

ADR NEWS



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EDITORIAL :

As we emerge into the cold light of a new year, it is perhaps hard to think of anything to celebrate or to look forward to in the light of the awesome and dreadful consequences of nature's display of power in the early hours of the 26th December last when the sub-maritime earthquake shook South East Asia and released a massive tsunami that wreaked havoc on the region, claiming tens of thousands of lives and destroying the livelihoods of millions of people.

None-the-less, the changing political climate arising out of elections in the Ukraine opens up the possibility of closer relations between the Ukraine and the European Union, which could bring hope and prosperity to the region and scope for modern commercial dispute resolution processes to be established to support international trade in the region.

Equally, a unique opportunity has opened up in Ramallah as the occupants of this beleaguered territory engage in elections for a new President, for a settlement to the conflict with Israel. Let us hope that the parties to this conflict can put aside the guns and bombs and negotiate a way forward to the benefit of everyone who lives in the region.

In the UK court mediation schemes are gradually proliferating and ADR processes are becoming increasingly popular for the regulation of a wide range of social issues. The number of regionally based mediation organisations grows all the time.

The predicted demise of arbitration for the settlement of construction disputes appears not to have been realised. There is considerable dissatisfaction with the appropriateness of adjudication for large and complex cases and the courts are gradually developing guidelines for the successful management of the process for such cases. In the meantime, construction arbitration and litigations has seen a revival in the later half of 2004, with parties often choosing to bypass the adjudication process.



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With in excess of thirty reported cases in adjudication in 2004, the jurisprudence governing this specialist area of dispute resolution continues to be refined and enhanced.

A wide range of ADR initiatives are in the pipeline for 2005 and as the year progresses ADR News will keep readers abreast of these developments as and when they come to fruition. For instance the Scottish Mediation Network is holding its Second **Scottish Mediation Conference on the 3rd MARCH 2005** in the Kelvin Gallery, University of Glasgow. The first meeting of 2005 of the **Association of Welsh Mediators will** be held at the offices of Morgan Cole on Thursday, 27 January 2005.

The yearly progress review of the Pilot Scheme for Mediation in the Central London County Court will soon be upon us. It will be interesting to see whether or not the new hard line adopted for the used of mediation is judged a success or not, and what implications this has for the rest of the UK.

We wish all our readers a prosperous and above all peaceful 2005.

G.R.Thomas : Editor

PART II : Mediation: A Fledgling Profession or A Pot Puri of Good Intentions?

Rachel A Miles

Research Strategy.

Introduction.

It was my intention to gain an overall perspective of volunteers experience of mediation at a local level; with particular emphasis on standards and professionalism. My reading on such issues suggested that standards within mediation generally could be variable and inconsistent Black-Branch (1998), Hughes & Waddington (2001), Simon (2002), and I was anxious to make my own discoveries.

I needed to ascertain what services were locally available, given that access is an ever present difficulty when attempting to undertake any research. However as a native of the area I felt confident that with effort I could identify services, and convince the people involved to be supportive of my project.

The intention was to use both qualitative and quantitative research, involving three interviews, which would be face- to- face encounters and which I intended would be tape- recorded. The interviews would be semi- structured, using the same basic questions for all three participants, with an expectation of the interviews lasting approximately one hour. The three volunteers were recruited from three different sources of community service volunteering, and were self selecting, in as much as they agreed to my request for an interview; their status being ascertained by personal recommendation. The three volunteers were white and female, and while it would have been desirable to interview a male for gender balance, ultimately I needed to utilise the material available to me. I identified no interest in social status, only an occupational background, as an indicator of possible prior experience.

The Issues.

The issue was standards and levels of professionalism apparent within the local community mediation service. It was my intention to identify the quality of service available to the public and maybe identify variability in standards between these community services.

The intention to use both qualitative and quantitative research meant that the questions for the qualitative interviews needed to be open, encouraging a more well- developed insightful

response. The questions for the questionnaire however needed to be closed, demanding a more simplistic contained response, while allowing some room for limited comment. I used basically the same questions for both situations, but during interviews encouraged the interviewees to expand and develop the informational themes. In effect the interviews were semi structured, aimed at gaining information without being interrogative. I was interested in the individual experience, while simultaneously being interested in threads of commonality.

The Questions.

The questions were designed to reflect issues of quality and standards, either directly or indirectly. They were structured from my prior reading and from my experience of interfacing with standards, both at university and during my limited experience of teaching law to students on access courses. During the interview I did not provide the volunteers with a rationale for the questions, but merely identified at the outset that my interest was in the quality of community mediation services.

I was interested in their background prior to their work with mediation services, because of its relationship to issues of experience and transferable skills (Benjamin 2001), and the 'double- edged sword' potential to infect the mediation process with inappropriate ideals.

Self –awareness is arguably highly significant to personal encounters (Rogers 1974), and I was particularly interested in issues of self- awareness, reflected in question two, four, and sixteen particularly (see appendix), as an indicator of a quality encounter (Cohen 2003). Quality of community mediators will reflect in levels of experience (Simon 2002); and as retention is a major issue (Hughes & Waddington 2001), duration of service was also a significant factor.

Question four was intended to reveal awareness of process, indirectly indicating levels of training/ knowledge and interpretation of appropriateness of model applied to the type of mediation, and awareness of role; while appreciating that a mix is frequently used. There was an attempt to illicit the values of prior alternative qualifications, consequent to the skills versus academic qualifications debate, within the mediation literature (Honeyman 1999). As well, identification of the duration of training was requested, given the prior entry requirements are non-existent.

A broader perspective was sought in the questions relative to linkages and support from external regulatory bodies; given the relevance of codes of practice and guidelines to standards of practice. Questions on the helpfulness of legal and specialised knowledge were intended to give an indication as to levels of awareness and standards of training. Supervision of practice constitutes a critical element in maintaining standards of practice, as well as supporting volunteers. The four questions relative to supervision (Richards 1998c), in conjunction with the question relative to evaluating practice, were intended to be critical indicators of adherence to 'best practice'. The question relative to significant problems affecting practice was intended to indicate levels of critical thinking, necessary for effective practice (Brookfield 1987).

My intention throughout with these questions was to attempt to ascertain some indication of whether quality practice was taking practice.

Access.

Access is always a major consideration. If access is prohibited there is no research. It is a critical factor. Hammersley & Atkinson (1995) consider that the mobilisation of the resource of acquaintanceship, kinship, utilising existing social networks and occupational membership, may/will prove helpful in facilitating access, to what would otherwise prove difficult areas to penetrate for purposes of research. The presence of gatekeepers, especially though not exclusively, found in professional domains, serve to limit inclusion and safeguard what is perceived to be the legitimate interests of that organisation. Hence knowing who holds the power to legitimise the research is not only useful, but ultimately critical. As Hammersley & Atkinson (1995) identify, personal knowledge may make judgement of the most effective strategy for gaining entry obvious. My serious considerations of undertaking voluntary mediation within the community had placed me in an appropriate position to make contacts, which made this research possible.

Arguably the most innovative of research ideas will shrivel and die without the appropriate respondents with whom interaction can take place. Access has to be a very early consideration, and enquiries were made and a poster prepared (see appendix). Verbal permission was gained from appropriate persons and the questionnaires were delivered with stamped addressed envelopes for a response. Persons who undertook to give interviews were contacted by

telephone, and arrangements made to meet at their convenience, which was at a location where interruption would not occur and privacy could be maintained.

Some thoughts on ethics in relation to researching.

Hammersley & Atkinson (1995) consider that the essential ethical issues in research production include informed consent, considerations of privacy, harm, the potential for exploitation and the consequences for further research.

Consent.

Within this study the volunteer community mediators participated freely, consent being given verbally, and passed via an internal network. Hammersley & Atkinson (1995) note that obtaining free consent is not straightforward and individuals may agree to be involved for complex social reasons. There appeared to be no difficulty with consent when assurances of confidentiality were given.

Privacy /Confidentiality.

