note on our efforts in creating the current credentialing draft, the Credentialing Committee has exerted an amount of effort on the current draft that is not likely to be replicated. The last time OMA attempted a credentialing draft, the process lost steam, and it was another 5 years before the political will culminated in another effort. Over the last year, our

# The Disadvantages and the Negatives of Mediator Credentialing

*Jay Patterson, Past OMA President*

Members should vote No on the OMA proposal to implement mediator credentialing. Although the goals sought to be achieved by the proposal are laudable goals, the proposal will either not achieve those goals, or those goals could be met through other means without the negative consequences that would be brought on by the implementation of the plan.

Perhaps the most fundamental reason the proposal should not be adopted is that it attempts to achieve a professional standard through a not-for-profit organization of volunteers who would have no real enforceable job duty reporting structures to ensure such an ambitious endeavor will get carried out consistently, thoroughly and sustainably. Virtually no one is getting paid to do their job fully, vigorously, and with due diligence. Although the proposal does call for a paid administrative assistant to process applications and perform clerical duties, the real work of decision making and verification, is to be done by volunteers. Given the current state of OMA's financial resources, it is questionable whether it is a good use of its treasury to pay a person to do clerical duties. Further, even if the proposal called for all credentialing personnel to be paid, the revenue generated from the plan would not be sufficient to create enough financial incentive to ensure the plan is carried out with due diligence in the way that it likely would be if the duties were staff's day job. As the proposal is constituted, no one stands to lose their livelihood if they do not perform their job dutifully and well. As a past Vice President, President, Immediate Past President and longtime member of OMA, I question the capacity of OMA to sustain the program over time.

Second, the plan does not require verification of some of the required standards. It allows for verification of such things as an applicant's alternative to a bachelor's or higher degree or of the hours or number of cases mediated, but it does not require it. Moreover, some of the

standards are not only vague but highly subjective. (See Section VI. A. 1. a. and b., for example.) Combining a lack of required verification with vague or subjective standards through volunteers who have no real economic incentive to seek verification will likely create a dangerous scenario where some proffered credentials are inconsistently approved or not approved or not verified at all. This, in turn, will lead to the appearance of true professional standards but in reality is anything but that. If the standards are not carried out thoroughly and consistently over time with due diligence, it will represent, at best, a hollow promise to the general public and, at worst, a misrepresentation. Standards that are not real are worse than no standards at all. While, as will be noted below, I favor having standards that are real and clear and verified by professional regulators, at least the current status quo without standards on the state level, avoids a hollow promise or a misrepresentation.

Third, the proposal has and will continue distract OMA as an organization from advancing the field in more achievable, realistic, and sustainable ways. As evidence of the assertion that credentialing has and will act as a distraction from higher priorities for OMA, I offer four observations: 1) Despite the current version of the OMA web site having gone live some time ago, parts of it still does not function properly. For example, perhaps the most important part of the site, which most impacts the profession's interaction with the general public, i.e. "Find a Mediator," still does not operate properly. In multiple attempts, on different computers I was unable to do a search for a mediator in the way that the former OMA web site could. Previously, one could search for a mediator by the type of dispute, geographic location, etc. That tool is especially useful for a person who is trying to find a mediator according to criteria important to the person

doing the search as opposed to looking for a mediator already known to the person. That function appears to not be available currently. There are other problems with the site as well. 2) Attendance at the OMA conference has been abysmal in recent years. From my time on the board, I recall conference attendees in the area of 100 or more. Those in attendance at recent conferences, especially last year, can attest to attendance falling far short of 100. 3) OMA membership appears to be declining. In my time on the board, membership was also in the neighborhood of 100. Based on a look at the OMA web site, it would seem current membership is far below that level. Having an effective professional organization requires real nuts and bolts organizing that involve such things as member and officer recruitment and retention, and building the treasury so that those human and financial resources can be utilized to advance the field. 4) There are more pressing priorities that OMA could and should engage in that would have a greater impact on advancing the field and many of the goals professed to be achieved by the proposal. For example, OMA could do more outreach to governmental entities, private businesses and civic associations as well as to other business and professional associations to tout the benefits of mediation, encourage the creation of quality mediation programs, or explore partnership initiatives to help disputants consider mediation. Such efforts may not be flashy and glamorous but it is the life blood of the long term success of any professional organization. The human resources and energy consumed by the creation and implementation of the credentialing proposal has and will continue to diminish the capacity of that OMA is in its current evolution to advance the field in other more meaningful, sustainable ways.

