Mediator Strategies and Tactics

by Genevieve A. Chornenki[i]

This article is intended to provide candid, informal and somewhat irreverent insights into mediator behaviours and assumptions that prompt them. It has been written with the generous assistance of several Canadian mediators who work in many civil contexts including personal injury, employment, debtor/creditor and professional negligence. Some have practised mediation for over a decade.[ii] I refer to them as "participating mediators". Here, we reveal our strategies and tactics – what we are really up to. We do this to promote a deeper understanding of our work and to enable counsel to work with us more cooperatively and effectively.

The words "strategies" and "tactics" are not used here in the military sense, as aspects of battle. Nor do they connote trickery, cunning or ploys. This is not because we are morally superior, but because we are usually doing our best to diffuse a good fight and make no secret about it. In lofty terms, we "transform" adversarial contests with binary outcomes into participative, problem-solving clinics with multiple options. At least, that is our ideal.[iii]

The mediator's strategy is her mission or goal statement, the big-picture philosophy that sets the parameters of the process. A mediator's strategy influences her tactics, those individual activities that contribute to the over-all goal. A mediator needs a well-defined strategy as a touchstone to sustain her in the frequent turbulence of mediation.

There is a limited range of mediator strategies, with caricatures at each extreme. At one end are mediators who drive deals. These pure pragmatists unambiguously define settlement as *the* goal.

At the other end are mediators who foster personal, moral growth without regard for tangible outcomes.[iv]

The majority of mediators fall mid-range.[v] They view mediation as a means to make informed decisions about whether and how to settle. Success is a range of outcomes from a complete deal with reconciled relationships through to a wisely chosen trial. You will see what I mean from how the participating mediators describe their strategies:

> The "mission" or "goal" or "objective" (used interchangeably) of mediation is to assist in creating an environment in which all parties are able to make a (subjectively) good decision, all things considered.

> Until proven wrong, I assume that the parties are there because they want a deal and my job is to help them find that deal. It is as if they are in a room and they want out. My job is to help them find the exits.

> As a mediator, my job is not to create a deal. My job is to uncover one if it exists.

> I frame the mediation process as a decision-making process, not a settlement process. The goal of a mediation, to me, is to give the parties better information so they can decide whether to settle or proceed. My role, in concert with that of counsel (if there are counsel), is to get the best information out so that the clients can make an informed choice.

> Getting a deal is a big picture strategy but it is not my overriding one. Mine is to have

> each party make an informed decision about settlement. That means I help them hear each other, help them understand their own and the other's interests, and see all possible ideas for settlement. Then, I don't care if they settle.
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> My job is to help the parties to determine whether and how they might settle. It's not simply about getting a deal, although that is often important. The parties have to see if they can create something better than they currently have. If so, they'll settle. But, if the status quo remains appealing, they will stick with that, and rightly so.

Note that these strategies are infused with values. Rational, individual decision-making is revered and swaddled in a strong urge "to help".

In the service of mediator strategies, there are countless tactics with both pragmatic and psychological aspects. Tactics are how we bring about our strategy. We perform them directly and indirectly, verbally (through questions and statements) and non-verbally (through demeanor and actions).

I have grouped the participating mediators' favourite tactics into categories, together with commentary and anecdotes. Like the Deadly Sins, these categories number seven. None of them are rocket science, and if you expect some dirty secrets, you may be disappointed. On the other hand, as experienced mediation counsel or a mediator yourself, you may take comfort in their familiarity.

Tactic #1 – Having Tea

A trial may not be a tea party, but to some extent mediation is. Mediators have to survey the

scene, get to know who is at the party and minimize anxiety. While not everyone will have a good time, we have to encourage them to stay until the cake arrives. The tactic most frequently mentioned by participating mediators was “making people comfortable” and "establishing rapport". In fact, one mediator mentioned it as his “primary” tactic, from which all else flows.

Mediators establish rapport in many ways ranging from social niceties (What about them Jays, eh?) through to making educated guesses about the players. Much depends on the available time, problem, people or context and the mediator’s personality.

One outstanding mediator (who we would chose as *our* mediator) routinely sees parties independently first, if only briefly. She hears their stories and permits them to connect with her, a stranger, one-on-one without the pressure of the other party’s presence. The goodwill she builds is money in the bank for later.

Other mediators start to get a feel for who is involved and what is important to them by reading briefs and background documents. From these they deduce the parties’ interests. (See Tactic #3.)

The notion of rapport may strike you as hot air, but nothing could be further from the truth. The mediator needs a kind of authority. If she is dismissed every time she opens her mouth, she will not be effective. Her opinions have to count for something, be received as credible. One participating mediator explains, "I try to connect with the parties, find ways to get them to identify with me and care what I think. *This increase is my ability to influence them or at least to earn a hearing from them.* If it is apparent to disputants that you are sincere and motivated to help, you can overcome any number of missteps procedurally or technically and still be effective.”