Privacy is clearly seen to include trust that the information given to the researcher will be used in a professional manner, which respects confidentiality. The information is 'privileged' and consequently would not be used or divulged in the course of normal social interaction, only being used for the purposes identified. In addition the volunteer mediators in this study were identified only by Mrs A, B. C. No names were requested of people completing the questionnaire. At an early stage it was apparent that confidentiality and the privacy of the respondents, was a critical ingredient in their participation in the process. Within the context of this work it was not difficult to assure them of confidentiality, informing them that only myself and my tutor would be processing the material. Its academic library residence also ensures a selected readership. The tapes used in the process of interviewing were offered to the respondents on completion of the work, or the promise of destruction. The latter option was accepted by all three respondents.

The Potential for Harm /Exploitation.

It was important for me to give careful consideration to the questions asked and their possible impact. The purpose of enquiring into standards and levels of professionalism, was not in any sense intended to implicate or criticise in any way the organisations concerned. The trust placed in me to act with integrity and professionalism was evident.

Hammersley & Atkinson (1995:277) emphasise the importance of “avoidance of serious harm to the participants,” conducting the interview with sensitivity and analysing the findings with integrity. However interpretation relies upon perception and understanding, and translating the respondents information truthfully as it is understood. Sensitivity, awareness and adherence to a personal value system have to be in operation. Trust in the researcher’s professionalism and confidentiality are essential. The scale of this piece of work is small and unlikely to affect any of the volunteers who directly participated.

It has been argued that ethics are about responsibility to others. I attempted to address that issue, despite the limited nature of my empirical research. Questioning related to their perception of standards and professionalism within their organisation. It was vital that I too demonstrated and applied the highest standards in interpreting their position.

Interviews.

“Perhaps we live in what might be called an interview society, in which interviews seem central to making sense of our lives” (Silverman 1993:19).

Of the major methods used by qualitative researchers, observation, analysis of text and documentation, interviewing, recording and transcribing, pursuit of a method which focused on a one to one interaction proved very appealing. This may not provide the illusion of the clear cut answers apparent within questionnaires, where statistic comparison of people and actions appear more objective. However arguably there is much benefit to be gained from a personal interaction which is more likely to take on an extra dimension of depth and richness, and where the complexity of people and their actions becomes more obvious. The interviews lasted approximately one hour, and I aimed to talk as little as possible, beyond giving encouragement to expand on various issues. Life is not black and white, it is very complex, and as Coffey & Anderson (1996:118) note “no text can have a completely fixed meaning”, it is open to some level of individual interpretation. Inherent within that is the need to be very aware of personal biases, and be rigorous in the interpretation of the material.

Questionnaires.

The same information was requested in the questionnaires using closed questions, providing for

a more confined, limited response. Care must be applied when asking questions, for the answers received will be a response to the question asked, and so need careful crafting.; for within a questionnaire there is little opportunity for expansion, and no opportunity for checking meaning. Pilots should always be conducted of a limited number of questionnaires, with a view to correcting problems early, before major errors are made and the situation becomes irreversible. The presentation must be attractive, clear, and the meaning of the questions unambiguous. Two pages is usually a maximum consideration, unless it is the intention to inspire a loss of interest in its completion.

My questionnaire was two sides in length on A4 paper, the perception of length being less than it was in reality. I had no desire to discourage participants, and intended that the questionnaire should not take too long to complete. A pilot test of the questionnaire was carried out on one willing volunteer prior to the survey being distributed. This identified an approximate time it took to answer the questions, and also served as an opportunity to identify any fundamental flaws within the question design. As a result some questions were reworded, aiming for increased clarity. An identical layout and pattern was used throughout, and most of the questions were similarly formatted, to enable ease of use, and not to give an impression of some issues being more important than others. Tick boxes were provided for ease of use, and clear guidelines provided on how to answer the questions (without being directive) were inserted in italics under each question to avoid confusion. An attempt was made to group subject areas together, so that a logical sequence was followed. The questions comprised a mix of options, including opinion, knowledge, and factually based questions. As anonymity and confidentiality were extremely important issues, a confidentiality clause was inserted at the back of the questionnaire. This was printed in capitals and underlined. I used a red font colour to highlight its importance.

On reflection maybe I should have placed that guarantee on the front. However it did not appear to have affected the response. My thanks was expressed at the end of the questionnaire.

Data Analysis.

During the three interviews I gained permission to use a tape recorder. Clarity was essential for

accuracy, and relieved me of the pressures of taking copious notes of what was being said. I was able to concentrate upon the interaction. I transcribed all three tapes, the production of which is seen as essential activity to good research (Silverman 1993), but found benefit from re-listening to them also. My intention was content analysis and to identify common themes, as well as differences throughout the interviews. A new tape was used for each interview, clearly identified by a label.

As Coffey & Atkinson (1996) identify much qualitative analysis begins with the identification of patterns and themes. A pattern of information could be seen emerging. I identified the main themes of each interview which produced commonalities and differences. There were crossovers of information which required coding. This coding as identified by Coffey & Anderson (1996) is essential for effective retrieval, organisation and interpretation of data. After transcribing the information I tagged the individual interviews with protruding labelled stickers to promote easy access to information. Having established the themes within the commentary by colour coding, I marked the pages by using a profusion of coloured paper clips eg. blue referred to similar attitudes on regulation. The principle proved very effective, enabling me to extract appropriate commentary with relative ease. As I only interviewed three women I was able to remember the basis of what they said, which made checking the content material easier. A functioning system is essential to effective management. The selection and consequent grouping of the questions did to some extent assist in the process of retrieving material. Having clarified the themes I then attempted to critically analyse my findings, while acknowledging the comments of Coffey & Anderson (1996) that analysis is never complete.

Writing up the qualitative & quantitative research.

A personal starting point.

My personal starting point began with writing key words and ideas on A4 sheets, followed by a preliminary literature search in the library. This process further refined my thinking. A thorough search for articles, law reports, careful use of Lexis and the Internet followed. A system of coding information in books using coloured paper clips, and a variety of highlighter pens on photocopied articles provided a wealth of information. Articles were summarised for future ease of reference, and appropriate themes identified. My personal books

were equally well marked. However when it came to the actual task of writing, the wealth of information collected overwhelmed me to the extent that I felt I could not write anything. It would seem that the more one knows, the more one realises just how much one does not know. Perhaps the reading of yet another book, another article, just might provide some flash of inspiration. Wolcott (1990:21) supplied that inspiration by citing Clifford Geertz (1973:20). "It is not necessary to know everything in order to understand something". Such obvious wisdom thawed my frozen mind and pen. I proceeded to design a plan of my dissertation, which was extremely useful in keeping me on track, and decided to take the advice of Wolcott (1990:21), "and commence the task for the "knowing is never complete".

Some thoughts on the writing process.

Silverman (1993) asserts that there is no direct route to what he calls inner experience, and no pure data from which to undertake the writing up process. There is perhaps only that formulated through the writer's reasoning, assisted and supported by empathy and possibly by being part of the culture/subculture one is researching. Positivists would argue that, that results in distortion and increased bias. I would argue it represents a truer flavour of the truth. The perspective of the volunteer mediators within this research may not present as universal truth, but it is not invalid because of its partiality. Delmont (1992:9) identifies it is essential to be scrupulously self conscious about the construction of text, making all processes explicit. Given that condition exists Delmont considers that "issues of reliability and validity are served".

Conclusion.

I have tried to follow the directions of Delmont (1992:67) in ensuring the writing is "ethically sound", thereby reflecting the perspectives of the respondents. The data reflects the perceptions of volunteers who work in a mediation capacity on issues of professionalism and standards. I made an effort to critically and honestly review the information supplied.

The Interview Questions.

These questions were asked, with encouragement to expand and develop informational themes.

- What was your background before mediation?
- How long have you been practicing as a mediator?

- What approach / model do you use in mediation?
- What are your existing qualifications if any?
- How long did your initial training last?
- Are you required to attend ongoing training courses, and if so how often?
- What do you see as the most important goal of the mediation session?
- Do you have a code of practice?
- How useful do you find the code of practice?
- How satisfied are you with the level of supervision?
- How would you grade the satisfaction on a range of 1-10?
- Tell me about the frequency of supervision?
- Explain the format of your supervision?
- What do you perceive are the existing skills you bring to the mediation process?
- Do you think you should have expert subject knowledge?
- Do you think having legal knowledge is an advantage in facilitating mediation?
- Do you think all mediation should be regulated centrally?
- What mandatory regulation do you see as beneficial to effective mediation practice?
- How do you evaluate your practice?
- How often does this evaluation occur?
- What do you see as the most significant difficulty or problem affecting the quality of your practice?

