

Thoughts and Themes

STRATEGIC LANGUAGE USED BY MEDIATORS (AND NEGOTIATORS)¹

by John Wade²

Summary

This paper summarises ‘types’ or categories of linguistic interventions used by mediators (and negotiators). Then a chart of illustrations of these types of interventions is set out, from which mediators and negotiators can select for their toolboxes. Finally, empty charts are set out with a challenge to watch a mediation or negotiation and indicate which types of interventions are used.

Three Categories of Mediator Intervention – Directive, Reflexive and Non-Directive

“Most studies of mediator behavior have sought to identify the strategies and tactics used by mediators (Kressel, 1972; Sheppard, 1983; Wall, 1981). Kressel (1972) developed a useful way in which mediator activities may be categorized. He proposed that mediators can adopt three broad strategies: *directive, reflexive, and nondirective*.

Directive tactics involve “strategies by which the mediator actively promotes a specific solution or attempts to pressure or manipulate the parties directly into ending the dispute” (Kressel, 1972, p. 13). Reflexive tactics involve “behaviors by which the mediator attempts to orient himself to the dispute and to establish the groundwork upon which his later activities will be built” (Kressel, 1972, p. 13). Nondirective tactics involve “attempts at increasing the probability that the parties themselves, with a minimum of manipulation or suggestion from the mediator, will hit upon a mutually acceptable solution to the dispute” (Kressel, 1972, p. 13). Kressel presents these categories not as exclusive sets but rather as a convenient means of summarizing a large number of mediation tactics. It should be noted that a tactic may serve more than one strategy – e.g., caucusing may be used to pressure one party into agreement, to establish rapport with a party, or to educate a party to the impasse procedures (Kressel, 1972).

Mediation tactics that exemplify these three strategies have been frequently observed. As to directive strategies, it has been noted that mediators make compromise suggestions (Kerr, 1954), press the parties to make concessions (Stevens, 1963), suggest particular settlements (Perez, 1959), argue one party’s case to the other (Perez, 1959), mention the costs of disagreement (Stevens, 1963), discuss other settlements in comparable cases (Simkin, 1971), try to change the parties’ expectations (Douglas, 1962), make proposals (Pruitt, 1971), express pleasure or displeasure at negotiator progress (Douglas, 1962), and threaten to withdraw from the negotiation (Pruitt, 1981). As to reflexive tactics, it has been

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observed that mediators seek to gain the trust and confidence of the parties (Kressel, 1972), use humor to lighten the atmosphere (Karim & Peggnetter, 1983), deal with constituent problems (Kerr, 1954), take responsibility for concessions (Maggiolo, 1971), and assure each party of the other's honesty (Eiseman, 1977). As to nondirective tactics – in Kressel's terms those intended to “assist in the birth of a settlement” – it has been observed that mediators control bargaining structure and timing (Young, 1972), organize the agenda of issues (Douglas, 1962), control hostility (Douglas, 1962), educate the parties about the impasse procedures (Pruitt, 1971), and help the parties save face (Pruitt, 1971).”³

“Successful” Types of Mediator Intervention?

A mediator's function is to “facilitate” negotiation – to oil the process of discussion between individuals in conflict. There are a number of interventions which may assist the conversations. These interventions may be reflexive or practised during intake sessions. Predictably, the more experienced a mediator is, the more likely that (s)he will develop a repertoire of readily available interventions.

One definition of communication competence is “the knowledge of appropriate communication patterns in a given situation and the ability to use the knowledge”.⁴ There are accumulating empirical studies on utterances, words, sounds and body movement of mediators.⁵

Donoghue and Weider-Hatfield used the following questions to:

“...reveal the extent to which successful and unsuccessful mediators differ in their use of control, involvement, and consistency strategies. With respect to *control*, three questions are relevant.

1. Will successful mediators (those fostering an agreement) talk more than unsuccessful mediators as a means of sustaining control?
2. Will successful mediators prevent a disputant from talking over them more than unsuccessful mediators?
3. Are successful mediators more capable of controlling the level of language intensity than unsuccessful mediators?

Regarding the *involvement* strategy, two questions may be addressed.

1. Will successful mediators use shorter utterances than unsuccessful mediators as a means of providing the disputants with opportunities to present their views?
2. Will the disputing parties talk more to each other than to the mediator in the successfully mediated disputes?

Finally, with respect to the *consistency* strategies, the following research questions will be tested.

³ P.J.D. Carnevale and R. Peggnetter, “The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis” (1985) 41 *Journal of Social Issues* 65 at 67-68.

⁴ W.A. Donoghue and D Weider-Hatfield “Communication Strategies” in *Divorce Mediation in Theory and Practice* ed. J Folberg and A Milne (New York: Guilford, 1988) at 298.