Tactic #2 – Lending an Ear:

North American mediation is an extroverted, oral affair. People are expected to come together and talk explicitly about the situation, to exchange information and make rapid decisions. This model challenges everyone – mediator, counsel, parties – to listen openly and without judgment.

Frequently, the mediator is the only one in the room who listens with indiscriminate respect. Listening is a powerful mediator tactic. It connotes a genuine, ongoing effort to fully understand the verbal and non-verbal messages exchanged. This is more complex than regurgitating what someone says after the preface “What I hear you saying is…”. Listening invokes the whole mediator, body and soul.

Like other tactics, listening has both pragmatic and psychological aspects. On a pragmatic level, it helps to establish whether the parties are talking about the same thing. Surprisingly, they often are not. Sometimes they use words, like "fairness", “damage” or "justice" with different meanings. Frequently they think they know what the other side is saying but are only clinging to presumptions. And, occasionally, parties think they are disagreeing when they are not.

Listening also unlocks doors. During an intractable personal injury mediation, the plaintiff talked about a young man who rescued him during the accident. Defence counsel labeled the story irrelevant. Plaintiff’s counsel rolled his eyes. And the fellow’s own son tried to shush him. But, the mediator listened to the rapt descriptions of the radiant Good Samaritan who intervened. Suddenly, the mediator knew. "Why, you believe that you were visited by an angel." "Yes! Yes!" came the reply. "I was." What the mediator thought about angels was irrelevant. His non-judgmental listening counted more.

Tactic #3 – Sniffing things out

Like tracking dogs, mediators love to sniff things out. We call it "uncovering hidden interests", those tangible and intangible motivators which lie beneath demands. Is a claim for $1 million about economic loss, self-esteem, publicity, prophylaxis, or retribution? The mediator is curious because these different interests suggest an array of solutions, some without price tags.

Mediators classify interests as substantive if they relate to the subject matter, psychological if they relate to feelings, and procedural to if they relate to *how* things are done. Interest-based mediators elicit interests to convert a tug-of-war into a problem-solving exercise. Mediation then moves from a contest of competing demands into a joint question -- *how do we meet both sets of needs?*[vi]

One mediation concerned an apparent fight over a patent. When the mediator exposed the interests, however, ownership of the patent fell away. One party simply wanted to be recognized as a creative inventor. The other's goal was commercial exploitation. Instead of debating entitlement to the patent, the parties cut a business deal.

Tactic #4 – Sharing a Canoe.

One participating mediator summarized nicely, "To succeed in mediation, you really have to get into the other guy's canoe and paddle around a bit. It's no use berating him or wishing that the world were different. The trick is seeing things through the other person's eyes." This means that the mediator, the parties *and* counsel have to acknowledge the other side's point of view and engage in some measure of empathy. In mediator-speak we call this "recognition". As the label suggest, this is about getting one side to *recognize* that there is at least one other possible way of

looking at things. This can be enormously difficult[vii], yet it is of intense practical importance because there is a direct relationship between "recognition" and settlement.[viii]

Encouraging one party to paddle in another's canoe does not mean forcing them to satisfy the other person's needs. It means inviting them to consider those needs and why it might be useful to take account of them. In one mediation, a financial institution had a perfectly logical explanation for closing a customer's account and wanted to repeat this explanation several times. But, the customer's focus was the impact of the closure, which no amount of explanation would address. The financial institution came to understand that its investment in explanations would net fewer settlement points than attention to the consequences of its actions.

Tactic #5 – Giving needles:

Sometimes people are ready to settle. But often, one (or both) are frozen in impenetrable blocks constructed of what "really" happened, how much they suffered, the demonic nature of the other side, or the "right" solution. Then, the mediator's job – in the face of conscious or unconscious resistance - is to affect a thaw. This is a little like administering an unwelcome inoculation. It is ultimately beneficial, but the needle can hurt.

Participating mediators give this tactic many names. One calls it "debunking" or deflating unrealistic expectations, like correcting arrogant predictions of absolute victory or complete annihilation of an opponent. Another mediator calls it "asking painful questions" that draw people to uncomfortable areas of weakness or risk. Another talks of "untethering people from the past – regardless of what their conflict is about." That mediator speaks "as much as possible in future directed language, the future tense. I am not as interested in hearing where they are 'coming from' as 'where they want to go'."