The Interviews. Mediation as it appears within the voluntary sector. A local perspective.

How can we ensure quality?

Liebmann (1997:169) identifies community mediation as being *"connected with disputes which cause problems between people in the broader community"*. The range usually encompasses neighbourhood mediation, mediation affiliated to educational establishments and victim offender mediation; though places of employment also offer clear opportunities for the use of mediation services. The community mediation focus for purposes of this work are confined to neighbourhood mediation and victim offender mediation.

Three interviews with volunteer mediators were conducted, with a view to obtaining a flavour of the quality and standards available from local mediation services. This was undertaken in conjunction with the use of twelve questionnaires, using different respondents. The interviews were conducted using basically the same question bank, but the interviewees were encouraged to elaborate

on statements, with a view to adding quality and depth to the encounter. The numbers are small and consequently statistically insignificant. However the project would have constituted an adequate basis for a pilot study, and the principles and questions could be transferred for use with a larger piece of work. One volunteer worked with a neighbourhood scheme, another with youth offending,, while the third worked as a victim support youth offending team volunteer mediator. The questionnaires were distributed between neighbourhood, victim support, and youth offending panel volunteer mediators.

Youth Offending Panel Mediation.

The main provision of the Youth Justice and Criminal Evidence Act (1999) that concern young people (under 18yrs) are those, which create the relatively new sentence of a Referral Order and the establishment of Youth Offender Panels. The Referral Order is intended to replace the conditional discharge, and is in accordance with the government's interventionist policy towards young offenders. Youth Offender Panels draw heavily on restorative justice for their philosophy.

"Restorative justice is a process whereby parties with a stake in a specific offence, collectively resolve how to deal with the aftermath of the offence, and its implications for the future..... It is a problem solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies". (Marshfield 1999 cited by Haines 2000:60)

The principles allow for:

- Personal involvement of those concerned ie. Offender, victim, family and community.
- Locating crime problems in their social context.
- Utilising a problem solving orientation.
- Utilising flexibility of practice and creativity.

The Youth Justice Board (2001:1) identifies that *"resolution should aim to make amends as far as possible. It seeks to balance the concerns of the victim and the community, with the need to reintegrate the offender into society"*.

The process (as outlined by Mrs A.)

The young person is referred to the Youth Offending Panel by the court. The young person is accompanied by a relative or guardian (usually), as well as their youth offending team worker (classified as a panel member). The other panel members, numbering two minimally or three, made up of trained volunteer mediators from the community, engage the young person in

conversation with a view to establishing information. Victims rarely express a desire to be present, though it is their 'right', given the agreement of all parties. All parties have the opportunity to express their position, and significant issues relative to the offence are selected for discussion, with a view to providing greater understanding and providing the young person with the opportunity to rethink his/ her position. A list of items for attention by the young person are identified and agreed eg. sessions on consequential thinking, referral to a substance misuse worker, referral to the health worker, in addition to identification of the number of hours reparation to be undertaken. Where there is agreement a contract is signed, which formulates a legal and binding document. Successful completion of the contract ensures the young person has no criminal record. Failure to complete (what are clearly identified as achievable goals) within a specified time span, results in the young person being returned to the courts and the Criminal Justice System, resulting in a criminal record.

There are issues with this process, which Mrs A identified as potentially problematic in her interview.

- She considered there to be the potential for conflict of roles, between the role of neutral/mediator and interested citizen. Arguably there exists a clear difference and conflict between the position of a responsible public citizen with access to rights, powers and civil responsibility (Abercrombie 1984), and that of a neutral independent facilitator.
- She identified a realisation that contracts are signed under circumstances of what could arguably be classified as coercion. Although the young person has an opportunity to present his/her position, failure to sign the contract results in a return to the courts. It is clearly in the young person's best interests to sign the document, but the balance of power is decidedly uneven, which is perhaps inevitable. Pressure to sign the contract, as being in the best interests of the parties, is a concept well identified in mediation literature. Davis (1997:65) identifies situations where he observed mediation sessions in which "a great deal of pressure was brought to bear" on parties concerned. While the 'carrot' of a 'clean record' provides incentive, some level of coercion, however well intentioned would

appear to exist. Boule (2001:304) recognises the power imbalance and significantly identifies that victim offender mediation involves "a different model of neutrality", as the parties, including the mediator acknowledge that a wrong has been committed and the process is aimed at reparation. Haines (2000) considers that the process diminishes the attention applied to the needs of the offender, and infringes the Human Rights Act (1998). Arguably it is the rights of the victim that have been infringed. Mrs A identified that the hours of reparation are never onerous and always undertaken at a time convenient to the young person. 'Bolt on' sessions are invariably applied to help support the young person with his/her problem eg. alcohol; but the child is obligated to give consideration to victim issues, because sessions with the Youth Offending Team Worker are identified in the contract, to focus the mind of the young person. In Mrs A's experience the issue of consequences and the affect on victims are invariably addressed during panels. The young person is left in no doubt that there is a victim, and actions have consequences. Mrs A considered that the offender was invariably treated in line with the United Nations Convention on the Rights of the Child (1989) Art.3, where "the best interests of the child shall be a primary consideration".

- Mrs A considered that venues for panels were regularly unsatisfactory and did not meet an acceptable standard; not being in tune with the significance of the occasion ie. cold, shabby, inappropriate, difficult to locate, with the location some considerable distance from the place of residence, resulting in transport problems. Arguably funding affects quality and standards, and government directives established in law should be adequately funded.

When looking at the issue of local standards of community mediation, and in my decision to undertake interviews in conjunction with the use of questionnaires, I was very aware that what people say and what they actually do, does not always equate. Hence consideration of the issue of supervision, where there is emphasis, albeit subtle, on observation, assessment and feedback.

- Mrs A identified a very veiled process of supervision, which took place in the form of observation by peers and paid youth offending team workers; but which lacked transparency

and overt form. It was successful however in excluding 'unsuitable' panel members, but did not stand on clearly identified criteria, and was of an ad hoc nature. There would appear to have been nothing 'official' or structured about the process of feedback, but it existed. Dingwall & Greatbatch (2001:381) in their comment on lawyer mediators identify that "mediators are examined on their knowledge of what they ought to be doing, rather than demonstrating what they actively do". Within Mrs A's situation it would appear that supervision of quality and standards is taking place, though hardly in what could be described as an acceptable format.

- Mrs A identified that initial training involved substantial effort on the part of the organisers, but consequent to the newness of the project did not adequately prepare her for the reality of the task. That only came with the doing of the job. Simon (2002:2) cites the research of Rogers & Saunders (1997) in their findings that "*Experience in mediating seemed the only aspect of qualifications that was related to increased settlement*". The old Chinese proverb '*I hear and I forget. I see and I remember. I do and I understand*' would appear appropriate.

Benjamin (2001) similarly extols the value of experience, and considers it to be critical to an appropriate instinctual response; the 'instinct' having developed from the benefit of experience.

- Hence it would appear that supervision existed in a surreptitious format, which Mrs A seemed to find quite acceptable, despite her awareness of its unstructured nature. She had no problem with its arguably unsatisfactory character and format. This I believe resulted from her highly developed self-confidence and self awareness, which was a reflection of her professional background, knowledge and experience. Mrs A considered her prior professional experience, which was extensive, in addition to her life skills was a valuable resource. She saw no contradiction with previous professional experience and present mediator role, only a need to adjust her mind to the need to practice mediator skills within the full awareness of the model utilised; giving full cognisance to the ethics and aims of the session. She admitted that life experience invariably affect perceptions, and consequently actions, identifying the importance of reflective practice.

Benjamin (2001:1) admits to being "*professionally schizophrenic, a state not readily accepted in legal circles*". However what he clearly identifies is the benefits of experience, and the value of transferable skills; for which high levels of self-awareness are arguably necessary.

- Despite Mrs A's extensive range of professional qualifications and experience, her only official mediating skills were those gained during the process of her minimal training for her voluntary role. However her perceptions of the requirements of the role appeared well grounded, with an awareness of the model of mediation necessary for her practice; which is that of an adjusted model of neutrality, giving consideration to the intention of reparation.
- Mrs A was in possession of a copy of 'Good Practice Guidelines For Restorative Work With Victims Of Young Offenders', and identified an effort by members of the group to draw up separate guidance, more specifically helpful to new panel members.