⁵ *Id* Donoghue.

1. Will the successful mediators interrupt disputing parties on a more equal basis than unsuccessful mediators?
2. Will successful mediators manage the level of language intensity more equally between disputants than unsuccessful mediators?"⁶

Their study concluded:

“[m]ediators who successfully fostered an agreement between disputants

1. were better able to control the allocation of floor time among the disputants and the disputants’ level of language intensity
2. used shorter utterances in communicating with disputants in an attempt to increase disputants’ involvement and increase the information base
3. were significantly more consistent in interrupting disputants and in the kinds of language intensity selected by the mediator.”⁷

Set out below is a list of common interventions or “moves” with an example opposite each type of intervention or move.

⁶ Ibid p.308.

⁷ Ibid p.308.

MEDIATOR INTERVENTIONS OR MOVES⁸	
1. Mini lecture on conflict.	“You have only been separated for three months and it is quite normal for both of you to still be angry...”
2. Mini lecture on the negotiation process.	“In negotiations about several linked issues, it is often helpful to make an “if ... then” offer. For example “If you are prepared to consider a higher valuation, I would be prepared to consider a lower percentage.”
3. Develop rapport.	Particularly during private intake sessions listening, reframing, summarising concerns.
4. Suggest compromise solutions.	“You both want the children for all of Christmas Day. Is there some way of dividing Christmas Day and Christmas Eve so that you both have a special time with the children?”
5. Suggest a particular solution.	“Of the possibilities you have suggested, the only realistic one appears to be alternate weeks in each holiday, with the children phoning the absent parent regularly – perhaps every second night”.
6. Let parties blow off steam.!!!..... “So you’re both saying that what started as a good and loving relationship deteriorated into patterns of sniping. You each are bringing out the worst in the other?”
7. Require parties to face the mediator while speaking.	“Now Jane it’s your turn. I’d like you to tell me, not Bill, but me, what possibilities you think might be suitable in relation to the occupation of the house.”

⁸ These mediator moves have been adapted and expanded from PJD Carnevale and R Pegnetter, “The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis” (1985) 41 *Journal of Social Issues* 65.

8. Repeat areas of agreement.	“Having listened to you both it seems to me that you have already agreed on 3 things. Firstly, you are both good parents; secondly the children enjoy spending time with each of you; and thirdly, the house must be sold at some time - is that correct? Joe? Michelle?”
9. Focus on a particular issue.	“You lost me. I thought we were talking about question number 2 on the board. How are you going to organise the children’s week?”
10. Argue case for each side.	There are predictable arguments both for and against the sale of the business. The arguments for are..... The arguments against are.....I’m sure your lawyers can verify those standard arguments each way. So, what would a wise umpire do? Bill? Barb?”
11. Clarify needs for each side.	“So let me see if I understand you correctly David - you need 6 months to finish this building job; and you also need cheap and peaceful accommodation for that 6 month period?”
12. Frequent private meetings.	“The reason we are having these regular private meetings is that I find that privacy gives us all an opportunity to think clearly and to discuss concrete proposals.”
13. Mini lecture on dynamics and outcomes of similar disputes.	“It is normal for you each to go through a grieving process for any loss - including the loss of your marriage. The difficulty for all negotiations is that you may well be at different stages of grieving - one still very angry, the other further down the track”. OR “Don’t worry. Over 90% of these disputes settle by agreement. It is a question of whether you are ready to settle tonight, or in a few months time, closer to the door of the court.”

<p>14. Costs of disagreement.</p>	<p>“Obviously there are costs to disagreeing - costs in time, stress, loss of concentration, income foregone and money paid out. Do you each have a clear written estimate of the lowest and highest that your legal costs would be if you settled at the door of the court?”</p>
<p>15. What do you understand by “going to court”?</p>	<p>“One option, as you mentioned David, is ‘going to court’. I’d like to explore with each of you later what you understand by that phrase.”</p> <p>OR</p> <p>Can you each tell me now what the option of “going to court” involves - for example time span, documentation, time lost, meetings, expense, chances of getting an umpire’s decision?</p> <p>OR</p> <p>“It seems clear to me that before either of you choose that option of “going to court” you both need clear answers to these more particular questions. Do you each think you can get those answers?”</p>
<p>16. Mini lecture on loss of control.</p>	<p>“Don’t worry, only about 10% of these disputes get to an umpire’s decision. The question for each of you tonight is basically whether to settle tonight or to settle later.”</p> <p>OR</p> <p>“One of the benefits of mediation now is that you have control. As a dispute is processed towards the door of the court, you each progressively lose control as costs, attrition and time deadlines take over. At the door of the court, you will each be under intense pressure to agree in cramped quarters in a 45 minute shuttle negotiation between lawyers. So the question is again basically whether to settle now with control or later with less control.”</p>

