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Inter-disciplinary perspectives on mediation

Mediation and qualitative research interviewing: commonality and difference

Patricia Marshall and **Rosalind Hurworth**

The following analysis has arisen from discussions between the authors when we met in a common academic environment. Our areas of expertise are different: one is an experienced professional mediator, the other is an expert qualitative researcher and evaluator.

As we talked and worked together on a joint project we discovered that, although ostensibly very different, the two types of activity had much in common, especially when considering the qualitative method of interviewing.

However there remain features that distinguish the essential nature of each practice. The commonalities and differences are examined in this article, an exercise which is timely given the increased application of qualitative methods to researching mediation practice.

The tasks

A professional mediator is required to handle a dispute by facilitating a mediation process in which:

> The participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.[1]

In order to fulfil this task, the mediator engages with the disputants and encourages communication between, or among, them, with the purpose of increasing their understanding and their ability to make decisions.[2]

Meanwhile, qualitative research involves 'an interpretative approach, concerned with understanding the meanings which people attach to phenomena (actions, decisions and beliefs)'.[3]

A core method within this approach is the person-to-person interview. Again, this requires a great deal of engagement with research participants, whereby the interviewer gains responses to questions which will enhance understanding of a phenomenon or generate new theory.

In contrast is the stance of the purely quantitative researcher who, rather than interacting with participants, is removed from them, just as a judge who handles disputes is physically separated from the parties by a bench, by form of dress, and by court protocols.

Instead of maintaining physical distance, the qualitative researcher and mediator are present and interacting with participants. Both practitioners are trying to decipher events, actions, beliefs and values, even though their purposes differ. Both practices may be termed 'postmodern' because they share a perspective whereby the 'social construction of reality'[4] is the focus of meaning and interpretation.

So how have these parallels arisen? To understand the answer we talked about the historical development of both our spheres of work.

Historical and philosophical impetuses

Both mediation and qualitative interviewing have gained currency during a similar timeframe and have been informed by similar principles. For example, each activity has developed greatly since the 1970s and emerged as a reaction to logical positivism.

As a result both have challenged the notion that a coded set of principles can explain human behaviour or that an objective reality can be accessed readily if 'scientific principles' are applied.

Each area has acknowledged that multiple realities and perceptions of the world exist. This means that neither mediators nor qualitative researchers will try to establish the truth of participants' actions, experiences and feelings, but rather 'how specific (and sometimes contradictory) truths are produced, sustained and negotiated'.[5]

Although one might expect opposing views of 'reality' in mediation, equally in research projects the interviewer will meet contradictory statements not only from different participants but even from the same person. For both, there cannot be an 'objective' assessment of any proposition because 'facts have no meaning except within some value framework'.[6]

More specifically, qualitative research has re-emerged in response to a need for different kinds of knowledge. The reason for this is that between the mid-1920s and 1970s there was a marked shift towards the dominance of positivist, number-based, supposedly 'objective' survey approaches in social research.

However by the 1970s there were the first rumblings of disenchantment with the predominant positivism and the beginnings of renewed interest in qualitative approaches common a century ago. It was recognised that research and evaluation needed not only to answer 'how many?' or 'what causes what?' but also 'how?', 'in what way?' and 'why?'

The complexity of human interactions and the possibility of there being more than one way of knowing about the world were also appreciated. It was recognised that what constitutes 'reality' can come from an interviewee's perception or the researcher's interpretation or by either of these

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'players' acting in different situations or contexts.

At the same time mediation burgeoned not only in relation to this swing in social sciences but also in response to other concerns, particularly dissatisfaction with court systems which excluded disputants' ability to express their own views without using lawyers as intermediaries. People became frustrated attempting to make their own voices heard and to fight for individual rights.

Further, many disputes were not clear-cut but involved shared responsibility for pain and suffering, rendering difficult any determination of blame, punishment and recompense. There were additional financial pressures as courts became clogged with litigation. All this resulted in 'strife and discontent on many fronts'.[7]

The response to these issues was to assess cooperative ways of resolving conflict and to establish neighbourhood centres at which citizens could state their case and have the right to resolve their own agreement, providing the other disputing party consented. This encouraged a reappraisal of mediation, a practice which had been familiar to earlier generations and to non-Western cultures.

These historical developments prompted the study of human behaviour in ways that relied not on controlled experimentation but on receiving and processing individual and group accounts of behaviour from the participants themselves, where the concentration is on the 'specific and detailed' rather than the 'average'.[8] Similarly, in the context of conflict resolution, the precedent is not the benchmark, but rather the effectiveness of human beings in resolving their own disputes.

This coalescence of the two fields should not be surprising given that we are 'never interacting in a historico-socio-cultural vacuum. We are always embedded in and selectively and artfully drawing on broader, institutional contexts'.[9]

The changes of approach in both legal settlement and social science research came at a time when liberating social forces of the 1960s supported the ideals of: self-determination, the empowerment of the individual against corporate or socio-political monoliths, the diversity of opinion and concerns, and the value of collaboration.

In each case, the work is underpinned by the humanistic values enunciated by Patton[10] which demand 'equity, fairness and mutual respect' and where 'the point is the empowerment of others.'

The respective stances and roles

Both mediators and qualitative researchers occupy a middle, yet extraneous, ground. For instance, the 'interpretative approach' referred to earlier implies that the researcher will be in the world of the participants but not of it.

When interviewing, researchers act as interpreters, responsive to the agency of participants who give their own meaning to events. They are 'go-betweens' who act as intermediaries between the meaning attached by participants to their circumstances and a broader set of meanings which are either deemed significant by theorists or practitioners, or which are yet to be developed.

Similarly, mediators are 'outside' the dispute, but still present in the situation of the participants. They also act as a 'go-between', not only between parties involved but also between the actual dispute and a broader set of principles called 'community justice'.

The mediation literature has challenged the possibility of mediator neutrality and impartiality, arguing that mediators bring with them their own biases and interpretations, which are more or less evident depending on the closeness of a mediator's situation to that of the parties.[11]

However, disputants' belief that they have been treated in an unbiased way still appears to affect their satisfaction with the outcome.[12] For this reason, mediators continue to strive to be impartial (a word which suggests a strategic stance rather than a state of mind or being which 'neutral' might convey) and feel role strain when they find themselves not fulfilling this requirement, or even anguish when disputants accuse them of partiality.[13]

Similar caveats have been forthcoming in the research literature.