It would appear that however well intentioned codes of practice and guidelines are in attempting to develop consistent practice, they do not always prove as helpful as intended. Dingwall & Greatbatch (2001) identify that a Code of Practice is intended to define the culture of practice; which in this case would appear is inadequate for volunteer mediators undertaking a new project in mediation, who might find more detailed guidelines more helpful, always with the danger that they might prove inhibiting and restrictive. Umbreit & Greenwood (1997) has produced helpful guidelines on the Criteria for Victim Sensitive mediation and Dialogue with Offenders, which although directed at the State of Minnesota USA, might prove helpful in the current system.

- Mrs A saw no necessity for expert subject knowledge, only the need for mediator skills, a professional presentation and excellent communication skills to enable the acquisition of facts and information, to facilitate the process effectively.
- When asked about the regulation of mediation Mrs A saw the overall process of the mediation of Youth Offending Panels already being linked to the state by legislation, though felt benefit could be gained by the existence of a central body, with whom all practicing mediators should

register. She did highlight the issue of difficulty in retaining volunteers and considered such a system would be difficult to administer.

An inability to retain volunteers is problematic. This has to have a detrimental effect on quality and standards, because experience is being lost that has been gained, or never reaches peak performance. This is an issue well realised by Hughes & Waddington (2001:IX&XIV), who in reference to a project undertaken for the National Assembly of Wales identify *"an annual fall-out rate of 40% of volunteer community mediators"*. They further identify *"a need to recruit 20 new mediators every six months"* to maintain adequate numbers. Arguably that is costly, wasteful and does not result in a quality product. It is a highly significant issue, given that experience has previously been identified as affecting outcome.

- However the individual process of mediation she saw as a more individual encounter, the quality of which was heavily dependant on the individual panel member mediator, some of whom were very good in her estimation, while the quality of others *"left much to be desired"*
- When asked about evaluating her practice Mrs A identified a high level of awareness of the need for the process, but stated there was no *'official'* mechanism in place at present for realisation of this process at an overt level, but recognised it happened at a subliminal level. This she saw as unsatisfactory with a need for an identifiable process of assessment. She also identified the difficulties inherent with quality issues and volunteers. *"They tend to leave if they are placed under any pressure. Why should they stay, they are not paid"*. Hughes & Waddington (2001:IX) would have a clear affinity to that statement, when they identify that *"Retention of volunteers is a challenge for mediation services"*.
- Mrs A identified that she relied heavily on her professional background and life experience to self-support her in her role; in addition to undertaking ongoing education.

"It is important to feel part of a live structure and process, and that can be difficult as a volunteer. The support structure in my experience is not there. Ultimately it can affect the quality of practice as well as retention rates. Ongoing personal effort is required. Many volunteers are not prepared for that". It is perhaps no surprise that retention of volunteer

mediators is a major problem, with a consequent detrimental effect on the quality of service provided.

The Interviews. Neighbourhood Mediation.

Boulle (2001:229) identifies that neighbourhood disputes constitute the largest category of work for community mediation services. The 1995 Community Mediation Service identified that *"95% of the work of 16 community mediation services involved neighbour disputes, and comprised 92% of one other service; while for a further 8 community mediation services, it formed the bulk of their work"*. Mrs B was able to identify that this situation prevailed locally and constituted the bulk of her work.

In Synopsis:

Mrs B identified a commitment to her role as a volunteer mediator by her assertion that she was one of only two people who remained from her original training. This had involved commitment on her part, as well as a belief in the nature and quality of the work undertaken.

She identified that the role of volunteers was undervalued, especially by government and bureaucracy, who saw volunteers, be they mediators or not, as a cheap option, not to be valued but *"used and abused"*. If this proved to be more than an individual assertion, it could provide a further indicator of the problems associated with retention identified by Hughes & Waddington (2001) which arguably affect quality and standards of practice.

However at a more immediate level she identified her training as of quality and relevance, and provided by a mediator of considerable positive reputation. She was in receipt of supervision. Her supervisor was supportive and did indeed provide the levels of support and supervision of practice she considered so essential to the maintenance of quality practice. Quality feedback she measured in unsolicited telephone calls of thanks to the department. This process however appeared totally ad hoc, and while they were encouraged to be reflective and fill in a self-evaluation form, for personal consideration and supervision perusal. However she identified she did not understand some of the questions, so omitted to complete some areas of the documentation. Guidelines in the form of a Code of Practice were utilised and considered helpful and directive to good practice.

She identified a model of facilitative mediation, which involved co-mediating where the mediation

was supported by an experienced mediator, until an adequate (undefined) level of experience had been gained by the less experienced person. The core values were expressed as impartiality, and confidentiality, based within a client led situation. Facilitation to meet the needs of both parties equally was seen as paramount. Fairness and “even-handedness” were considered touchstones for ethical practice.

She clearly identified issues of quality encounters, clarifying the need for good communications, cultural awareness, experience and a professional approach – identified within the concepts of a dress code, language, and identification of her position as trained and experienced.

She monitored success by a mediation which resulted in a signed contract and telephone calls of thanks from the clients. (The service is free within the local area). She considered the success rates to be particularly commendable, as the organisation tended to get only ‘hard core’ problems which alternative professionals had failed to resolve ie. Police and housing officials.

She saw a lack of willingness to refer disputes to mediation, as a reflection of misplaced perceptions of ‘role poaching’. Police saw it as their role to deal with disputes, as did housing officers, each believing it to be their responsibility to take on mediating roles; without necessarily having the time and skills to deal with the issue effectively and to the clients’ satisfaction. For mediation it was ‘the’ central task, and not subsidiary to another role, hence a more effective outcome. She saw the promotion of organisational image as critical to an increased flow of work, and ultimately a better quality service. Marketing was clearly a significant issue, and the responsibility of management. The public she considered had no real perception about what the service had to offer.

Mrs B identified funding as a problematic issue, which ultimately reflects in standards. This seemed to be an ongoing issue, with levels of funding being reflected in client numbers. Problematic without a high profile and a good public image. Mrs B also saw health and safety as a quality issue, identifying a process of checks and supports for the volunteer mediator.

She demonstrated a clear understanding of the boundaries of her role, and the significance of staying within those boundaries, clearly

appreciating the inappropriateness of not giving legal advice at any time. Despite her primary facilitative role, she saw place for the giving of factual information and identifying the significant issues for resolution. Face to face encounters at an early stage in entrenched conflicts, she had found to be counter productive. Quality outcomes she saw as emerging with the application of appropriate mediator skills and patience.

Mrs B considered situations beyond mediation eg. poor building construction, affecting noise levels, were issues that cause frustration and were beyond the remit of the organisation to quality control. Ultimately she believed the local mediation service to be a valuable resource that offered good standards,(not defined), which she saw as benefiting the community.

Comment.

Mrs B showed a clear commitment to her role as a voluntary mediator and indicated her commitment to high standards and a quality service. Arguably it is not what people say, but what they do which is of consequence. However her commitment to the service and dedication is without question.

The executive summary of ‘Making Mediation Work for Communities’ which was compiled for the benefit of the National Assembly of Wales as part of a commitment by that body to improve community life, clearly supports the concept of a strong mediation service locally. It identifies the importance of well screened and well trained volunteer mediators, providing a much needed service to the community, recognising the significance of quality, so that high ethical and practical standards are achieved. It recognises the challenge of recruiting quality volunteers, and the provision of high quality training, as well as the difficult problem of retaining volunteers once trained.

There exists a quality issue relative to retention. Mrs B like Mrs A clearly understood that they were being used as ‘cheap labour’. Hughes & Waddington (2001:IX) identify in this specifically locally targeted report a “fall out rate of 40%. Arguably that is pure wastage and requires re-evaluation of recruitment and retention policies. However while volunteers continue to feel used and unappreciated, they are unlikely to remain as voluntary mediators. Society it would appear does not value that for which it does not pay. Consequent

to failure with retention, the report projects the need to recruit 20 new mediators every six months; which is arguably unrealistic and wasteful.

