

## Linguistic Parameters of the Mediation Discourse

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**Abstract:** This article focuses on the specific linguistic parameters of the mediation discourse. The study of intertextual interaction between different discursive formations contributes to the understanding of the inner structure of mediative speeches and statements. An in-depth study of the linguistic side of the legal mediation process will help to elaborate more efficient strategies for solving conflicts and making mediation process successful. Such parameters as subjectivity and terminological density are introduced to shed some light on how different participants of mediation construct their discourse, whether they use neutral or highly specific lexical material, whether they are passive, impartial or active, etc. This article addresses the need for research on discourse characteristics for further analysis of specific mediation strategies used in different types of alternative legal dispute resolution.

**Key words:** Discourse • Mediation • Terminology • Terminologization • Intertextuality • Subjectivity • Discursive model of mediation • Discursive formation • Discourse strategy

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### INTRODUCTION

The field of alternative dispute resolution emerged in response to the need for finding alternative way to solve conflicts as the courts were overloaded and could not handle all the cases. Besides qualitatively some conflicts did not fit into the boundaries of the existing judicial system. In comparison to a judge or an arbiter, a mediator does not pass any judgments but impartially facilitates dialog between the two parties involved in the dispute and it is up to them to come to an agreement [1].

A mediator assists in developing options for and achieving a mutually agreed resolution but he does not make a decision for the parties. Now mediation is a popular way of resolving disputes between people, organizations, states or any other communities [2]. Success of mediation depends greatly upon such factors as a) understanding of the goals of mediation by the conflicting parties, b) adequate strategies used by participants, c) individual communicative behavior. Since mediation is a discourse-centered practice, an in-depth analysis of the linguistic side of this process seems critical for streamlining mediation and making it a more effective alternative to court proceedings [3].

The analysis of the discourse of mediation is impossible without a clear definition of its general and specific parameters. In this article we have made an attempt to give a description of some specific parameters of the discourse of mediation (MD) such as terminological density, intertextuality, discursive formations, subjectivity. We hope that it will help to move the research on ways of handling the complex interpersonal dynamics during mediation to a more advanced level.

Let us consider the individual parameters of MD in the following sections.

**Terminological Density:** We base our further considerations on the provision that MD implements specialized discourse models to achieve specific purposes, therefore, a considerable part of its lexical component is represented by terms. Mediation terminology is an open set of technical words or expressions which denote the core concepts of the mediation practice and are used in mediative texts, documents, during the process of discussion of the case with the parties involved, in the legal dispute and decision making. For example, different mediation styles use different terms for denoting official request for providing

mediation services (*claim, application, appeal*). Mediation texts are also characterized by specific terminology used for designating the participants of the mediation process. E.g. “The parties have agreed to the appointment of Mr. N to serve as mediator in this dispute. Party A and Party B understand that the mediator is an independent contractor and not an agent or employee of USA&M and is not serving as the attorney for either side. The mediator may not have any financial or personal interest in the outcome of the mediation and must disclose any circumstances which create a presumption of bias or cause a delay in the mediation process” [4].

However, it is worth noticing that the MD, though being a part of the legal discourse (LD), differs from other legal discourse practices in respect of terminological density. The language of the LD is extremely precise, technical and defies misinterpretation, so terminology is an essential part of legal texts and it is hardly possible to paraphrase or omit terms in LD. B. Shartel remarks that “the lawmaker sends his message over wide reaches of space and he hands it down through indefinite stretches of time. These facts require that the lawmaker, above all speakers, transmit his message in a form which cannot miscarry or be lost to view” [5]. By contrast, the process of alternative dispute resolution is less formal than a standard process in the courtroom because of the variety of informal verbal means implemented in mediation procedures – from conflict discussion at a mediator’s office to on-line negotiations which do not include strict official regulations for statements and speech formulae. Therefore quantitatively terms are more frequently found in traditional legal texts.

We compared the terminological density parameter based on the following two extracts: a mediator’s opening statement (#1) and a judge’s speech during a preliminary hearing (#2).

#1 “If for any reason either you or your ADR provider feel that a separate meeting is necessary for any reason, such as the need to address or unearth a confidential issue in depth, each of us can request such a meeting. Now, let’s review and sign the agreement to mediate and thanks again for your participation. We believe that your effort will be rewarded” [6].

#2 “[Mr./Ms.] [name of defendant], you have the right to make the prosecution prove in a preliminary hearing in this court that you probably committed the offenses with which you are charged. Do you understand that right? Do you give it up? As part of this waiver, do you also agree that the prosecutor may accuse you of the

following additional offenses if this matter is not resolved before trial? Do counsel for both parties agree to the waiver?” [7].