Recognising that 'researchers cannot be value free',[14] Patton uses the term 'empathic neutrality' to describe 'a middle ground between becoming too involved which can cloud judgment, and remaining too distant, which can reduce understanding'. He claims that the 'neutral investigator enters the research arena with no axe to grind, no theory to prove … and no predetermined results to support'.[15]

One strategy which aids researchers and mediators in maintaining balance between becoming too involved and too distant is what Kvale calls, 'deliberate naivety'. This stance implies 'openness to new and unexpected phenomena' inviting curiosity and sensitivity, and 'a critical consciousness of [one's] own presuppositions'.[16]

In qualitative research such critical awareness is sometimes equated with 'phenomenological reduction' in which previous knowledge about the phenomenon is placed 'within parentheses in order to arrive at an unprejudiced description of the essence of the phenomenon'.[17]

Openness to new experience presumes curiosity about the phenomenon. For Legard et al, 'curiosity — an enquiring mind — is an essential asset in in-depth interviewing'.[18] Reitman uses the same concept in outlining the requisite personal qualities of mediators: the mediator wants 'to know not only what they did, but why they did certain things'.[19]

This curiosity, however, is not without strategic purpose. To reach understanding both practitioners employ a logical process which, broadly, involves three steps: preparation, implementation, and closure. Each stage is challenging, and each involves distinct competencies and attributes. This article focuses on some aspects of this process: preparation, the maintenance of interpersonal relations in implementing the process, necessary political control, and the challenges which face both practitioners.

Preparation

In order to elicit cooperation from participants, whether in mediation or a research interview, much attention must be paid to preparing them for the meeting.[20] The amount of elicitation will vary.

Ostensibly, it should be easier to encourage parties to cooperate in mediation because it is in their interest to do so to settle the dispute. However, conflict clouds the judgment that settlement is either necessary or possible, so cooperation may be resisted.

Similarly, research participants may question why they should cooperate and may well ask, 'What's in it for me?' For this reason, incentives are offered sometimes for people to become involved in research.

But both mediators and qualitative interviewers depend on participants' readiness to disclose information about their circumstances. Therefore, preparation is necessary in both activities in order to elicit cooperation. The preparation focuses on three objectives:

- to gain credibility and trust,
- to build rapport,
- to establish safety and comfort for participants.

It should be noted that there is no linear progression among these objectives, they are intermingled and interdependent. For example, in the absence of trust achievement of rapport is unlikely, and without rapport a positive environment will not be created. And if a party does not feel safe, they will not trust the mediator or researcher.

However, each objective is treated separately here because they involve different concepts.

Gaining credibility and trust

Most professionals achieve credibility through the perception of how well they have performed their task and role. In both mediation and research the focus is not on the professional's competence but on the participant's belief in their own value and capability.

Because self-determination is a foundation principle, the 'ideal' mediation is one in which parties perceive they have achieved an outcome through their own efforts. Therefore, they may be less inclined to deem the mediator to be 'effective' than they would be if they were engaging the services of, say, a lawyer or counsellor or financial adviser whose efforts may be more obvious. Similarly, research participants are unlikely to commend a researcher for asking 'good' questions, they will focus on their own responses to the questions.

Let us first consider how mediators might gain credibility and trust which has to be established early. Some attempt to do so through reference to their training and experience in dispute resolution, or to their primary profession,[21] or through creating impressions of their expertise by asking questions which 'display experience in these matters'.[22] Certainly, factors which contribute to credibility are 'competence and trustworthiness', with the former referring specifically to knowledge, skills and abilities, and trustworthiness referring to 'a source's apparent sincerity'.[23]

Arnold posits that part of this competence is 'insight into a disputant's interests and needs' (2000, p 321). If this is the case, credibility and trust may

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be gained by gauging what people in conflict most want, and then responding to these desires.

When the research is distilled on the interests and needs expressed by people in conflict, three primary concerns are indicated:

- Will I be listened to with understanding?
- Will I be treated fairly and have the chance to have my say?
- Am I still worthy of respect even though I am in this mess?

It seems, therefore, that the mediator is more likely to be seen as 'credible' when he or she takes into account these fears and, without naming them, is able to address them. For example, we know that people value the opportunity to 'voice' their concerns,[24] so the fact that parties will have the opportunity to do so is stressed in the preparatory stage.

Understanding, fairness and respect are also built into preparation for the research interview. This is why prospective participants in research activity are reassured that: the process is voluntary and they can withdraw at any time; their views are valued because of their unique contribution (which may include experience with the phenomenon); they will not be identified in the process, so they have the opportunity to speak freely and honestly; and their confidence will be respected in the submission of the results.

Listening with understanding

More will be said later about the skill of listening during the course of the meeting; at this point, we want to stress the importance of effective listening specifically in order to achieve credibility. Such listening involves:

- reflection which demonstrates that the substantive issues and associated feelings have been well understood ('So it seems your main concern is … Is that right?');
- support which demonstrates empathy ('That situation must be tough.');
- listening for possibility which, in mediation, demonstrates hope that a path may be found through the dilemma ('So what have you thought about doing to deal with that?') and in research links the contribution of the participant to the body of knowledge about the phenomenon ('Your experience/insight/expertise is important to enhancing understanding. You were saying that you have been a manager for 20 years?').[25]

Effective listening depends on interpersonal skills — being engaged with what is said in order to convey understanding; recall of what has been said; and checking that one has interpreted what has been said correctly. Indeed, culturally appropriate non-verbal communication is important here; it conveys genuine interest in what is stated, whether through a nod, forward physical stance, or eye contact.

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Fair treatment

The first point to consider about what is fair is the suitability of the proposed mediator or researcher for the task. Suitability may be judged by three factors:

- Is my knowledge of the subject matter sufficient to engage participants in discussion of the issues, or will I have to keep interrupting to check the meaning of terms used?
- Am I sufficiently aware of cultural norms that my presence does not

offend and I avoid appearing disrespectful? For example, gender and age may be aspects to consider in dealing with some cultures and even manner of dress may be distracting or, worse, offensive.
- If I believe that impartiality is vital, are there aspects that would cause me to doubt my impartiality — personality, behaviours and attitudes of participants, or the situation itself? Are there 'hot buttons' for me?[26]

Requisite knowledge

Varying amounts of work will be undertaken by the researcher before embarking on qualitative interviews. In some cases a considerable amount of prior knowledge is required before the questions can be determined.