<p>17. Simple issues first.</p>	<p>“I’d like you to start by suggesting possible methods for Marg getting to and from work each day, now that the Ford Falcon is unregistered.”</p>
<p>18. Restate progress.</p>	<p>“John, you are concerned that we are going over old territory. Well, correct me if I’m mistaken but it seems to me that tonight you have already identified 3 areas of agreement (up on the board) and 4 possible ways of valuing the business. Is that correct?”</p> <p>“If you’ve been disagreeing now for ...18 years - you will almost certainly take more than 2 hours to build some agreements”.</p>
<p>19. Express pleasure at progress.</p>	<p>“May I say that you’re to be congratulated on your negotiation skills. You have both shown restraint, despite the hurts of the past; and, you have both come up with several very constructive suggestions on how the children will move back and forth from Mum’s house to Dad’s house.”</p>
<p>20. Say they are being unrealistic.</p>	<p>“How realistic is it to expect a teenage boy to want to leave his neighbourhood friends every weekend?”</p> <p>OR</p> <p>“In my experience you can agree that teenagers will move from house to house every weekend, but the reality is they will buck the system, sleep in, want to go to local parties? How will you respond to that real likelihood?”</p>
<p>21. Strongly hold parties to the process.</p>	<p>“In mediation, the mediator is in control of the process; the parties are in control of the outcome. So it is essential that you discuss issues one at a time; not all jumbled up together. Now, Bill we already have 2 possibilities in relation to issue 1 on the board. Any others.....?”</p>

22. Bring in another mediator.	“As our next meeting will involve 3 grandparents, 2 teenagers and an aunt it would be helpful to have another mediator present. I have worked with before and would like her to be included. Do you have any objections to another facilitator?”
23. Suggest trade offs (what if).	(In private meeting). “Would you be prepared to make an offer in the following terms? “What if the sale of the house is delayed for ... months and I pay the outgoings during that time, would you be prepared to divide proceeds closer to my preferred percentages etc?”
24. Speak parties’ language.	“I suppose you have many friends who are farmers who are being forced to sell up because of the recession. You seem to be in the same difficult situation.”
25. Increase number of issues on the table.	“O.K., we seem to be stuck discussing the payment of the Bankcard debt in isolation. Let’s look at questions 2 and 3 on the board and see what possibilities you can suggest in relation to each of these.”
26. Reduce number of issues for discussion.	“You have identified 14 issues for discussion. Obviously in the time available tonight we can only discuss say 4. I am going to ask each of you which 2 you would like to discuss tonight.”
27. Prioritise issues.	Ditto.
28. Use late hours	“You have invested a lot of time and effort to get this far tonight. It is going to be difficult to get everyone together again. Do you want to keep going after a break for coffee?”

29. Keep parties at the table.

“Mark, you do have the option of leaving now. But my advice to you would be to consider all the other options before you choose the walk out option. There are certainly a number of other possibilities yet to be unearthed.”

OR

“Mark, if you take the walk out option now, what do you think Joanne’s lawyers and relatives will say? ‘There I told you so, Mark isn’t willing to negotiate.’ In my experience, it is wise to avoid that inevitable label.”

“Everyone has made considerable effort to get here tonight. It is going to be very difficult to assemble everyone again once the litigation engine starts. In my opinion you should **both** exhaust every negotiation possibility tonight before calling it quits. Let me summarise where we are

30. Coach how to negotiate.

“In negotiations, you can pluck a number from out of the air. But it is often more helpful if the method for calculating the number is explicable.”

OR

“In negotiations, it is important that neither party feels like (s)he is giving everything, and getting little in exchange. Bill has made a concession in relation to frequency of visits - can you suggest any methods of increasing frequency of phone calls in return?”

31. Change the parties at the table.

“I’d like to meet now with Joe, Jane, Mark and Mary in the next room.” “If you reach any agreements here, I need your commitment to sell that agreement hard back in the other room.”

<p>32. Adjourn to get more facts.</p>	<p>“You both have 3 pieces of homework. Please write these down. Firstly, the range of legal costs from highest to lowest if you proceed to a 3 day trial. Secondly, your lawyer’s advice on property percentages - highest to lowest with at least a 15% margin between. Thirdly, you both read this article on teenagers’ responses to parental separation.”</p>
<p>33. Private meetings with different groupings.</p>	<p>See (29).</p>
<p>34. Affirm mediator neutrality</p>	<p>“My job is to be absolutely impartial. If either of you think in any way that I am favouring one of you over the other, please tell me - either openly or in private whichever you feel more comfortable about. It is essential to help your negotiations that I am and am perceived to be impartial.”</p>
<p>35. Use silence.</p>	<p>..... (Someone will eventually fill the silence).</p>
<p>36. Threaten termination.</p>	<p>“We have been here for a considerable time. Issues 3 and 4 are still to be resolved. I need to be out of here by 10.30 pm. Can we make another time to reconvene?”</p>
<p>37. Work on saving face.</p>	<p>“I also have difficulty understanding the 3 different methods of valuing businesses, David - could you help me understand?”</p> <p>OR</p> <p>“If you negotiate by making extreme claims and creeping towards some middle position, there is a risk that one or both parties will lose patience. We need to increase the issues on the table so that there is more to give and take.”</p> <p>OR</p> <p>“If you feel like the negotiations will trigger your response of tears or yelling, at any time give me the signal and I will declare a break.”</p>