As can be seen from (1) and (2), terms occupy a greater part of the legal text. The complexity of certain legal concepts demands a corresponding complexity of the technical vocabulary, a great many qualifying phrases may be required in order to express a concept with the necessary precision. These two extracts also differ in respect of terminological density, which refers to the degree to which a linguistic unit is related to a domain-specific concept. The parameter in question is usually calculated based on term frequency and the bias of frequency [8].

S. Shelov suggested one of the simplest ways for calculating terminological density by summing the indexes of its subterms [9].

- If a term is a composed one and can be divided into subterms, its terminological density is calculated by summing the corresponding parameters of its subterms [8]:

$$T(\text{Private ADR provider}) = T(\text{Private provider}) + T(\text{ADR})$$

- If a term is motivated and its meaning can be derived from the meanings of other terms, the terminological density is calculated by summing the corresponding parameters of all the terms (including subterms) that are necessary for bringing out the “motivation” of the original term [9]:

$$T(\text{Damages}) = T(\text{money}) + T(\text{compensation})$$

Such calculations have come under serious criticism because even though they give a good approximation of terminological density, still they do not directly reflect the parameter in question because these calculations are based on superficial statistics [8].

Legal mediation is a relatively new form of conflict solving, therefore such a linguistic process as *terminologization* is common for mediation discourse. Terminologization is the process by which a general-language word or expression is transformed into a term designating a concept in a language for special purposes (LSP) [10]. In addition to technical terms and expressions, the lexis of the mediation documents is also characterized by the use of common words with specialized meanings [11].

Table 1: Terminologization in mediation and legal terms

Word/Phrase	Primary Meaning	Meaning of a Word as a Mediation/Legal Term (after terminologization)
Damages	Injury or harm that reduces value or usefulness	Money that the losing side in a lawsuit must pay to the winning side to make up for losses or injuries.
Person	A human being (man, woman, child)	An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government;

The lexical component of the discourse model of legal mediation is based on neutral vocabulary as well as on mediation terminology (the latter includes general legal terms, psychological terms). All of this gives us reasons for considering “terminological density” as one of the important specific parameters of the discourse of mediation.

**Objectivity and Subjectivity of MD:** The object of MD is alternative dispute resolution (ADR). At the present stage of development ADR is realized by means of a set of specific discourse practices, which give different interpretations of the specific MD features. As it has been observed above, MD is closely connected with LD practices and, as a result, at the ontology-level falls into a great number of conceptual models illustrating various forms of ADR (on-line or real mediation, round table talks or closed negotiations).

According to E.A. Kozhemjakin, subjectivity (or presence of discourse participants) is a universal discourse parameter. Traditionally discourse involves at least two participants – the producer (speaker) and interpreters (discourse listeners) [12]. E.A. Kozhemjakin believes that discursive practice involves reflective activity of its “authors” and in this respect the discourse is directly related to its subject. These are not full-scale dialectic relations, as the subject of discourse has sufficient freedom to follow, interpret and transform the rules of discourse [12].

Although there are always *three subjects of MD* (two parties and a mediator), the subjectivity of MD is still a very peculiar issue for linguistic analysis because there can be a great number of possible combinations of parties representatives:

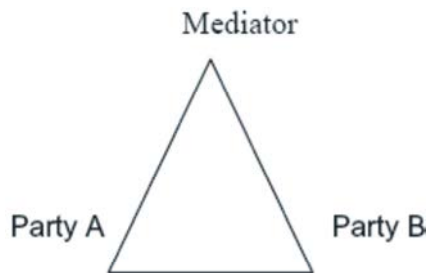


Fig. 1: Above illustrates the general subject structure of mediation discourse

- People involved in a conflict;
- Attorneys;
- Official representatives (relatives and colleagues).

The mediator is always an individual, while the parties can be represented either by one person, attorney and relative or by a group. Therefore, we classify the parties of MD in the following way:

- Conflicting/ non conflicting participants;
- Voluntary/ court-ordered;
- Individual /group of participants.

Voluntary participants are parties which agree to participate “in good faith and believe that a mutually acceptable resolution can be accomplished with assistance from a neutral mediator” [13]. These are usually *non-conflicting participants*. Voluntary participants also tend to use pragmatic and cognitive strategies aiming at smoothing conflicts and reaching resolution as soon as possible.

Participants of MD are active and passive at different stages of mediation process, e.g. the parties are passive during the mediator’s opening statement but become active when the actual discussion starts. Discussion is the vital part of the mediation process and, while MD is unfolding, the parties begin to use different cognitive, communicative and pragmatic strategies for supporting their position and interests.