Mrs B's commentary would suggest that the projected number of mediations anticipated did not materialise, hence not requiring such large numbers of volunteers; arguably take up being a feature of poor marketing. However the principle of wastage remains an un-addressed quality issue.

It would appear locally that the commitment to mediation by some volunteers exists, as does the belief in the quality and standards of the product. This is combined with a belief in the ultimate benefit of mediation, to both the individuals concerned, and the community at large. However the path ahead is far from smooth.

Interviews : Victim Support Mediation.

Boulle (2001) identifies that victim offender mediation can take place before criminal proceedings, during criminal proceedings ahead of sentencing, or following criminal proceedings. The types of crime mediated are wide ranging, to include common assault, theft, robbery, affray, carrying an offensive weapon and driving offences. The list is not exhaustive.

Victim Offender mediation provides an opportunity for victims to express their feelings relative to the offence, to offer some input into the reparation that will be undertaken by the young person, to obtain an apology if required; and to be present during the panel meeting enabling a face to face encounter with the young person, if so desired, given that all parties concerned are agreeable. " Victims need to be approached sensitively and given time to decide whether to participate in a restorative process.... and facilitators should have received suitable training"(Guidelines for Good Practice. Restorative Work with Victims and Young Offenders. Feb 2001)

In Synopsis.

Mrs C had agreed to provide me with an interview, despite the fact that she no longer worked within the voluntary role of victim offender mediation, as related to youth offending. Her departure from the scene was recent, so I felt it legitimate to proceed with the interview. Mrs C identified a situation in which she was an existing voluntary community worker and had been recruited into this particular mediating role. She identified the training specific to this role as being inadequate and inappropriate, and very focused for the benefit of the young offender; ill

preparing her for the task ahead. The initial phase of the process involved high levels of telephone work and some report writing, the former of which she found highly unsatisfactory. Victims were not infrequently organisations, shops or businesses, and finding an appropriate person with whom to form part of the mediating process often proved frustrating and unrewarding at a personal level. There were also very high levels of reluctance amongst individual victims to be involved within the process of reparation. They usually had no desire to meet the young offender, and frequently expressed the desire to undertake an unlawful approach to the problem. She assured me that in the rare instances where mediation between victim and perpetrator occurred, the anecdotal results were usually positive; in that the victim was relieved to be met with a 'child' often with an unfortunate background. The offender meanwhile found it a learning experience which included an apology.

Mrs C's experience however was less positive. She found communications between linking organisations were poor to non-existent, support did not exist and personal satisfaction levels were minus zero. Attempts to correct the issue of bad communications proved fruitless, given that the power did not lay with her to make the necessary adjustments. Mrs C eventually decided that she was making extensive efforts with no reward of personal satisfaction, which was important for she received no expenses, never mind financial gain. She considered the potential within the role to be promising, but the reality for her proved gravely disappointing Hence her resignation from that role.

Comment.

It would appear there is little that was positive within this experience, beyond the recognition that there is potential for improvement and positive outcomes. Arguably this scenario reflects an inadequate management structure, a non-existent supervisory role, and a total breakdown in communications, between interested departments. The situation would appear to reflect poor standards and a failure to retain the volunteer.

This has to be unfortunate, not only for the volunteer but for the principle and process, which has consideration of victims as well as rehabilitation of the offender in mind. Umbreit's study in 1996, cited by Boulle (2001) identifies that offenders who participated in mediation were more likely to consider it important to apologise to the victim,

when compared to young persons in similar situations who did not participate in mediation. Umbreit's study highlighted that 80% of victims considered it important to receive an explanation from the offender, compared with 36% of victims who did not participate in mediation. Perhaps more importantly 90% of victims participating in mediation considered that it was important that they had an opportunity to explain to the offender the impact of the crime on them, compared with 64% of victims who did not participate in mediation. 93% of offenders who participated in mediation stated that they considered it important that they have an opportunity to provide an explanation, compared with 59% of offenders who did not participate in mediation (Umbreit & Roberts 1996:21)

The loss of the volunteer is also in line with the problem identified by Hughes and Waddington (2001:IX) when they cite "an annual fall out rate of 40%". Highly unsatisfactory and a very negative indicator of quality. It would appear that there exists enormous opportunities for positive improvement within the system, which require improved communications, higher levels of commitment to volunteers and an educational programme directed at the public to increase awareness of the benefits of community involvement with young people.

The Questionnaire. Dissection of a document.

1. What is your work background pre mediation?

The logic behind question one emerged from the possibility of using transferable skills in communicating effectively and interfacing with the public and individuals. Arguably '*people skills*' form an integral facet of mediation skills. Entwined within that concept is the issue of self confidence (Cohen 2003) and experience. Rogers & Saunders (1997) cited by Simon (2002) clearly saw experience within mediating as critical to a successful outcome. Part of the experience is in people management as well as specific mediating skills. The need to act as a mediator and not as a counsellor or a social worker is paramount. The professionalism should remain, but attached to the best practice of mediation.

It would appear from this small (pilot) sample that a range of professionals are involved in community mediation, which perhaps unsurprisingly given the nature of the mediation, does not include lawyers, doctors, or the clergy. The professionals in this instance emerged from the caring/ service providers, and numbered 50% of the total surveyed. The

remaining 50% were identified as divided between home based 30% and industry based 20%. The desirability of a diverse range of mediators is arguably beneficial in reflecting the personage of the clients. The perception of volunteers has traditionally been seen to be 'middle class do-gooders'. With 30% home based and 20% emanating from an industrial background, the trend in this instance does not necessarily reflect that common perception. However Hughes & Waddington (2001:XX1) clearly identified a lack of success in their efforts to recruit and train "disadvantaged groups" as mediators; the course being considered "too intensive and the venues too remote". That does not bode well for an absolute cross section of mediators, but is simultaneously and arguably an unsurprising facet of the culture of life in the identified geographical area. The value judgement emanated from experience of interface with valley folk over many years.

2. Do you think your background and culture influence the way you deal with mediation sessions?

The intention was to attempt to reflect levels of self-awareness within the mediators, considered necessary for effective practice (Cohen 2003). Arguably culture and experience will inevitably influence personal performance, it is part of what we are. Superimposed upon that however is the discipline of process and experience, which should reflect best practice and acceptable standards.

Within this group of respondents 70% perceived that background and culture did influence their management of the mediation session, while 20% felt it had no influence and 10% felt it sometimes influenced the mediation session.

Arguably mediation needs to be context based and reflect that culture and situation. The situation in Japan and Rhondda might differ in format and social decorum, while retaining the core principles of mediation; always with the need for mediating skills.

3. How long have you been practicing as a mediator?

The question was a direct attempt to assess the duration of mediation practice, given the link between experience and successful outcomes (Rogers & Saunders 1997 cited by Simon 2003). For this group of respondents 70% had been practicing

more than 6 – 12 months, with 20% having practiced for 2yrs and only 10% for 5yrs.

This would reflect Hughes & Waddington's (2001) concern about the difficulty with retention of volunteers, and produce concern relative to the negative connotations of lack of experience on mediation outcome. Within that study it proved to be the only factor which effected positive outcome.

If this pilot were to reflect a larger study it would appear that only 10% of mediators would remain after 5yrs, with a loss value of 22.5% annually. These figures are however far too small to be of any statistical significance. Hughes & Waddington (2001:X1V) identify a need to recruit 20 new mediators every six months over a three year period, allowing for an annual fall out rate of 40%.

The issue is clear, retaining volunteer mediators is a significant and wasteful problem, in terms of training costs, and arguably less satisfactory mediation outcomes.

4. Identify the approach or style of mediation you most often use?

This question aimed to identify awareness of the process, which to some extent would reflect context, training and practice, and highlight the appropriateness of the model in use. Arguably many mediation sessions result in a mixed model approach.