38. Control hostility.	“Jack, I’d like to interrupt there. The last interchange represented a series of accusations about past behaviour. Mediation is about you making decisions about the future. I’d like you both to concentrate on possible solutions for the future on issue number two.” (Plus various other strategies).
39. Take blame/responsibility for concessions/misunderstandings.	“Jane, could you please repeat that for my sake; I didn’t pick up the essence of your comment.” OR “I’ll have to change my question. The way I expressed it has obviously been misleading.” OR “Can you help me, I still don’t understand why it is so important to you - as it clearly is - to have the children stay with you every holiday period.”
40. Reframed/summarise regularly.	“I’d just like to pause again and summarise where we have progressed so far tonight. First, you each listened to one another express his and her concerns; I attempted to summarise these as follows
41. Confirmed trustworthiness/sincerity of both parties.	“You have raised a question whether Peter is really interested in settling tonight. I cannot breach confidentiality in relation to the substance of any private conversations I have had with each of you. But I can assure you, that in my judgment, there is no evidence of lack of sincerity or lack of interest in settlement. From my observation both of you want to explore every possibility of settlement now.”

42. Attempted to provide insights into the dynamics of parties' behaviour.

“You have both indicated that you have certain unhelpful and entrenched patterns of communication which you have been practising for 19 years. You are both concerned that that pattern will prevent a constructive discussion. “

“Part of my job is to pull you out of that unhelpful pattern which you feel trapped in. I will interrupt if it recurs too often.”

OR

(In private session) “It is clear to me that Jan feels very threatened when you open the topic of her job retraining. How can you avoid backing her into a corner? How can you avoid her closing down on **all** negotiation, because of her feeling so insecure about retraining.”

OR

(In private session) “I want you to practise making that offer to me Margaret. Yes, right now. We can write it out if necessary. In negotiations, the form of words is very important. Some loose words can cause unintentional offence and the substance of the offer is lost. Alright, can you make that offer to me now?”

43. Use humour.

“You get no lunch until we settle.”

44. Mini lectures on solving small parts of the complex dispute.

“Most negotiators want to ‘get to the bottom line’ quickly. But mediation is not like that - we have a saying that ‘slow is fast’. We will address possible solutions to small parts of your dispute - and then fit together pieces in the jigsaw. Please be patient even when we seem to be moving slowly.”

45. Casting doubt by questions to over-confident positional “experts”.

“If I understand it correctly, one or both of the (lawyers; engineers; accountants) is currently wrong – dramatically wrong?”

OR

“So one or both of the (lawyers; engineers accountants) will at some time in the future be apologizing to his/her client – I got it badly wrong?”

OR

“Can we delay the debates for a moment? Can we first define precisely how you are currently apart on the facts and on the law?”

OR

“It may be that the current inaccurate legal advice is based on garbage in-garbage out. Why are you currently giving such different advice?”

OR

Add to 4, “I’d like to take a break and ask lawyers X and Y to meet (with me) to define exactly the major current differences on facts, evidence and law; or on these 3 issues.”

SELF EVALUATION (or OBSERVER) EXERCISE

MEDIATOR INTERVENTIONS OR MOVES	<i>Frequency of Use</i>				
	0 - Never	1 - Occasionally	2 - Regularly	3 - Frequently	4 - Always
	0	1	2	3	4
1. Mini lecture on conflict					
2. Mini lecture on negotiation process					
3. Develop rapport					
4. Suggest compromise solutions					
5. Suggest a particular solution					
6. Let parties blow off steam					
7. Require parties to face mediator while speaking					
8. Repeat areas of agreement					
9. Focus on a particular issue					
10. Argue case for each side					
11. Clarify needs for each side					
12. Frequent caucuses					
13. Mini lecture on dynamics and outcomes of similar disputes					
14. "Tell me about...costs of disagreement"					
15. What do you understand by "going to court"?					
16. Mini lecture on loss of control					
17. Simple issues first					
18. Congratulate/restate progress					
19. Express pleasure at progress					
20. Say they are unrealistic					
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