

Should Mediation Be Free?

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It's a no brainer, right? Of course mediation should be free, then many more people would use it, it would solve the problem of court waiting lists and huge legal aid bills right? Shouldn't it? Or should it. What does free really mean? Free for whom?

These questions arise out of the current debate here in Ireland on our new draft mediation law, a different aspect of which I blogged about last month. The draft law isn't perfect but marks a sea change in mediation regulation and, potentially, practice in Ireland. What is missing, however, is the willingness on the part of the government to put even a single euro's worth of funding towards mediation under this new regime. No mediation services will be funded, nor will any regulatory efforts such as the proposed Mediation Council.

This is not to say that mediation does not get any government funding at all in Ireland. The Family Mediation Service, under the aegis of the Legal Aid Board, is state funded and free to all who wish to avail of its services, irrespective of their means. The only trade-off for this is the lengthy waiting times for appointments in some areas. Some other state agencies, such as the health services and the Workplace Relations Commission, also have free mediation services, the former for staff and the latter for the general public.

This means that all other mediation falls into two main categories – private paid mediation and private or community-based free mediation. Free, that is, because it is delivered for free, by volunteers. And this is where it gets complicated. Mediators give their services for free for many reasons, mainly because they enjoy and believe in what they are doing and want people who might not be able to afford it to have access to their service, and also to gain experience. It is also the only way that many mediators can get regular work as the uptake of mediation remains lower than it should be. But it also means that mediators are often not being paid for delivering an effective, professional and important service.

This is problematic for three reasons. First, it creates an expectation that mediation is something that should be provided free of charge or for very low cost. If free is the lowest price bar at which mediation is set then that is the starting point for fees people expect to pay. This means parties will often be reluctant to pay for mediation, meaning it will be difficult for mediators to get paid work, therefore making volunteering the only way to get experience, and so the cycle continues.

Second, it can create a diminution in the value of the process in the minds of parties. Anecdotally at least, there is evidence from free and volunteer-based mediation services that parties are more likely to skip sessions, not give notice of inability to attend a session in advance or engage only half-heartedly, knowing that more sessions won't mean more costs.

Finally, this failure to value the mediation process can become more systemic, extending also to gate keepers like legal professionals and others who may refer parties to mediation. This, in turn, only serves to keep mediation out in the "alternative services" space where it is seen as less valuable and robust than other professional services, particularly legal ones. If you have to pay €150 an hour for a lawyer, how could a service that costs nothing possibly be as useful and effective?

The government's failure to "buy in" to mediation, literally, in Ireland as in many other countries, further feeds into this devaluation of mediation as an effective dispute resolution process. Where no funding is put towards the setting and maintaining of training standards and professional regulation, it is left to mediators themselves to put in place these structures, again on a voluntary basis. The hugely important work of setting standards for and supporting the profession of mediation is left to dedicated and passionate volunteers who have to squeeze this important work in alongside their day jobs and families. This can compromise the effectiveness of important tasks such as producing and disseminating information on mediation to potential users, which is a crucial way of diverting more cases into mediation. If the government wants to achieve its aim of reducing legal costs by diverting cases out of court lists into mediation, there has to be a recognition that this will require some financial input. We all know that even the most complex mediation is likely to be significantly more cost effective than a contested court case. For the State to continue to rely on volunteer mediators to help bring about reductions in its legal budget is not sustainable.

None of these arguments are intended in any way to devalue the extraordinary work done by volunteer mediators. On the contrary, the services they provide are every bit as valuable as those provided by the very small elite of mediator who actually earn significant fees from mediation. The public, other professions, and the government must be asked to recognize and value the professional services provided by mediators in all sectors and all contexts and support them accordingly. For government, this will mean subsidizing mediation for those who cannot afford it and funding the development and oversight of the profession. For other professionals and, most importantly for us as mediators, this means recognizing the value of the service we provide, and demanding that it be recognized by others.