50% of this group of mediators clearly identified a facilitative approach, which could be readily identified with a neighbourhood mediation style, where an effort was being made to establish harmony and good relations; while maintaining the core principles of neutrality, fairness and a client led agenda. The remaining 50% identified a mixed style which incorporated a facilitative, interventionist and settlement geared agenda. The source of this difference was identified as arising from the need to adopt a necessary style for the satisfactory outcome of restorative justice, and Youth Offender Panels. Mates (2003:1) identifies the essence of these panels " *Restorative Justice allows the victims a voice that has no place in the traditional court system.....while offenders are given the opportunity to explain motivehopefully developing a new understanding of accountability Involving a circle of dialoguemoving from adversarial position to cooperation and understanding*". A set of values which sit comfortably with mediation. However within Youth Justice there remains the necessity for evaluation,

intervention and a contract, for successful completion. The alternative is a return of the youth to the adversarial court system, which is the antithesis of the intention of Youth Offending Mediation Panels.

5. What is the highest qualification you have in firstly mediation and secondly other disciplines?

I was conscious of the issue of transferable skills and residual ability, and interested to see if this transferability applied to this cohort of mediators. Also involved was the relevance of Rogers & Sanders (1997) research cited by Simon (2002) which demonstrated that the only issue that significantly affected outcome was experience.

This group demonstrated that 100% had been trained 'in house' as mediators. The quality of such training is somewhat indefinable and could provide the substance for further work. A reasonable assumption gained from alternative questions is that the standards were variable over the three organisations.

Alternative qualifications demonstrated that 50% had degrees and within that 50%, 10% had multiple qualifications to include higher degrees. It however must be remembered that because absolute numbers were small, 10% represents one person, it distorts the results. 30% presented with no qualifications, while 10% had qualifications to diploma level, and 10% had certificate level qualifications. Entwined with this is the 'voluntary issue', and the reasons why people undertake voluntary work. It would appear from my anecdotal conversations with volunteers that the reasons are various, and range from altruism, to 'looks good on the CV.', to placing oneself in a good position to get a job. From that perspective the range of qualifications, combined with a relatively low level of mediator experience, might indicate that an undefined percentage are seeking this route as a means to employment, not necessarily as a mediator. The clients are to some extent the by-products in this arena.

6. How long did your initial training last?

The intention of this question was possibly to establish a linkage between duration and quality. It is a very tenuous link, but the reasoning was that an organisation who only provided 1 days training was less interested in quality than one who provided 1 week; given that no prior mediation qualifications or experience were required of the voluntary mediators.

60% of this group identified initial training as having a duration of 8 days (40hrs).

30% a duration of 6 days (30hrs), and 10% a duration of 2 days (10hrs). This would appear to be a reflection of volunteer status, in that compulsory attendance was required but not always a necessity. Arguably if workers are not being paid, it becomes more difficult to inflict draconian rules and standards. However it would appear that some of the training was highly satisfactory.

7. Are you required to attend ongoing training courses?

The thinking behind this question evolved from the belief that arguably education should not be something one does for a very short period of time. It should be an ongoing commitment for a professional person, or someone in a position of supporting others. Technology and ideas are in constant flux, and there is a need to stay 'sharp' and informed. Hence the need for ongoing professional development, in this case demonstrated in the form of 'training courses'.

Within this group of people 80% identified a requirement on the part of the organisation for ongoing 'updating'. However 20% stated that they were not required to attend, which seemed odd, given that there should have been a more uniform response. They were either required to attend, or it was not compulsory. Upon reflection I decided that my question should have been worded as in, are you required to attend, followed by, do you attend? I suspect the voluntary aspect again impinges into this situation; in that if individuals are working without payment it is difficult to enforce rules without fear of labour being withdrawn. A situation which arguably places standards in a moral dilemma, especially if the individuals are working quite well and no complaints are received.

8. How often are you required to attend courses?

This question again emerged from the belief in professional development being a positive activity, with the need to update at regular intervals, and is clearly linked to the last question.

60% within this group identified a requirement to update every 6 months, while 20% stated a need to update every 12 months. That would account for the 80% who identified in question 7 a requirement for updating. 10% identified no requirement for updating and 10% an ad hoc requirement, again suggesting that element of flexibility.

9. What do you see as the most important goal of the mediation session?

The question sought to identify quality of practice, as well as quality of training, while appreciating that value systems are likely to be somewhat variable, and the context of the mediation may affect the process. There were eight options, to be ranked in order of importance.

Settlement with agreement. 60% saw it as taking 2nd position of importance within the mediation session, while 40% saw it as taking 3rd position of importance. Clearly this issue is seen as a highly significant aspect of mediation within this group of mediators.

Fairness and impartiality. 50% saw the issue as 1st in order of importance, while 20% saw it as 2nd in line of importance, while a further 10% saw it as 3rd in line of significance, and 20% as 4th in order of importance. I have to admit to finding 20% of the number finding it as 4th in order of importance quite alarming, as it could be argued to rank as second only to confidentiality in significance. Richards (1997:573c) sees it as "fundamental to the role of the mediator". However again the numbers are very small and may not be representative of a larger group. Equally in no way was this a randomised approach. The group was in many senses self selecting, thereby arguably affecting the results.

Reduction in hostility. 10% saw this factor as 4th in line of importance, while 60% saw it ranking as 5th in line of importance, while 30% saw it as in 6th position of significance. 90% of these respondents saw reduction in hostility as not ranking within the four most important goals of mediation. While it is clearly desirable in an ideal world, they like Richards (1998:b.) saw it as a issue over which they had limited control.

Providing a forum for parties to express themselves. 30% saw this as primary and of 1st importance. Maybe the input of Restorative Justice Panel Members felt this to be of significant importance to victims. 30% of this group saw it as of a 3rd level of importance. Clearly these mediators saw a forum for expression (clients having their say), as of real significance.

Saving money/ reducing court work- load. 100% of respondents saw this as of least importance of all eight issues identified. Saving money and reducing the court work- load are clearly an issue, but not for these mediators it would appear.

Fair outcome to both parties. After distribution of the questionnaire I wondered if respondents would be confused by fairness and impartiality of the process and a fair outcome to both parties; which from my perspective were very different questions. However the answers were very different, so I will presume understanding. 10% saw it as of primary importance, 10% saw it as of 3rd importance, 30% as 5th in line, and 20% as 6th in order of importance.

Arguably if the parties are in agreement, and the situation is client led, then maybe a fair outcome in legal terms may be of secondary importance to a satisfied client. There was clearly some division of opinion between respondents as to its importance.

Confidentiality. 70% of respondents identified this issue as of first importance in conjunction with other factors, which registered equally eg. fairness and impartiality. Within that 70%, 30% identified confidentiality as of first (singly) importance. The remaining 30% of the respondents saw confidentiality as 2nd in line of importance. Confidentiality was clearly a leader, with impartiality and fairness being rated as either equally important, or only secondary to confidentiality

Legal rights of individuals not infringed. Out of eight possible positions 60% of the respondents placed the issue in 7th position of importance, and 20% placed legal rights in 6th position of importance. Arguably these mediators did not see their role as reflecting legal significance. Maybe this is a reflection of context. None of these respondents have a legal background. Restorative Justice Community Panel Members appear to have a clear agenda. This does not appear to impinge on legal rights, beyond the obvious rights of the child, the rights of the victim and the right for all present to be heard. Maybe neighbourhood mediators do not see legal issues as part of their remit. Clearly the legal rights of individuals are not seen as an issue with this group, though it clearly has relevance and importance.

10% of respondents however perceive legal rights in 4th position of importance and 10% in 5th position. Spurin (2002) argues the importance of legal rights when the participants have no legal representative.

10. Do you have a Code of Practice /Guidelines?

The intention of this question was to establish awareness of Codes of Practice in relation to mediation behaviour and best practice.

100% of the respondents identified that they had no Code of Practice. The subdivision within the question however identified 60% had guidelines, and comments included on the questionnaire stated that the remaining 40% had general policy statements.

Arguably as Mediation UK is affiliated to all these organisations it is somewhat worrying that these voluntary mediators did not appear to have possession of a code of practice. (see appendix (Mediation UK Code of Practice).

11. How useful do you find a Code of Practice or Guidelines in conducting your practice?

The intention was to establish the degree to which respondents found Codes and Guidelines. 50% identified guidelines as not that helpful, 30% as helpful and 20% as very helpful. Clearly they have a place of usefulness, given that no one found them actually unhelpful the comments added to the questionnaires proved interesting. One respondent said "I rely on my prior professional experience, though less experienced persons might find it helpful". Another respondent stated "Watching, being a part of, and doing the job is the most helpful and the way I have learnt most".