Fourth, the human resources needed to execute the proposal will deplete the pool of people who will serve on the board and fully implement their duties. In OMA's current evolution as a professional organization, it has been quite hard enough for OMA to get people to run for election and serve in an officer or to fill an appointed board member position. That difficulty will be exacerbated by the time and effort required by the execution of the credentialing plan. Volunteers can only commit so much of their time. People only have so much time to give. Given the small pool of persons available to serve on the OMA board, it seems unwise to dilute that pool further by creating a need for even more personnel. It would be far better to focus the limited human resources on more realistic, sustainable projects rather than on this ambitious credentialing plan. It might be possible to imagine a time in the future when OMA is big enough and strong enough to carry out such an ambitious program as proposed. That time has not yet arrived and it is not likely to arise until other more basic and fundamental initiatives are undertaken by OMA.

Fifth, the proposal creates a risk of liability on OMA. This exposure could come in multiple ways. One way might be an allegation by the public that OMA improperly credentialed a mediator. Although some may dismiss this concern as far-fetched, the risk may not be that remote. Another potential exposure could come from a mediator alleging improper denial of credentialing or improper removal of the credential. Whether such allegations would be meritorious is almost beside the point. Just one law suit would likely devastate OMA's small treasury in defending the action, thus threatening the mere existence of OMA and its ability to support the profession. Although the proposal purports to call for insurance for the individuals serving on the committee or the board, it does not seem to call for insurance for OMA as an organization. Further, even if such insurance for the organization was obtained, that is money that could otherwise be used for initiatives that advance the field in more meaningful and realistic ways. In addition, no costs information for insurance has been provided so that members can make an informed decision about





OMA is a professional organization of mediators and Alternative Dispute Resolution practitioners throughout Ohio, dedicated to giving a collective voice to the diverse business and professional needs of its individuals members. Founded in 1989, OMA provides leadership, professional development, networking opportunities, business advertising, a mediator registry, information, and opportunities for individuals to help publicize the benefits of mediation to the public.

Through regular meetings, conferences, newsletters, email blasts, committee activity, and reciprocity with other organizations, OMA is constantly working to increase the use of ADR in both the public and private sectors.

As an information clearing house, OMA provides information about employment and training opportunities as well as links to other ADR organizations and activities.

### **Advantages and the Pluses Cont'd from page 2**

Credentialing Committee met in person for four day-long meetings (with members driving a total of 2,590 miles), had four lengthy conference calls, produced 8 separate drafts of the credentialing proposal, consulted the OMA membership twice, conducted independent research, and consulted stakeholders, courts, insurance companies, and credentialing bodies from other states. If this credentialing draft is not approved, the prospects for future credentialing efforts will be grim.

In conclusion, OMA's current credentialing effort offers substantial benefit to the mediators who are interested in becoming credentialed and should create long-term benefits for the profession of mediation in Ohio. Our Credentialing Committee has channeled a large amount of research, information, and feedback into the proposed credentialing process. We therefore encourage you to vote your approval for OMA's mediator credentialing process.

### **Disadvantages and the Negatives Cont'd from page 3**

whether credentialing is worth diverting OMA's meager treasury toward any insurance costs now and insurance cost increases the future. Although not in the proposal as far as I can see, some have discussed requiring the applicant to waive ones right to sue. Even if that were to be the case, it would not address the costs of a law suit filed by a consumer of mediation services. Moreover, even if a waiver signed by applicant would hold up in court, members should consider if they believe it is fair or proper for the OMA to take away an applicant's right to assert one's claim for improper administration of the program.