This might involve a full-blown literature review. Other instances might include document analysis such as looking at minutes, correspondence and articles so that the interviewer understands the background, context and politics of a situation before facing interviewees.

This helps to avoid 'putting one's foot in it' or appearing ignorant and uninformed to the interviewee. In other cases it is accepted that researchers may know little of the substance of the topic of investigation.

The amount of knowledge required by a mediator is a fiercely debated topic. Some mediators believe it is necessary to understand the situation so that one knows what questions to ask, and others see danger in 'too much' knowledge because the mediator is tempted to give advice.[27] Self-awareness is the key. Mediators ask: will lack of knowledge impede the process, or will substantial knowledge cause me to overstep my role and engage in advice-giving?

A similar dilemma occurs for researchers who investigate a familiar domain. Sufficient knowledge enables ready understanding, too much knowledge may lead to presumptions about responses, and may preclude listening intensively.

However, in interviewing 'elite' groups knowledge appears necessary if a researcher is to be perceived as credible.[28] So a researcher enquires of him/herself: will lack of knowledge impede the process, or will substantial knowledge cause me to assume I know answers to the questions I am asking?

Suitability of the participants

Then the ethical question of the suitability of the participants for the required activity must be considered. In the structured negotiation which constitutes mediation, three key questions apply:
- *Are the parties able to negotiate?* Do they have sufficient empathy for the other side (or is this likely to develop through the process) and the ability to be assertive about their own needs, given that empathy and assertiveness are essential for negotiation to occur?[29]
- *Is the dispute able to be mediated?* Can an outcome be negotiated, or does it have to be decided by a third party, be that an arbitrator or adjudicator?
- *Do the parties have authority to settle on behalf of the constituency they are representing?*

The first question concerns power. Early writing on mediation saw much space devoted to 'balancing the power' but experience has shown the futility of attempts to balance power as if it were a commodity.[30] Instead, mediators must determine what power is possessed by disputants and how this may be 'harnessed' for them to achieve outcomes sought.[31]

For example, does the power reside in knowledge, in access to other resources, in ability to coerce or reward, in access to support, both personal and professional? Or does power reside in personal attributes, or ability to 'get under the other's skin'?[32] Asking parties how they have attempted previously to resolve the dispute gives a mediator a fair inkling of where they perceive their power to lie. As well, 'often the question of who is more powerful turns on who is less dependent'[33] and thus provides a further guide.

The second question concerns the substance of the dispute. For example, if a builder says that he has performed work to specifications but the homeowner claims the work is shoddy, is the issue able to be mediated, or does it call for expert decision?

Mediation is not suited to every dispute. Issues of illegality such as violence and abuse of any kind, and mental incapacity to negotiate, appear to render mediation unacceptable.

The third question focuses on the acceptability of parties to represent an interest group in a dispute. 'Constituency pressure'[34] may make an agreement unviable and the mediator or intake person needs to check that parties have authority to settle.

The researcher also needs to assess the suitability of participants. For example:
- Is the respondent contributing voluntarily to the research or could there be perceptions of coercion? This is particularly the case when members of an organisation may be asked to take part.
- What is the relationship between researcher and participant? For example might 'reward power' be vested in a researcher? Such issues have arisen in action research undertaken by educators when students or their parents have been in the role of participants.[35]
- What is the likelihood of harm for the participant? The research questions might touch on sensitive issues which cause distress or awaken forgotten memories. Some backup procedures need to be in place in case this occurs.

Cultural considerations

Inability to discern prevailing cultural patterns may seriously affect credibility.[36] Basic patterns include:
- Traditional versus urbanised cultures — in the former conflict is viewed as a communal concern and in urbanised (Western) cultures it is perceived as an individual matter.[37]
- Individualistic (low context) cultures prefer directness and open disclosure, while collectivist (high-context) cultures tend towards indirectness, ambiguity and subtlety.[38]
- An analytical linear process of resolving conflict may suit low context cultures while high context prefer 'spiral logic' which defies a linear progress through the issues.[39]
- Non-verbal gestures or stances acceptable in one culture may not be so in another: for example maintenance of eye contact, sitting in

close proximity, shaking hands, and showing the soles of one's shoes. Even filling in silence with 'talk' may be inappropriate in cultures where reflection is valued.

However, Boulle's warning is salient:

> There are concerns about over-generalisations and stereotypes in respect of culture … Cultures change and modify over time … and some individuals may operate comfortably and proficiently in more than one cultural setting. Besides, culture, behaviours and attitudes are also affected by education, individual personality and the demands of particular circumstances.[40]

The safest path through cultural minefields is to check one's credibility with the parties.

Impartiality

We have flagged the importance of engaging people yet retaining some 'distance'. The seeds of participants' reactions to researchers or mediators are planted early. This is why 'from the first moments of his or her involvement with the parties or their counsel, the mediator seeks to convince the parties that he or she will be fair and even-handed'.[41]

The same may be said of researchers. How this happens depends on the manner in which information is conveyed at the outset, and we deal with this shortly. But approaching the task with understanding, without being shocked, alarmed or judgmental, is important in conveying even-handedness and establishing credibility.

Further, fairness may be established even through choice of venue. Although venues for a qualitative interview or mediation can vary considerably, some general principles are that the location chosen should be: comfortable, free from distractions and interruptions, and a place where people feel free to talk.

In both situations confidentiality is a given. With this in mind there can be various options. In interviews some people prefer to talk at their workplace or at home, while others prefer to come to the interviewer's office. Yet others prefer to meet in a totally neutral environment, such as somewhere half-way between the location of interviewer and interviewee.

Of course, in mediation neutrality of the venue is vital. In a workplace, for example, a meeting between a manager and staff member would not be conducted in the manager's office, because although convenient for the holder of that role it would not be comfortable for the staff member. For similar reasons, the latter's home would not be appropriate and a more 'neutral' venue would be sought.