12. How satisfied are you with the supervision and the support from your organisation?

Arguably support is a significant element in retaining workers (especially volunteers). It is an important element of supervision which is critical to the maintenance of high standards. 50% of the respondents identified a mid range level of satisfaction with 10% being very satisfied. However that left 30% who were very dissatisfied at the extreme end of the linear of possibility, and 10% who were moderately dissatisfied.

Hence only 10% were very satisfied with the supervision and support provided. Arguably that has serious implications for retention, which reflects in experience, which emerges in quality encounters and satisfactory outcomes. Perhaps it is unsurprising that retention rates are so poor (Hughes and Waddington 2001)

13. Do you consider the levels of supervision to be – options?

This question was a clear link to the two previous questions reflecting the same principles. 60% identified a non existent level of supervision. As supervision could be perceived by some as assessment, which is viewed negatively, maybe the

strategy is not to frighten the unpaid workers? However that cannot be good for standards. 20% identified that there was too little supervision while 20% felt that the level of supervision was 'just right'. Overall 80% of this group of mediators identified severe deficiencies in supervision, which has severe implications for standards of practice.

14. How often do you receive supervision?

60% identified no supervision. 30% identified that assessment took place, but not in an overt manner. The assessment was "via an underground system of perceived performance". There was no formal supervision and feedback. 10% identified that supervision and feedback occurred after each session. Again lack of support and supervision will have implications on standards and retention of volunteers.

15. What is the format of your supervision?

90% of the respondents were unable to answer the question, given that supervision did not occur, and in the 30% of situations where it was perceived to take place no formal system of feedback existed. One respondent commented "If we were supervised all the points identified in this question would be important". 10% of respondents identified that supervision involved discussion with the supervisor who was not present during the mediation, plus completion of an evaluation form rating the mediators perceptions of the session. Arguably that would not meet high standards of supervision. By any scale of measurement the level and quality of supervision was highly unsatisfactory. Richards (1998:106. c.) sees supervision as supportive of "the provision of a consistent mediation service, built by a collective search for higher standards", whereby the mediators thinking is constructively challenged and support is provided to ensure a quality service.

16. How do you perceive your skills – ranking and ability?

100% of the respondents perceived all the identified skills as of high importance, which was remarkably positive.

From the perspective of their grasp of those skills 60% believed that they achieved 100%. Of the remaining 40%, 20% believed they achieved 100% in communication and interpersonal skills, while the remaining 60% of the 40% demonstrated some uncertainty in levels of intellect, self awareness and management skills.

Overall a remarkably confident set of individuals it could be argued. Maybe mediators need to be confident to enable them to manage people and situations. However there is a great awareness by the author that the emphasis is upon the perception of skills. Reality may well be 'a different ball game'.

17. Do you think you should have subject knowledge of the subject area of the dispute?

100% of respondents identified that they did not require subject knowledge of the dispute to function effectively. One respondent noted " I do not necessarily need to be an expert on the subject, just an 'expert' at mediating, but I must have knowledge to deal with the situation effectively. That knowledge can be gained from the client and or the documentation. Perhaps this is a reflection of the context of the mediation.

18. Do you think having a basic legal knowledge is an advantage in facilitating the mediation?

100% of the respondents identified that they did not think it an advantage, to the point of being completely unnecessary. One respondent commented " It is not my role to make legal decisions".

19. Do you think all mediators should be compulsory regulated?

80% of respondents considered the answer to that question to be no. 20% considered that regulation would be a good idea. 10 % identified that their organisation was affiliated to Mediation UK, while the remaining 90% were not affiliated to any mediating body. Given the nature of the one organisation – community youth offending team panel members, they would probably consider themselves to be covered by the criminal justice system, as they are indeed a part of that organisation. How well that situation supports them in a mediating capacity and how well it controls standards is debatable.

20. What type of mandatory regulation do you see as most beneficial to effective mediation?

50% of respondents said none with an adherence to the present system. 30% perceived that a central umbrella body overseeing mediation would be a positive advantage, while 20% saw that specialised regulation e.g Mediation UK could be a positive benefit. One respondent noted that a central governing body could have problems regulating volunteers, consequent to the insubstantial time and commitment many of them gave to volunteering.

21. How do you evaluate your practice?

40% of respondents identified they do not evaluate their practice. 30% identified that peer feedback provided evaluation. 10% identified written reports as an evaluatory mechanism. 10% noted client feedback as an evaluatory tool. 10% identified that supervisor feedback formed an evaluatory mechanism.

When asked to identify how often this evaluation occurred 40 % stated never. 40% stated each session and 20% said occasionally.

It would appear that the three organisations have different or no system for self evaluation of practice in place, hence a level of mild confusion over the responses. Writing reports is something they all do at one level or another and self evaluatory report writing verses report writing has confused the issue I suspect. What is clear is that self evaluation of practice is not being undertaken in an overt manner by all mediators; which is arguably a beneficial practice.

22. What is the most significant problem affecting the quality of the service that you provide?

30% of respondents identified a problem with supervision.

20 % identified insufficient or inadequate training

10% identified a lack of funds as being problematic

10% saw a lack of awareness of the potential of the mediation service as a drawback

20% perceived there to be no problem

10% identified the transience of volunteer as problematic

Additional Comments included

- Inadequate administration
- Lack of continuity of mediators with clients
- No evaluation of sessions
- Lack of support

23. Identification of gender

Gender balance was noted to be 3 males and 7 females.

SUMMARY OF MAIN FINDINGS

There was:-

- Difficulty in retention of volunteers, resulting in a continuous flow of inexperienced people undertaking mediation. Average retention rates were quoted as having a duration of three months, but information literature identified the

service as using professionally trained volunteers.

- A generalised lack of awareness of the presence, purpose and role of mediation, by professionals and the public, resulting in poor uptake.
- Inadequate funding resulted in insufficient money, even for the provision of adequate promotional leaflets.
- Supervision was minimal, to non-existent, in a formal setting. Supervision that did exist was arguably open to criticism.
- No volunteers held qualifications in mediation.
- All mediation training was 'in house'.
- Problems with Restorative Justice Mediation were minimised by a professional approach from management, who were experienced, academically qualified, and had a clear perception of the requirements, both interpersonal and legal.
- There was a perception by the volunteers of being undervalued.
- Overall women volunteers outnumbered men.
- Role conflict, mediator versus citizen, was noted in relation to Restorative Justice Mediation.

Conclusion.

I came to Alternative Dispute Resolution and hence to mediation via an uncertain path, being unsure as to its merits, but was enticed by its promise of flexibility, adaptability, creativity, and the possibility of people taking control of their own lives and decisions. The impersonality and arrogance so much a '*natural*' element of the adversarial system, and the impersonality of the Criminal Justice System, had for me resulted in an alienation of that process, while being simultaneously entranced by the process of law and its inherent desire for justice.

There is the innate belief that justice will bring fairness. The Criminal Justice System applies the law, with no guarantee whatsoever of fairness; and the process is well beyond the control of the individuals who are its '*victims*'. Rather obviously the Justice System is a critical component of our functioning society, and provides the only reasonable and appropriate outlet for the attention of many issues. Menkel – Meadows (2001) identify the essential need for what is in the public domain to be dealt with by that appropriate route. However there are many other issues which are arguably not

of public interest, that fit more comfortably within a non –adversarial structure, and mediation provides the ideal medium for consent led personal involvement in the resolution of dispute.

Menkel-Meadows (2001:416) cites others when she says that *“It serves a metonymic function for understanding the tensions in the development of our legal system from formalism to realism, rule- based to standard-based laws, formal equality to substantive equality, law to equity, substance to process, statute to common law, uniform to particular and most recently, justice to care”*.

The fascination with mediation developed into a preoccupation with its standards and levels of professionalism, which set me on a path of discovery. Coffey & Atkinson (1996:110) identify that *“One of the most important disciplines for analysts is the ability to read the work of others as part of the required craft skills”*. Beyond identification of the toil and enlightenment of others, I attempted to identify issues of quality and perceived professionalism. At a local level I accessed the community mediation service via interviews and a questionnaire. I looked at quality issues with a view to ascertaining local standards.

