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ADR certification: Why 'unambitious' may be best

By John Derrick

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When the California State State Bar rolls out its new ADR certification program in 2025, there will likely be much hoopla about a new era of oversight for a hitherto somewhat unregulated area of practice. But unless careful thought is put into the details, ADR certification may do more harm than good. It could confuse consumers of ADR services into thinking certification means more than it really does. And it could leave out many practitioners who deserve to be included.

Senate Bill 940, signed into law on Sept. 29, 2024, was a direct result of the Tom Girardi scandal, which left the state's legal profession with a huge black eye. Ethical lapses exposed by the scandal were so egregious that in 2023, the State Bar conceded the need for a lawyer "snitch" rule – belatedly bringing California into conformance with every other state in the country.

The push for oversight didn't stop there. The shortcomings of retired judges complicit in Girardi's affairs prompted focus on the ADR system. The bad acts mostly occurred outside of actual mediations or arbitrations – the focus of SB 940. But the former judges overseeing the disbursement of Girardi client funds had been brought in from a major ADR provider.

Certification of ADR providers was, therefore, the next step in the state's legal rehabilitation plan. The new law requires the State Bar to certify arbitrators and mediators who commit to prescribed ethical standards and establish processes for receiving complaints and remedying noncompliance.

It's debatable how widespread a problem the new measure is trying to remedy. California already has the strictest rules in the nation for arbitrator disclosures. And it is not clear the state is awash with unethical mediators. (I did, however, recently come across someone who, upon being disbarred as a lawyer, promptly set up shop as a mediator, calling himself a "former litigator" now offering a more constructive form of dispute resolution.)

There may be mediators whose skills are subpar, but it is a mathematical necessity that half will be below the median. And SB 940 is not about regulating competence. It is simply about recognizing a commitment to ethical standards – not proven adherence, just self-declared commitment.

The law is unashamedly half-baked, with the details to be figured out by the State Bar. Until the program is fully drafted and implemented, it is anyone's guess whether it will improve the way ADR services are delivered to litigants.

Certification is not a license

ADR providers – whether firms, individual lawyers, or non-lawyers – will not be required to be certified in order to ply their trade. Under the new regime, certification will simply be a recognition of commitment to certain standards.

Arbitrators must commit to the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, as adopted by the Judicial Council under Code of Civil Procedure section 1281.85. Mediators must commit to ethical standards equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases in Rules 3.850 to 3.860 of the California Rules of Court.

SB 940 envisions different certification tiers based on levels of commitment. "Higher levels or tiers are awarded to firms, providers, or practitioners that demonstrate a higher level of commitment to accountability and consumer protection based on criteria developed by the State Bar."

Risk of confusion

"Certification" is an important-sounding word. It imbues a level of comfort in professional transactions, allowing parties to believe that those to whom they've entrusted their fortunes know what they're doing and will serve competently. The risk is that the public will accordingly read into SB 940 certification more than it actually entails.

Certification status will doubtless be displayed on ADR providers' websites and in their advertising, just as lawyers tout their honors and recognitions. The new law, however, emphasizes that "[t]he levels or tiers do not reflect an assessment of the quality of a firm, provider, or practitioner."

What? Ethical commitment is, surely, a hallmark of "quality." The Legislature may have meant to say that certification does not reflect an assessment of competence or skills.

This could come as a surprise to consumers who read the law before shopping for ADR services. Most consumers, however, are unlikely to do such due diligence. They will instead rely on the bland reassurance of the "certification" they see posted online.

Trained to rely on Good Housekeeping Seals of Approval and Consumer Reports ratings when making purchasing decisions, how are they to know that State Bar certification tells them nothing about the competence or experience of an ADR provider? Certification includes no independent testing, no laboratory analysis, no third-party validation.

The California Dispute Resolution Council, which opposed SB 940, warned that the certification process would mislead consumers. "Certification often tells users that a certified business is superior to and has more experience than a business that is not certified.... Yet, under SB 940, a firm can become certified almost immediately after its creation without ever having to conduct an arbitration or mediation and before it acquires either competency or experience."