Building rapport

It has been claimed that mediators attribute success to their ability to build rapport.[42] This assertion has been supported by a study which identified the resources mediators rely on to cope with the pressures of their task and role. In this study mediators referred more often to being able to build rapport within a short timeframe than to any other competency, including the skill of listening.[43]

It is just as important for the researcher. The value of rapport resides in the fact that it allows people to communicate openly 'as they trust that their worldview, values, and behaviors won't be criticised and attacked'.[44] Without rapport people will not be forthcoming about their behaviour and attitudes.

'Rapport' is not easily defined. Most attempts at definition suggest a relationship which is characterised by affinity, harmony, mutual agreement or sympathetic connection. Goldberg, referred to above, defines it as 'a relationship of understanding, empathy, and trust'.[45]

When applied to the mediator's role, the term is particularly interesting because participants are in conflict with at least one other person, so their experience is anything but mutual, harmonious, trustful or sympathetic. Then, the mediator is required to act impartially, that is without favouring either side. So building a relationship or connection poses a danger to impartiality. One mediator in Marshall's study has described the tension in this way:

> I work really hard to engage people, and they come on board. But there's a fine line between staying engaged and at the same time accepting that the other person might feel exactly the same way.[46]

Yet failure by a mediator to build the engagement leaves a participant unconnected with anyone who might offer understanding of their situation. Making the connection is particularly important if a matter has been referred by the court or by a manager who may be less than empathic to the concerns expressed.

For the qualitative researcher as well the achievement of rapport poses some challenges. Without it, participants are unlikely to reveal significant information about themselves and their situation, yet excessive rapport may cloud the researcher's judgment and lead to an accusation of bias and of stepping over the interviewer/ interviewee line. Establishing this fine line may be assisted by examining how initial rapport is achieved. It seems to depend on two factors: the first impression of the person, and then the assessment of his or her actions.

In explaining the success of the best psychotherapists, Kottler concluded that:

> They are the kind of people who radiate positive energy. They are upbeat, enthusiastic, witty and quick on their feet. They have good voices and are highly expressive in using them.[47]

Bowling and Hoffman support a similar assessment for mediators, and add that this energy encourages parties to believe the mediator is genuinely interested, and thus respectful of them as people.[48] They can then be more confident that the mediator will show non-judgmental awareness of their needs (p 40), including what they most desire, and what they most fear.

Natural conversational ability is also advocated by Jackson, who claims that 'the best interviewers somehow make the difference between conversation and interview as unobtrusive as possible'.[49] Indeed, it is difficult to imagine being able to build rapport without being energetic and skilled in interpersonal relations.

Rapport can be easily lost so actions must support the initial assessment. If, for example, mediators and interviewers have promised to listen carefully but do not show genuine interest rapport is not sustained. Their actions are also judged in terms of how swiftly they pick up parties' non-verbal cues — if a party is anxious and conveys this through mannerism but not in words, the tension can be verbally acknowledged and 'the participants will know that you are concerned, interested in listening, and observant'.[50]

Interestingly, it has been claimed that parties in the West are seeking both connectedness and authority in the resolution of their conflicts.[51] Experience indicates that this balance is also important in research. Participants will not respond to a researcher whose endeavour seems to be a waste of time, so appropriate authority conveys assurance that the professional can be trusted. But without the 'connection' established through genuine interest and acceptance, the interviewee will not entrust their significant experiences and opinions.

Establishing comfort and safety

Creating a sense of comfort and safety involves establishing a positive climate and ensuring clarity for participants or parties.

Creating a positive climate

A positive and harmonious tone allows participants to have a grasp of the interviewer or the mediator 'before they allow themselves to talk freely, exposing their experiences and feelings to a stranger'.[52] The importance of this skill is underlined in a humourous mediator anecdote recounting an analysis of 30 mediated cases which involved obtaining the perspectives of both mediators and participants:

> The mediators — myself included — gave elaborate explanations of strategies, timing, and tactics. We identified how we went about conducting our conflict analyses and circumscribing issues to be worked on. We deciphered the breakdowns, breakthroughs, and the windows of opportunity both lost and found. The participants in our cases had a very different view. What they recalled us doing was opening the room, making coffee, and getting everyone introduced.[53]

This anecdote emphasises the power of good manners: being punctual, courteous and respectful, and treating participants like guests. Lind and Tyler refer to politeness, concern for rights and respectful treatment as 'ethicality'.[54] The logic behind this approach is encapsulated in Deutsch's 'crude law of social relations',[55] whereby cooperative behaviour is likely to elicit similar behaviour.

Being clear

If participants know what is required of them, they attain security through that knowledge. In mediation the purpose of the meeting is made very clear, for example:

> We are here today to discuss the issues which affect both of you and which have caused you concern. Hopefully, the matters will be resolved, but if they can't in this meeting, at least you will both be clearer about your future options.

Just as clearly, the role of the mediator and the process that the mediation will take are explained. It is made explicit that the role of the mediator is not to give advice, or make judgments on who is right, or to take sides.

Parties are assured that in the joint meeting they will first speak to the mediator directly before any discussion is held with the other party. They are also informed of the guidelines that will inform the process, namely that everyone has the right to be treated with respect, even though their opinion may be disagreed with. Because appropriate rapport has been established, the mediator is able to explain the necessity for everyone to be treated fairly, and to move beyond engagement with a party to detachment, a necessary movement if the role is to be achieved.

In the research interview, however, the purpose may be more obliquely stated. For example although the research topic may be the stressors facing general practitioners and how they cope, the purpose may be framed less directly. The interviewer may start, for instance, by stating:

> I am interested in your perceptions of the challenges of your role and the resources available to you.

This is because the mention of the term 'stress' may prejudice the response and bias the research results. But the expectations of the participant and what they can expect of the researcher are just as clearly established as

in the mediation situation.

Although contact may have been established beforehand through letters or phone calls, the person may not understand the task fully. It can also be the case that he or she has been sent along by a key contact or intermediary, and has no idea about the research.

For both practices clarity is also achieved through attending to the logistics of timeframe, payment for service (when relevant), use of mobile phones, and reassurance about breaks. The logic behind such reassurances and conveying of information is 'human needs theory'[56] which maintains the importance of establishing security before embarking on more ambitious schemes for achieving self-actualisation and autonomy.