The results identified in the previous chapter, and followed by a synopsis, were arguably unsurprising. They showed as the literature had suggested, a variability in standard, which ranged from excellent through to that of dubious quality. High levels of commitment and quality were demonstrated by some of the volunteers identified, while equally demonstrating professionalism and adherence to the principles of quality based criteria led training and practice. Some volunteers demonstrated an extension of their professional prior good practice, while adhering to the ethos and principles of mediation. Arguably leaving their profession at the door, while taking their professionalism in with them to that experience of mediation. Wilson (2002:67) considers *“becoming a mediator means not just undergoing a profound transition of role and understanding, but also possessing intrinsic personal qualities not easily susceptible to psychological measurement”*.

The use of interview and questionnaires did however attempt to measure in some limited way the quality of the local service. However there exists a very real awareness that the numbers are insignificant, and I am but demonstrating a process.

The findings were nevertheless interesting, demonstrating overall, that efforts had produced some success at establishing and maintaining standards. There existed limited awareness of the broader picture, beyond the immediacy of the working environment ie. linkages to organisations. There existed limited experience of mediation amongst many volunteers, consequent to problems with retention, and a perception that volunteers were not valued or appreciated for their quality and professionalism.

However it was clear from two of my interviews that quality does exist, and to a very high standard, with some volunteers. Equally it would appear there are those who ‘come and go’, finding sustained effort, albeit for an altruistic cause, not to their taste.

In the closing moments of this work I am reminded of the words of Antoine De Saint – Exupery cited by Campell (1995)

“A rock-pile ceases to be a rock-pile the moment a single man contemplates it, bearing within him the image of a cathedral”.

Mediation itself seems to me to be a ‘rock pile’ of different agencies, good solid stones, with the potential to be developed into an impressive structure, for the benefit of its users, if the appropriate vision and effort is applied.

My ideas for this work started as a ‘rock pile’ of possibilities and questions, with which I aimed to produce a structure. Perhaps my labour has not produced a ‘cathedral’, but I hope it no longer resembles a rock pile. My endeavours have certainly further developed my interest in non- adversarial resolution of disputes.

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MEDIATION CASE CORNER

Re Midland Linen Services Ltd sub nom Chaudry v Yap (2004) Lawtel AC9100146

An allegedly dismissed director sought a s459 Companies Act 1985 order of unfair prejudice. The company asserted an oral offer was made in 2002 and proposed mediation which the claimant had refused. A part 36 *payment in* was made in September and subsequently increased to £80,000 in October. The claimant accepted. The company sought a reduction in costs because of the claimant's asserted failure to accept the oral offer or to mediate. The court held there had been no serious engagement in (should this read commitment to?) mediation by the company. The claimant was the clear winner and thus entitled to recover litigation costs. CHSpurin

Thor Navigation Inc. v Ingosstrakh Insurance Co Ltd. [2005] EWHC 19

This case highlights the value of a multi-track approach to dispute resolution, litigating the elements of a dispute that require third party determination of rights and entitlement and negotiating/mediating those elements of the dispute that do not require a "*RIGHT ANSWER*". This is a technique frequently used by Dispute Review Boards in the US. Since quantum issues can significantly extend the trial process, apart from according the parties a degree of control over the outcome, it can also be cost effective. It also enables the parties to take into account broader concerns and facilitates continuing commercial relationships which a winner takes all approach could seriously damage.

Following agreement at case management, the parties to a disputed Marine Insurance claim submitted disputed issues in respect of construction of the policy and entitlement, leaving issues of quantum to be determined subsequently by mediation, in the event that the court ruled in favour of entitlement.

CHSpurin

CONSTRUCTION CASE CORNER

Collins v Baltic Quay Management Ltd [2004] EWCA Civ 1757

Collins, the contractor, carried out works under a JCT Minor works. With payment outstanding on the last interim certificate which effectively represented the last certificate, in the absence of a holding certificate, Collins served notice of termination and then commenced action legal action for non-payment. Baltic applied for a s9 Arbitration Act 1996 stay of action on the grounds that the dispute resolution clause provided for optional adjudication and or arbitration. Stay granted. Collins unsuccessfully appealed the stay on the grounds that once money became due under the contract, there was no dispute and thus no basis for arbitration. Upholding **The Halki**, the CA held that there was a dispute as to whether or not monies were due which had under the AA 1996 to be stayed to arbitration at the behest of an applicant. Principle cases on what is a dispute reviewed by Lord Justice Clarke. CHSpurin

CIB Properties Ltd v Birse Construction [2004] EWHC 2365

Birse contracted to build the Riverdale Data Centre for CIB. CIB terminated the contract. Birse submitted a final account and loss of profit for wrongful termination. CIB asserted to recover the additional cost of employing alternative contractors to complete the job. Two adjudication followed, the first held that the termination was lawful and the second held that on balance CIB was entitled to £2M+ compensation to cover alternative completion costs. Birse resisted enforcement on the grounds that 1) the dispute was too complicated to be decided by adjudication and 2) no dispute had crystallised 3) the adjudication was not fair or impartial because of a) ambush b) time constraints c) a slip that turned victory into a loss and 4) either the adjudicator should correct the slip or the court should instruct him to do so. The court upheld the decision.

By statute any dispute can be referred to adjudication. The adjudicator can request the parties agree sufficient time to do justice to the dispute. If the request is refused the adjudicator can resign. In the event sufficient extension was given by the parties.

However, **CIB v Birse** is authority for the view that if insufficient time is granted for the adjudicator to reach an informed decision, the adjudicator should resign. The decision would be susceptible to a successful challenge for a failure to resign in such circumstances.

Birse had itself been the perpetrator of an ambush in the 1st adjudication but was given 14 weeks before notice was served, so no ambush, even though the files were extensive. Birse attempted to prevent a dispute from arising by pushing for more information and a continuous stream of negotiations – which CIB took part in without prejudice to their asserted claims. Birse at all times were aware that a notice might be served and that whilst negotiations might stave off litigation, nonetheless a dispute had arisen – evident from the fact that they had engaged in a failed mediation. Continued post mediation discussions did not change the fact that there was a dispute.

Whilst the time constraints mean that the extent of the settlement process is proscribed, the adjudicator had sufficient time to reach a decision and the parties had sufficient time to put their cases and to counter the assertions of the other side.

There was in fact no slip, rather the adjudicator reached a valuation taking all matters into account setting off aspects of claims from counter-claims, so no issue of correction arose. CHSpurin

Emcor Drake and Scull Ltd. v Sir Robert McAlpine Ltd. [2004] EWCA Civ 1733

Letters of Intent : Appeal against award of costs. McAlpine unsuccessfully appealed against a first instance ruling that a letter of intent accompanying a sub-contract for limited M&E works created an obligation to carry out all the works. Payment for subsequent works was held to be payable as a quantum meruit. Costs incurred procuring an alternative contractor were refused.

McAlpine had been forced to commence a partial contract with Drake once the main contract commenced even though negotiations for the M&E contract were incomplete. Whilst projected works were likely to exceed £30M, an initial order for £1M was given. Drake tendered a letter of intent but McAlpine were not satisfied with its terms. The initial order was extended piecemeal to £14M. When McAlpine offered Drake the remaining £20M of works, Drake had declined to accept and McAlpine had terminated the works and procured alternative sub-contractors to complete the works at considerable extra costs.

This is not an uncommon situation and the case demonstrates the invidious position that this puts main contractors into, since essentially the sub-contractor calls the shots. On the other hand, since sub-contractors frequently lack bargaining power, perhaps this is a salutary warning that it is not before time that those engaged in the construction industry should treat each other with respect and that co-operation and the best interests of the project and the industry should prevail. Failing that the only real beneficiaries will be the lawyers and the ADR practitioners.

Did I hear someone say “Sir, He doth protest too much?”

GPN Ltd. v O2 (UK) Ltd. [2004] EWHC 2494

O2 engaged an architect to conduct contract negotiations with GPN for a construction contract. GPN submitted an alleged dispute with O2 about the contract to adjudication and subsequently sought to enforce the adjudicator’s decision. Dismissing the enforcement application Kirkham J held that the architect was not the express, implied or ostensible agent of O2 and thus had no authority to conclude a contract. Since there was no contract there could be no dispute arising out of it that could be referred to adjudication. The adjudicator had no jurisdiction. CHSpurin

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