As a practical matter, most ADR purchasing decisions are made by lawyers, not the clients who are the ultimate consumers. But lawyers, too, may be in the dark about what certification signifies, at least at the outset.

In short, to the casual eye, certification may imply more than it actually means. "Registration" would probably have been the better word choice, but "certification" doubtless sounded impressive to state lawmakers.

Non-lawyer certification

The new law also calls for the State Bar to certify non-lawyers who practice as mediators and arbitrators. This could cause additional confusion.

There are excellent non-lawyer ADR professionals, but ADR generally operates within the overall legal universe. And, depending on the case, training in the law can make a neutral more effective.

Consumers who see that a mediator is certified by the State Bar – not known for regulating outside the legal profession – may well presume that the person has some competence in the law. Might State Bar certification of non-lawyers be misleading and, potentially, harmful to consumers? Maybe.

The ship has sailed

As valid as all those concerns may be, the SB 940 ship has sailed and is, indeed, now docked at its destination. A new certification system *will* be going into effect. A State Bar working group drawn from the ADR community will diligently work on how best to implement what the legislative sausage factory has handed down. Its plans are likely to be made public in mid-2025.

Implementation challenges

Certified ADR providers will be required to have a system in place for handling complaints. Firms with mediators and arbitrators on their panels should have no problem checking that box. Individual panel members will fall under those large umbrellas. But what about independents?

Few arbitrators operate independently of provider organizations, but many mediators are solo practitioners. How would they comply? An independent mediator could not plausibly referee complaints directed against them individually.

When Senator Tom Umberg, the bill's author, was asked about this during a December webinar produced by the California Lawyers Association, he responded to the effect that those who do not meet the new law's criteria should just accept the fact that certification may not be for them.

This is troubling. There are many excellent mediators who do not operate through firms or court-appointed programs. Why should non-independent providers be able to flaunt their certifications when highly respected solos do not qualify?

Some have speculated the new scheme is intended to force solo practitioners out of the market and consolidate the ADR industry into provider organizations. While this was likely not the lawmakers' intent, the potential for it to happen suggests a lack of forethought. A possible solution might be to allow professional associations to operate complaints procedures to which solos could subscribe. Setting this up would take time, however, as well as much volunteer energy.

As for the provision requiring tiers of certification, it is far from clear how levels of ethical commitment will be demonstrated. A commitment should be binary in nature: You either are committed to the prescribed standards or you are not. Being "really committed" should not entitle providers to a shinier piece of digital bling than those who are simply "committed."

The State Bar might handle the tiers issue by giving weight to training programs. But beware of generating an industry of programs through which people sit purely to reach higher tiers. Girardi's retired judges could doubtless have qualified for higher certification simply by signing up and attending. Girardi himself could have qualified, had he wished to dabble in ADR. The new initiative should not descend into a morass of compliance busywork.

Fortunately, the ADR community has a strong tradition of offering high-quality MCLE programs, largely on a volunteer peer-to-peer basis. If multi-tier certification can incentivize more neutrals to take part in these programs, that could be a good outcome.

Higher-level tiers could, potentially, also involve peer review or taking an ethics exam. This would head up the path of the State Bar's legal specialization program (although the latter also has an experience component). But with more difficult hoops for higher ADR tiers, elevated levels could then be seen as denoting higher "quality." And, as noted earlier, the new law states they are not meant to do so.

Keep it clear and simple

Three pieces of advice for the new certification working group: Be un-ambitious; be transparent; don't leave out solos. The State Bar should resist the temptation to talk up the program; it should instead recognize the program's limitations while attempting to mitigate the risks.

"Certified" badges or logos would risk inviting careless trust. Neutrals who mention their certification should be required to include a legible statement that this merely signifies they have agreed to comply with ethics standards, not that they have a higher level of experience or skill – or, in the case of non-lawyers, any legal training whatsoever.

The new law requires the State Bar to implement a certification system; it does not require hype. A modest, unambitious implementation of the new system could cajole neutrals who need to brush up on ethical standards, while providing a level of comfort to consumers. Some good could come of that. Anything more ambitious could pose a risk of reality distortion.

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