
Kluwer Mediation Blog

In Praise of Standards – Joining the Debate on Mediator Regulation

Sabine Walsh (Sabine Walsh Mediation) · Friday, October 5th, 2012

Over the past few weeks I have been following a discussion on LinkedIn around mediator certification which has been going on non-stop for no less than four months. The question of whether the regulation of mediators is good, bad or indifferent seems to go straight to the heart of issues surrounding our identity as mediators and our view of the service we provide. It also gives one an interesting insight into the disharmony and lack of consensus that exists between different mediation bodies and institutions, even within individual countries. At the same time, having recently delivered a course in family mediation to a group of lawyers, I was engaging in some post-training reflection on what worked and what didn't when I received a worried e-mail from a colleague in another country which expressed serious concerns about developments in mediator training and certification in his country.

All this, and particularly the desire to make any training I deliver as relevant, useful and, for want of a more elaborate word, “good” as possible, has led me to ponder the issue of whether mediators need regulation and throw my five pence worth into the debate as well. While I have my own views on the matter, I wanted to look a little more closely at both sides of the debate and see what is behind the very polarised opinions on the subject of regulation.

First off a word on terminology – the concept of mediator regulation seems to have given birth to a whole vocabulary of its own, as discussed in the 2010-2011 Newsletter of the New England Chapter of the Association for Conflict Resolution, which began an article on the issue with “A Glossary of Certification Terms”. ([see http://www.neacr.org/Resources/Documents/Winter%202010-2011.pdf](http://www.neacr.org/Resources/Documents/Winter%202010-2011.pdf)). Such terms include, depending on which side of the Atlantic Ocean you are on, credentialing, accreditation, licensing and certification, to name but a few. What is meant though is a range of mechanisms intended to maintain standards of mediation and, in particular, of mediators. Few people would disagree that good mediators and good mediations are essential to mediation continuing to be a legitimate means of dispute resolution. The disagreement seems to be around whether this should be a task for an outside agent or body (outside the individual mediator) or for the mediator him or herself and how this should be done. While trying to list all the arguments for and against would take too long and is, ultimately unnecessary for the purposes of this discussion, one can identify a few trends.

First off, on the pro-regulation side, much of the argument in favour of regulation centres on the necessity for some form of quality control of persons practising mediation, that is, the necessity for mediators to have a minimum amount of training, and beyond that, depending on the country and

often the body or institution involved, an obligation to engage in professional development and supervision and be subject to a Code of Practice and / or disciplinary and complaints mechanisms. The director of the International Mediation Institute, Irena Vanenkova, focuses on the benefits of certification for the user, which include providing transparency, giving access to the right mediator (by means of registers or lists of certified mediators) and enhancing trust in the mediator and, therefore, the mediation process. One of the obstacles to mediation becoming a mainstream method of dispute resolution is the fact that it is viewed as “alternative”, and, by virtue of that label, a “soft option” or a process that is somehow less legitimate than litigation or arbitration. Lack of regulation and, in some cases, the lack of a requirement for mediators to undergo a certain standard of training only contributes to this view. If users are to put their faith in a mediator and the mediation process as a robust and transparent method of dispute resolution, why should they not be afforded the reassurance that the mediator has been trained and has the necessary experience for the dispute in question. As Ms. Vanenkova puts it such standards are needed in order to transform mediation from a “field to a profession”. http://www.imimediation.org/tmp_downloads/g114j14o149f78o34y128i81x124j143b149r47e101g33q109c41/what-s-in-it-for-me_-article-by-irena-vanenkova.pdf

The counter argument is often made that regulation cannot guarantee the quality of a mediator and their skills. Indeed it is often pointed out that mediation has more to do with personality and life skills than with training. L. Deborah Sword is one of the loudest dissenting voices in the debate on mediator regulation. In one of her articles on the topic, she views conflict resolution as a life skill and something that, ideally, everyone should learn from childhood onwards. She points to the origins of mediation in traditional societies where those with life knowledge, eg village elders, were mediators and who had no necessity for specific training (see <http://www.mediate.com/articles/swordL7.cfm>, for example.) She also raises concerns about standardising what is essentially a flexible process.

Furthermore, she feels that regulation is not in the interest of practitioners, or indeed users of mediation. Instead, she points to the agencies that certify, or regulate, as being those that benefit from such regulation, by charging fees and imposing ever changing standards on mediators so that they will have to undergo further training and certification. This then also has the side effect of having certification bodes scrambling for status and authority where no governmental or state-based standards are set.

This last point certainly rings true in this jurisdiction, where, the government having dodged the issue in the recently published Mediation Bill 2012 (and the law therefore remaining somewhat opaque on which bodies can “accredit” mediators) various certifying agencies, who also provide training, are scrapping over what, how much and whose training mediators should undergo in order to be recognised by the different bodies.

I would, however, strongly disagree with her contention that users do not benefit from mediator regulation, and that users have no need for, and do not request evidence of qualifications from mediators. Maybe Ms. Sword works in a much more enlightened society than I do, but 99% of people who come to me for mediation know very little about the process, and much less about how to select a mediator. Reassurance of training and a measurement of that training (ie certification or accreditation) is one of the first things that users or their lawyers look for when selecting a mediator. I would never expect to be entitled to charge fees for a service I am providing without having some sort of evidence that I am capable of providing such a service. Of course, no amount of training can prevent mediators from having a bad day, or from having different levels of non -

teachable skills, such as life experience, intuition or interpersonal skills, nor can a certain amount of training guarantee that a mediator will always perform their job perfectly, but this is, true, I would submit, of all professions, not least the legal profession, if you look at what has happened in this country over the past few years.

Another argument that is made by some is that existing professional training, in particular legal training, is sufficient in order to be able to practice mediation. This I would also strongly disagree with, particularly from the point of view of a trainer. I usually find in training lawyers in mediation that the first few days of training are spent by the trainees unlearning a way of looking at conflict, with the latter part of the course then learning a whole new set of skills. My lawyer trainees are consistently surprised at how many skills they learn that they would never have come across or had cause to use before, and many comment about how little they knew about mediation before undergoing the training. That might contain a message for those bodies responsible for training lawyers in this country but that debate shall be left for another time.

While this is only a summary of a few of the arguments made for and against regulation of mediators, and a less than neutral one at that, I still think that the recognition of mediation as a profession depends on verifiable level of training, transparency, and accountability on the part of those practising it that can only be achieved by regulation. There is no question that such regulation can be put in place without compromising the flexibility of the mediation process and the individual skills of mediators. As one trainee said to me, you can have the best skills in the world, but as far as the parties are concerned you won't get a chance to use them if you can't show them the piece of paper. Is this just in Irish thing? I doubt it, but am open to hearing your views!

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