Even-handedness

The choice of venue (which we have already discussed) and spatial context are important, with the aim of removing any threat to participant comfort. Frequently such a threat is caused by power differences which may result in disadvantage to either party.

Sensitivity to seating is one way of managing power; the 45° seating angle is a handy benchmark. In this way, neither the mediator nor one party establishes dominance. The angle also prevents a sense of confrontation, while still allowing for eye contact when desirable. This applies equally in the interview situation.

Also related to even-handedness is 'face-saving', an important objective undertaken by both practitioners on behalf of their participants, because:

> Facework is a universal human experience, a ubiquitous concept that occurs in all cultures. Face is a psychological image that can be granted and lost and fought for and presented as a gift; it is the public self-image that every member of a society wants to claim for him or herself; it is a projected image of one's self in a relational context. Face is an identity defined conjointly by the participants in a setting.[57]

Augsburger goes on to argue that in conflict, 'the individualist finds the greatest threat to face comes from an attack on the need for autonomy and the loss of control over self and others'.[58] These criteria help establish participants' comfort with the process.

What arrangements will be more conducive to the perception of autonomy and control? As we have discussed, a venue which offers confidentiality and privacy is essential, as are assurances about the purpose of and the practicalities associated with confidentiality.

The purpose of confidentiality is that people should be able to speak without fear of having anything they say being held against them should the matter progress to another forum, in the case of mediation, or when the work is published, in the case of research.

Maintenance

When either the research interview or mediation meeting is under way, a maintenance system 'keeps the interpersonal relations in a steady state and creates satisfaction for all'.[59] This is achieved through attributes possessed by researchers or mediators, namely:

- an ability to convey the appropriate level of empathy;
- an ability to convey acceptance; and
- patience.

An ability to convey the appropriate level of empathy

We have already stated that honest expression of feelings can be elicited only when the participants feel accepted and believe their views are considered valid. But such acceptance poses a challenge for both practitioners if validation is confused with agreement.

The danger for mediators is the effect on the other party; too much empathy with one leaves the other not only dissatisfied, but disempowered. For researchers too much empathy may result in loss of focus on the research questions. Both practitioners need to monitor the situation thoughtfully: Am I being drawn into the other's story so much that I am losing my sense of self and my role?

An ability to convey acceptance

It is inevitable that the researcher and the mediator will at some stage

hear statements that offend their own standards. Restraining the impulse to react is, however, necessary to accomplish the desired ends. The following comment made by Patton applies to the researcher but also has relevance for the mediator:

> Neutrality means that the person being interviewed can tell me anything without engendering either my favor or disfavor with regard to the content of his or her response. I cannot be shocked; I cannot be angered; I cannot be embarrassed; I cannot be saddened. Nothing the person tells me will make me think more or less of the person.[60]

However, both practitioners need to be alert to the mention of behaviours which threaten anyone's safety or which are illegal.

Patience

Careful attentive listening is tiring, but participants or parties appreciate the opportunity to talk about themselves and the challenges they face. Frequently they will veer from the question that has been posed to expounding on an event or problem that might appear to be extraneous. It is in this exposition, however, that the researcher and mediator may find the nuggets — clues to attitudes, feelings, and opinions.

Patience may be particularly tested when:

> … there are uncooperative respondents, people who are paranoid, respondents who seem overly sensitive and easily embarrassed, aggressive and hostile interviewees, timid people, and the endlessly verbose who go on at great length about very little. When an interview is going badly, it is easy to call forth one of these stereotypes to explain how the interviewee is ruining the interview. Such blaming of the victim (interviewee), however, does little to improve the quality of the data. Nor does it improve interviewing skills.[61]

At least one of the trying situations quoted here invariably occurs in mediation; often the behaviours are the very cause of the conflict. Like the researcher, however, the mediator cannot resort to blaming the party because blame flies in the face of the non-judgmental philosophy of the practice and of the ethic of respect.

Adaptive techniques and skills

The effective mediator or researcher often needs to adapt in order for an interaction to flow and accomplish its purpose. Maintaining a rigid stance is doomed to failure. Skills that are needed for adaptation include:

- listening;
- rephrasing;
- reframing;
- clear thinking;
- tolerance of ambiguity and change;
- flexibility;
- elicitation through questioning;
- gauging feelings; and
- the necessity for self-awareness.

Listening

Both researcher and mediator must rely on careful and honest listening to encourage the expression of perspectives without judgement being made. In fact, each 'listens more than he or she talks, and listens with a sympathetic and lively interest'.[62] For example, Rapley's advice to interviewers could be read as an exhortation to mediators: 'Follow the interviewee's talk … and work with them' and 'facilitate without overly directing the client's talk'.[63]

Only by such careful listening can interests, attitudes and values be deciphered. In mediation a dispute between two neighbours might appear to be about the placement of a trench to hold a telephone cable. But listening picks up the issues of grievance between them: lack of communication about how they intend to develop their properties; the belief one holds that the other is presuming on their relationship; the belief held by the other that the neighbour is deliberately thwarting their plans; and the differing preferences whereby they conduct their lives, one preferring attention to detail and the other just wanting to 'get on with it'.

Careful listening also allows for further probing. This is important for both mediation and research activities, but it is particularly important within research, especially where semi-structured or open-ended interviews are used. Just asking the plain question without some follow-up or extension could mean that valuable information is lost.

Rephrasing

This involves listeners re-stating in their own words what they think is the essence of the other's statement, without losing the intent or the amount of feeling expressed, then checking that the summation is correct. An example might be: 'It seems that you were disappointed with the grading system?'

Summarising

Both practitioners use the technique of a longer summary of all key issues, attitudes and opinions expressed by participants, but with differing purposes. On one hand the interviewer might use it as a form of 'member checking' and verification whereby the participant supports the fact that the interviewer has 'got it right', and their response has been correctly interpreted.

The technique allows for reinterpretation if that is not the case and is part of the 'audit trail' established by researchers to ensure trustworthiness of findings.[64] On the other hand the mediator uses it to reassure participants that they have been listened to carefully, that their position has been understood even if not agreed with.