Sixth, it appears a credential of sorts is already offered through the Association for Conflict Resolution (ACR). As I understand it, ACR calls it a membership level but, like the OMA proposal, it is in effect a stamp of approval by a professional association for the purpose of setting that person apart from those that have not obtained the approval. Therefore, a member who deems getting some sort of stamp of approval from a professional mediation organization may do so already without OMA experiencing the negative consequences of having its own duplicative credentialing program.

Seventh, there is a better, less risky route to achieving the goals cited in the proposal such as the stated, "promoting recognition of mediators as professionals." One of the most important ways to do this is to have meaningful professional standards with teeth. This would be a license granted by the state. In the end, licensure is the only route that has any chance of achieving the long term perception by the general public that the profession is legitimate. After all, many other fields must be licensed. Licensure is the harder route but declaring licensure impossible without even trying to achieve it makes the impossibility declaration self-fulfilling. In addition, even if licensure is not possible in the near future, it does not make it advisable to institute an unwise plan with virtually all volunteer, non-expert personnel. Some might also say OMA's mediation program is a step in the direction of

someday achieving licensure. It is just the opposite. If credentialing is instituted in Ohio, it will then be used as an excuse to say licensure is unnecessary. But even if you don't favor licensure, it does not make this credentialing proposal any more advisable given all the negatives associated with it.

Eighth, the proposal has numerous places where the language contains non sequiturs and is confusing, vague, subjective, and unwise. Time and space do not allow me to go through all the places in which the proposal does this. I will point out a couple of troubling spots which may not even be the most troubling. One example of can be found in Section XII Part 4 regarding the Review Board. The section leaves many unanswered questions about procedure. Who decides the makeup of the review board? Do the review board members have terms or can the review board members be manipulated to produce a given result? What might constitute a conflict of interest thus disqualifying that person from serving on the review board or, in another section, the credentialing committee? What happens if a review board member abstains from voting thus making the proposal's required majority vote mathematically impossible? These questions and more remain unanswered. Another example of troubling language or an unwise standard is found in Section II A. and J. These sections purport to define Alternative Dispute Resolution (ADR) and Sponsor (the person who is to attest to an applicant's mediation skills). If the credential is a *mediation* credential, it seems inappropriate to allow anyone from the field of ADR to speak to the applicant's skill as a mediator but who may have no actual knowledge or experience in *mediation* as a discipline separate from the broader field of ADR. There are several more examples of ambiguity and confusing language and I urge you to read the proposal carefully?

Ninth, the proposal asserts that Ohio seeks to join three other states it implies have a mediation credentialing program. I would venture a guess that the states that have established such a credentialing program remain an extreme minority. If it is true that only a handful of states

have instituted credentialing through their respective state professional associations, that might say something about the wisdom of the majority of the states that have chosen not to undertake this huge responsibility. Moreover, even if one assumes those credentialing programs in the few states that have implemented it have done so successfully, that says next to nothing about how effective it would be in Ohio given the current state of the evolution of the profession and the evolution of OMA as an organization. Citing implementation of credentialing in a minority of states with circumstances that are likely quite different from those in Ohio is not a legitimate argument that OMA should follow suit.

Taken together, the numerous instances of troubling language found by a close read of it do not inspire confidence that OMA is positioned to successfully administer a credentialing program. If the program is not done well it will undermine the meaningfulness of the credential and, over time, serve to undermine consumer and even mediator confidence in it. The problematic language and subsequent problematic implementation could also lead to negative perceptions of OMA by members and prospective members thus potentially reducing its membership and in turn threatening its financial and human resources to advance the field in other ways. I urge you to make your decision on this issue not on the mere *idea* of credentialing and OMA can implement the program well and consistently over the long run; whether this is the best use of OMA's human and financial resources, whether one could get some stamp of approval from another source such as ACR without the negative consequences associated with the OMA proposal; and whether the advancement of the field might be better and more realistically achieved in other ways.

*(Jay's original article was too long for this publication. If you want to read it in its entirety, please request that it be sent to you at linda.mediator@gmail.com)*