Every participant of MD carries out a certain role which can't be changed during the “discourse unfolding” (e.g. a mediator always stays neutral and cannot get involved and start defending the interests of a certain party). The full description of mediator’s competences is given in one of the main mediation documents, the “EUROPEAN CODE OF CONDUCT FOR MEDIATORS”. These can be summed up as follows.

- Mediators must be competent and knowledgeable in the process of mediation.

Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

Table 2: Behavior of the participants during the “unfolding” of MD

Participants of Mediation	Opening Statement	Mediator works with party A	Mediator works with party B	Discussion	In case of a conflict*	Decision making
PARTY A	-	++	-	+-	+∕	+∕
MEDIATOR	+-	+-	∕	+-∕	+∕	+-∕
PARTY B	-	-	+-	+∕	+∕	+∕

Active position +

Passive position -

Operating with discourse strategies ∕

Neutral -

Both variants are possible (according to the unfolding of the discourse) - ∕

\*Applicable to court-ordered (non-voluntary) parties.

- Mediators must at all times act and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation [14].

The parties, however, *are not impartial*; they try to benefit from meditative decisions, so they can use manipulative tactics, denigration and implicit or explicit intimidation to suit their individual purposes. Their speech is mostly imperative while a mediator stays neutral. Below, we give a phrase expressing an appeal to use strategy X, as it could be said by different participants of MD:

- Party A (command): “Strategy X is going to be implemented.”
- PartyB (obligation Statement): “We need to try Strategy X.”
- Mediator:
  - “Why don’t we try Strategy X?”
  - “Do you think strategy X would help us in this situation?”
  - “Perhaps we should take a look at one of these alternatives.”
  - “I wonder if we could run into any roadblocks on our current course?” [15].

This example shows that a mediator avoids direct imposing of certain ideas, but accepts and respects other opinions, although he is not obliged to share them.

**Discourse Formations and Intertextuality:** We view the structural parameter of DM in two dimensions. First, there are certain discourse formations that make the realization of DM possible. The second point is that structurally DM is an “unfolding model” that appears to correlate with the various stages of the mediation process (cf.: the opening statement, introduction, discussion, etc.).

According to M. Makarov, discourse formations make the adequate functioning of communicative and cognitive components of the discourse possible. The communicative component includes all possible positions and roles which discourse provides to speakers (participants). The cognitive component comprises the knowledge structures as verbalized in a discourse message. The principle of “family similarity” is relevant for discourse [16]. The formal resemblance of legal discourse practices reflects to a great extent the idea of “discourse family similarity”.

Stability and mutual permeability of discourse formations are provided by another discourse parameter – *intertextuality*. Various intertexts (for example, all types of mediation texts including regulations, establishing rules, texts of statements, performances and contracts) participate in the processes of discourse derivation and mutual loan. Considering the “intertextual interaction” parameter in relation to the mediation discourse, it is possible to draw a conclusion that MD is remarkable for its ability to be an intertextual donor and to participate in intertextual investment. Below, we introduce an example with borrows from arbitration texts.

“ATTORNEY’S AGREEMENT FOR MEDIATION

On behalf of \_\_\_\_\_, I request that \_\_\_\_\_ act as mediator in the above case and agree to be bound by the Rules of Mediation, which is attached to the Order of Referral for Mediation entered in this case” [3].

Intertextual interactions of MD are explicitly illustrated through multitudinous loans of arbitration, psychological and court vocabulary and patterns which are used in mediation texts.

CONCLUSIONS

In this article, we have explored several specific linguistic parameters of the MD.

Following M. Makarov (2003), we have assumed that the discursive parameters are vital characteristics of a discursive model. They let us distinguish between adjacent discourses and give us a material for further analysis of meditative strategies used in different types of alternative dispute resolution.

In particular, we have focused on such parameters as terminological density, intertextuality, subjectivity, discursive formation.

First, we assumed that mediation discourse differs from other legal subdiscourses in respect of its terminological density, as court and arbitration language is more precise, technical and formal. Terminology of MD is mostly loaned from other LDs. However MD is characterized by heavy terminologization from the regular literary vocabulary.

Second, we have discovered that the structural parameter of MD can be considered in two dimensions – as the process of discourse “unfolding” and as a structure consisting of several discursive formations.

Third, we have observed that DM acts as an intertextual donor for some legal subdiscourses, but still it loans more than shares with other discourse models. And finally, we have characterized the participants of the mediation process, classifying them according to such criteria as a) active or passive behavior, b) voluntary or court-ordered, c) individuals or a group of representatives, d) conflicting and non-conflicting parties.

Hopefully, this research will contribute to the elaboration of more efficient strategies for solving commercial and social conflicts.

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