Reframing

In mediation reframing can be used as a 'detoxifier' of statements that might otherwise be seen to be offensive. For example, if one party says of the other, 'You are totally unreliable', the mediator might reframe the statement to: 'It seems that you want more certainty in your work arrangements'.

In interviewing the technique may also be used to arrive at the heart of what a respondent is saying and to relieve tension they might be experiencing. Kvale describes a 'meaning-oriented' response to a student's statement that their grades were hopeless as, 'You feel that the grades are not an adequate measure of your competence?'[65]

Clear thinking

The demand for the researcher to have 'a clear and logical mind' in order to 'be able to think quickly to distil the essential points of what the participant is saying, exercise judgment about what to pursue, and simultaneously formulate

the relevant question'[66] could equally apply to the mediator. Both must also be able to interpret subtleties in body language and voice tone.

Tolerance of ambiguity and change

In the course of both research enquiry and mediation change may occur in participants' understanding so that they suddenly see things in a way they had not been conscious of before.

This realisation may result in a change in the 'story', the description of events as they were thought to occur. In mediation insight may be produced into the motives of oneself and 'the other' in a way which leads to recasting the conflict story. Rather than being frustrated or disturbed researchers and mediators understand and accept this change as normal.

Comments may also be ambiguous, 'reflecting contradictions in the world the subject lives in'[67] and both mediators and qualitative researchers are able to hold in tension contradictory 'truths' as they are perceived by participants.

Flexibility

The 'oblique' nature of both qualitative research and mediation practice renders difficult a prescription of 'rules'. Although both benefit from practice guidelines[68] they defy strict procedural adherence because human interaction produces the unexpected.

For example, an interviewer normally enters with a set of questions in a particular order but suddenly early in the interview the respondent may be talking about a topic scheduled for later in the conversation and the interviewer has to adapt the question route so that the topic is omitted at the later stage because it has already been covered.

Judgments, therefore, have to be made by researchers and mediators about appropriate strategies to achieve desired outcomes. Kvale cites the Dreyfus and Dreyfus (1986) model of the ultimate 'expert' who 'sees or "feels" solutions by relying on an intuitive knowledge generalized from extensive case experience', and claims that this knowledge 'come[s] closer to craftsmanship and art than to formal bureaucratic models of research design'.[69]

In writing of mediation Benjamin advocates a 'systematic intuition', a combination of 'analytical skill and intuitive ability'— analytical because 'multiple variables and factors' must be addressed, and intuitive because 'mediators of necessity must operate from … a holistic thinking frame'.[70]

From where does this sort of judgment come? In Marshall's study many mediators referred to their reliance on, and faith in, their intuition[71] and intuition appears to be relied upon by many professionals, including judges.[72] But intuition may not always suffice as a sound footing for decision-making because it involves inhibiting factors such as bias and selective recall. The practitioner therefore has to 'ground' the hunch by asking questions.

Elicitation through questioning

Much has been made of appropriate questioning techniques in both mediation and qualitative research. In fact it has been claimed that 'effective questioning is the primary means by which a mediator transforms the context of a dispute'.[73] It is even more impossible to imagine a research interview which did not rely on questions. Common to the two domains are the following:

- the necessity to retain the sense of purpose behind questioning so its use does not become a perfunctory exercise. (For example, is the researcher or mediator trying to elicit new information, or seek clarification, or probe for more explicit explanation of feelings or attitudes or motives?);
- the understanding that open-ended questions will usually elicit responses more effectively than closed questions, because they provide the opportunity to 'capture how those being interviewed view their world, to learn their terminology and judgments, and to capture the complexities of their individual perceptions and experiences';[74]
- the sensitivity with which questions are posed, and respecting the autonomy of participants by acknowledging that it is their right not to respond;
- the desirability of avoiding questions which may lead the respondent or the party to acquiesce in the researcher's or mediator's view.

Importantly, neither the researcher nor the mediator is afraid of silence, because 'almost always the interviewee [or the party] will fill the silence by a longer explanation, with more details, with aspects I hadn't thought to ask about'.[75]

Gauging feelings

Because both mediation and qualitative research occur in 'naturalistic' settings, they may be more 'intrusive and involve greater reactivity'[76] than their counterparts, namely a court, tribunal or laboratory. For this reason qualitative researchers and mediators are frequently confronting the challenge of 'doing no harm'. Indeed, 'fieldworkers often … make the informant face (and question?) aspects of themselves when they may not wish to do so'.[77] Sensitivity to emotion is therefore a most important adaptive skill.

Sometimes, the mediator or researcher expects that certain topics will be emotionally charged, for example death, family relationships and mental health. But many topics may appear 'innocent' and both professionals may be caught 'off guard'.

For example, the subject of schooling may lead to exposures about bullying or abuse. Tears can follow, and a decision has to be made about whether to proceed or call a halt.

The necessity for self-awareness

Working constantly with others' feelings, attitudes and values may awaken or challenge emotions and attitudes in the researcher or mediator. The psychological reality of counter-transference and emotional contagion[78] is ever present. This in turn may present challenges to the self and to accomplishing the task.

Ironically, mediators rely to a certain extent on emotional contagion in setting a positive climate for mediation.[79] If a mediator appears gloomy and pessimistic parties are unlikely to be sufficiently 'upbeat' to engage in negotiation. Similarly, a researcher who is 'in a bad mood' because of traffic encountered on the way or excessive partying the night

before, will not elicit the positive mood necessary for participants to disclose something of themselves.

However, too much introspection may result in 'the interviewer's defense mechanisms work[ing] against mutual disclosure and understanding'.[80] Therefore, a balance must be sought between effective self-monitoring and unproductive self-examination and critique. This is yet another adaptive skill.

The necessary political control

'Political control' relates to the appropriate amount of power exercised by the practitioner vis-a-vis that exercised by participants. Although researcher and mediators are always aware of participants' rights to be self-determining about their attendance and contribution, they need to exercise some control over the process if they are to achieve their aims.

For the mediator, the control is directed to ensuring balance and fairness and may be achieved through such measures as giving equal time and attention. Even more control is required, however, when the principle of respect is violated. The mediator has promised that the process will deliver on respect, impartiality and self-determination, so the manner of taking control must also be done respectfully, otherwise credibility is lost.

Strategies available to mediators include: refocusing on the issues; recalling the 'ground rules' of the right to speak without interruption and the right to disagree without disparagement; then 'upping the ante' with increased authority, generally shown in the voice, if the warning is not heeded. The ultimate control occurs with termination of the meeting, a strategy which may be called for if aggression or bullying is occurring, or if the ability to negotiate and be clear about options appears to be missing.

The researcher also needs to manage the process to achieve a good end product. A major challenge occurs when parties are tempted to 'slip away from the desired topics into a discussion about something quite different'.[81] The opportunity to 'just talk', especially about oneself, can be seductive. So the control becomes a matter of guiding the interview back to the topic, and simultaneously making judgments on the relevance of what is being said. Political control therefore relies heavily on the art of listening and on the attributes of adaptability discussed earlier. Of course interviewing in a group situation may involve interviewers in the same strategies available to mediators as they cope with the challenge of trying to encourage quieter members or dealing with dominant ones.

Common to both practitioners is yet another challenge which must be handled with political judgment because it is an issue of power between professional and client. This challenge relates to the question: what is 'truth', and does it matter? Previously we claimed that our approaches do not involve finding the 'truth', if such exists, and that a phenomenological approach demands acceptance of each person's 'construction' of reality.

However, for mediators and researchers there is always the question, 'What if people are leading you on?' Disparity among eyewitness accounts of events points to the difficulty of achieving absolute consensus on what happened, let alone on motives and attitudes.

Further, as professionals we do not like to be misled deliberately because that prevents our objectives being realised. For example, a researcher relies on what he or she is told in order to posit a new theory or substantiate an existing one. Similarly, the mediator oversees an agreement between parties based on a truthful account of what they perceive to be important to them.

What is relied on in any human research, even in responses to survey questionnaires, is 'general goodwill', a belief in people's integrity which, fortunately, is usually well-founded. What distinguishes the belief from unfounded idealism is the knowledge, empirically tested, that the crude law of social relations operates whereby competitive behaviour invites competition but cooperative behaviour invites cooperation.

The researcher and mediator do not need to rely on coercive measures to acquire 'truthful' accounts as does the law, provided the participant is:

- furnished with information about the project and/or the process;
- reassured about such matters as confidentiality; and
- not forced into participation.

Further, qualitative researchers are exploring the world of their participants in situ, and mediators are entering the world of the parties to assist in a matter troubling them, so the participant/party rather than being removed from the 'action' has an interest in the outcome.

Van Maanen, however, is less sanguine about the possibility of participant lack of truthfulness, believing that 'the researcher can be misled because informants want it that way'.[82] He sees 'penetrating fronts' as 'one of the more important goals of the competent fieldworker' because 'people lie about the things that are important to them'.[83]

The protection for both researchers and mediators seems to lie in the questions they pose. For a researcher the 'right' question is the one that gets to the heart of the matter: 'It is unfortunately true that most informants are only as good as the questions put to them.'[84]

For a mediator the situation is more complicated because agreements depend on honest disclosure, and another party's situation may be affected. The mediator then has to ask 'reality testing' questions along the lines suggested by Benjamin, 'I'm a bit confused, help me to understand; how will this work for you?'[85]

Thus researchers and mediators, while optimistic about good will, are sufficiently 'street wise' and alert to the possibility of being misled. The underlying value is respect for participant or party.

The interviewer all too frequently finds that he or she has offended subjects, transgressing a line over which only friends or intimates can cross. The craft consists in calibrating social distances without making the

subject feel like an insect under the microscope.[86]

The challenges

The impact of the researcher/mediator presence

Sennett's comment highlights the tightrope: the achievement of outcomes for both qualitative research and mediation depends on interaction with people. But with interaction comes presence, and presence has influence. Hoffman stresses the nature of this challenge for the mediator:

> No matter how strenuously we may assert that the only norm we bring to the table is a commitment to assisting the parties in reaching their own self-determined solutions, our reactions to them as people, and to their stories, unavoidably shape those solutions.[87]

Cobb claims that the inevitability of the influence is due to the interactionist or social constructionist perspective itself, whereby:

> The mediator's interaction with others (elaborating observations) has an impact on the evolution of the conflict, both by the content of the conversation as well as by the nature of the interaction in which the content emerges.[88]

This is because the introduction of a third party into a dyad dramatically changes the relational possibilities.[89] Such disruption can either 'be highly beneficial or prove problematic'.[90]

When the mediator attends to the cognitive tasks and accepts the emotional demands, with all their intensity, he or she is able to 'alter the power and social dynamics of an existing conflict relationship by influencing the beliefs or behaviour of individual parties'.[91] Implied here is a beneficial outcome, but this may not always be the case.

Similarly, the researcher is an intruder on the personal experience of the participant and even introduces a third party in the form of a tape-recorder. The introduction of the machine alters the dyad and makes the event into something formal.

We have noted the possibility of awakening memories or sharpening attitudes, an experience which may have positive or negative repercussions. An example occurs in Marshall's research when a psychologist describes the difference between acting as a counsellor and a mediator. She laughingly said, 'There's a different energy — I think I must be a mediation junkie! There's more adrenaline … It's adrenaline. I've never thought of that before'.[92]

Equally, however, the interview may be painful. In the same research project another interviewee admitted rather hesitantly: 'Sometimes I don't think I cope near as well as I like people to think I cope, and I often catch myself recognising that I am far more stressed than I'm letting on'.[93]

The roles of both the researcher and the mediator are circumscribed so that we cannot act as counsellors yet, being professionals, we feel responsibility to the participant once their experiences have been disclosed.

The responsibility

We have outlined the distinctions between the tasks of research interviewing and mediation.

In mediation every participant must experience a sense of 'justice' at the conclusion. The tightrope balancing involved in the mediator's role means that Patton's comment quoted earlier, that the researcher cannot be angered or saddened by anything they hear, cannot apply in all circumstances to mediators, because they are required to ensure that all parties experience fairness.

It may therefore be appropriate to react to something one party says, not because the mediator is affected but because of the effect on others involved in the dispute. An example would be learning in a family dispute of behaviour likely to be detrimental to children, or accommodating a woman's statement that she did not care if her next door neighbour objected to noisy music at midnight.

The extent of mandated responsibility for a professional is variable across state legislation and professions. However, it is fair to say that mediators and research interviewers may hear disclosures which align them with GPs or priests. They may protect themselves by warning participants that they must act if they hear about illegal, unsafe or socially unacceptable activity, but their responsibility is less clear if such disclosures arise in the course of the meeting. They are alike in facing the dilemma of ensuring confidentiality while maintaining allegiance to their social obligations.

Finally the possession of ultimate authority, and thus 'control', is not the same experience for mediators and researchers. In mediation ultimate authority is in the parties' hands; they decide whether or not agreement will be reached and whether they will abide by it.

A mediator's authority and control lapse immediately the mediation ends. The researcher, however, while still constrained by principles of credibility and trustworthiness, shapes the outcome in the form of analysis and presentation of data, and 'analysis, in deciding who and what to quote, involves decisions about whose voices will be heard'.[94] Only in the event of a participant withdrawing from the research is this control ineffective.

Conclusion

Qualitative research interviewing and mediation share a history, a process and practitioner attributes, skills and techniques. They also share similar challenges.

Although the tasks are different, this comparison is intended to reinforce: the need for respect for those we involve; the need for awareness of our own reactions to what we do; the need for assertive management of the processes which achieve the outcomes sought. ●

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Endnotes

1. Australian National Mediator Standards (2007), *Practice Standards, 5.*

2. Some mediators emerge from social networks of disputants or might be managers who act as mediators for employees. There are also 'partial' mediators who act in international disputes with a vested interest in the outcome for their constituency or country. The mediator discussed here is independent, a professional 'outsider' who has no ostensible connection to the parties (sometimes described as being 'neutral') and endeavours to conduct the process 'impartially', without showing favour to any party. This type of mediator uses a 'facilitative' style, whereby parties are encouraged to understand each other's viewpoint as well as express their own. Most of the mediation is conducted in joint session rather then in private caucus.

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15. Above note 6 at 50–51.

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Briefly, countertransference involves the particular feelings and emotions the professional experiences because the client reminds him of someone from the past. Emotional contagion is the 'passing on' of feeling and mood between people.

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GLOBAL RECENT DEVELOPMENTS

Settled, litigated, pending and overpaid

Nokia and Apple

Nokia, the largest mobile phone manufacturer on the world, is suing Apple in an American court. It alleges that iPhones infringe 10 wireless patents held by Nokia. The companies have been engaged in licensing talks over a deal which gives Nokia payments for the technology it developed and which has become the industry standard in mobile telecommunications.

The talks did not produce a settlement and Nokia commenced legal proceedings likely to come to hearing in 2011. A Nokia spokesperson said Apple could continue developing the iPhone and market existing models, even though it alleges that each device sold is in breach of its intellectual property rights.

A Nokia spokesman explained, 'We are not seeking to disrupt the business of any operator or the company, we are looking to get appropriate compensation for our intellectual property. For Nokia, legal action is always a last resort.'

See further: <http://hades.mg.co.za/article/2009-10-23-nokia-sues-apple-over-alleged-breach-of-patent>.

Microsoft and Yahoo

Microsoft and Yahoo's search-and-advertising agreement has received approval from the American Association of Advertising Agencies. This is a local advertising agency group which includes Publicis Groupe which had finalised a deal to acquire Microsoft subsidiary Razorfish for $286.8 million and 6.5 million shares. However the US Department of Justice is continuing to conduct an anti-trust evaluation of the Microsoft-Yahoo deal, due to be finalised in early 2010.

See further: <www.eweek.com/c/a/Search-Engines/Microsoft-Yahoo-Deal-Approved-By-Microsoft-Beneficiary-890868>.

Consent to cookies?

In proposed laws European visitors to websites may soon face pop-ups seeking consent to internet cookies. The plan to change existing laws on cookies can be stopped only if politicians fail to resolve a file-sharing dispute. If the new law is passed, websites will be required to seek consent from users before serving cookies — the small text files that help a site to remember a visitor. Out-Law.com reports that the law's fate has become linked to a file-sharing policy.

The EU's Council of Ministers and Parliament are in disagreement over one clause in a package of laws that requires a court's authority before an individual can be disconnected from the internet for illegal downloading. If the file-sharing impasse is sorted out the telecoms package will be passed into law.

European Commissioner Viviane Reding expressed concerns about behavioural advertising: 'European privacy rules are crystal clear: a person's information can only be used with their prior consent,' she said. 'The Commission is closely monitoring the use of behavioural advertising to ensure respect for our privacy rights. I will not shy away from taking action where an EU country falls short of this duty.'

Full Out-Law.com report: <www.out-law.com/page-10475>.

UK solicitors overpaid

The UK Law Gazette site reports that the National Audit Office (NAO) found solicitors in that country had been overpaid for legal aid work to the tune of £25 million. The NAO said solicitors over-claimed for legal aid work in the amount of £18.3 million in 2008–09, while £6.4 million was erroneously paid to solicitors who provided legal aid to claimants without evidence they were eligible to receive it.

The overpayments emerged during the NAO's audit of the Legal Services Commission's accounts, which received a qualified audit. The NAO said that the biggest errors were made in relation to solicitors working on family and immigration matters, where 25% of claims were incorrect. The legal profession issued a statement contradicting the findings.

For Law Gazette report see: <www.lawgazette.co.uk/news/solicitors-overpaid-millions-lsc-legal-aid-work>.

Lehman Brothers' administration

Lehman Brothers' creditors will continue waiting after a plan to speed up the bank's administration was thwarted for a second time, in England's Court of Appeal. *The Times* reported that the plan, developed by administrator PricewaterhouseCoopers was supported by creditors and would have speeded up the return of assets frozen when Lehman collapsed in September 2009. The plan was reported to be controversial because the assets were held in Lehman were on trust and therefore owned by the hedge funds.

Insolvency law technically allows hedge funds to the return of their assets unless they agree to accept less. The administrator's scheme required hedge funds to surrender ownership rights en masse, which the court found to be unacceptable.

Full report in *The Times:* <http://business.timesonline.co.uk/tol/business/law/article6906162.ece>.

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