Although this tactic yields pragmatic results, it frequently has a large psychological component. I once worked on a file where the plaintiff had to jump through fire to get to a deal. There was no fire, of course, just the perception of one. Settlement would mean letting go of his victim mentality and the stereotypes he nurtured about the defendant. These invaded his being. His palpable fear (which he could not actually articulate) was of the internal vacuum that would replace this dispute once it settled. His counsel had grown impatient. The defendant labeled him a calculating, if immature, gold-digger. It took a long time -- weeks -- to help that plaintiff let go. It took equivalent effort to persuade the defendants to extend time. When the plaintiff finally jumped he found that the chasm was small and he landed upright. Word reached me that he now believes it was the best thing he ever did.

Another mediator had a similar situation in a professional negligence file which called for this tactic. The defendant, an experienced and well-respected professional, invested significant time and effort justifying her past judgment. If that continued, there would be no movement towards resolution. Finally, after another rendition of justification, my friend said straight out, "Madam, I understand all that, as we have discussed it many times before, *but I am trying to take you someplace else*." "I know," the professional said sadly, "and I have been resisting going there."

Tactic #6 – Carrots and Sticks:

One familiar tactic concerns risk assessment. The mediator reviews what a party stands to lose without settlement. In more extreme cases, the mediator exaggerates, “You are bound to lose your house if you carry on!” Threats comprise one (crude) version of this tactic where the mediator searches for the right concrete motivator. This involves a comparison of the proposed

settlement to available alternatives like trial. The mediator asks, "What will happen if this file does not settle?" Or, "Can we talk about your past and future costs if litigation proceeds?" Since this tactic clips counsel's turf, it is sometimes provocative.

Social science research shows that people are generally risk averse. They prefer to protect what little they have than wager larger gains. When mediators canvass the costs of outstanding conflict (out of pockets, unrecoverable costs, lost opportunities, personal stress) they instinctively apply this research. I have seen lone counsel plead with co-defendants, "It's not right to settle! We could do far better at trial." He had a moral point, but no one wanted to fund it.

Of course, not all parties are risk averse. Some enjoy a good fight. Some are well-heeled and careless of cost. Some can scrutinize risk and thoughtfully assume it. Mediators adapt this tactic to these parties. One participating mediator explains, "I usually size up the case to see what is larger, the carrot (opportunity) or the stick (risk of a poor alternative "WATNA"" coming to pass). They say that a smart lawyer will argue the law when she has the law and the facts when she has the facts. I analogize this to my private mediator's practice: If there is a great opportunity they could lose, I focus on the opportunity. If there is a BATNA risk to avoid I 'walk them down BATNA road' taking time to smell the disturbing aromas and painting a colourful picture."

Tactic #7 - Passing the ball back:

"About every five years I have a mediation that is going nowhere and I simply put on my coat and start to leave. Once I even went to the lobby and sat for a while in my overcoat. Soon, counsel came looking for me."

Every (truthful) mediator has had files that did not settle. We had to pack our bags and leave. That is not usually theatrics. It is the ultimate deferral to individual choice. If we frame mediation as individual decision-making, we have to accept decisions not to settle.

Mediators remind themselves that if they are the hardest working ones in the room, they are hogging the ball and assuming too much responsibility. They have to pass the ball back.

I remember once spending all night between sessions trying to unpick a tangled dispute, without success. The next morning in exasperation I asked, "What is there about the present situation that makes it so desirable?" "I beg your pardon?" the parties asked. "Well, you are stuck and I am wondering *what is so compelling about your current situation that makes you want to stay there?*" "Well -- nothing!" they exclaimed. That exchange provoked the necessary flexibility. The file settled, but only after I let go.

Knowing some common mediator strategies and tactics together with the underlying assumptions can help counsel participate more effectively in mediations on behalf of their clients.

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[ii] I would like to thank the following participating mediators for their thoughtful insights:- Dominique Bourcheix (Montreal), K.W. Stephen Cheung (Windsor), Gary T. Furlong (Mississauga), William H. Jackson (Toronto), Kimberly T. Morris (Toronto), Richard Russell (Dundas) Mary T. Satterfield (Toronto), Cheryl Scott (Calgary), Ian C. Szlazak (Ottawa), and Richard J. Weiler (Ottawa).

[iii] Not every contest can be changed to problem solving. Sometimes a dispute is about the allocation of a scarce resource (like money) and there is only so much to go around. In that case compromise and trade-offs may be required.

[iv] Although in practice these extremes merge, in theory they are distinct strategies. See, for example, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1994) by Robert A. Baruch Bush and Joseph P. Folger.

[v] A mediator's strategy is also influenced by structure. For instance, 3 hour court-annexed mediations tend to be fairly driven, goal-oriented sessions. Even if a mediator is concerned about the moral or psychological aspects of the dispute, there often isn't time.

[vi] A broader discussion of interests is beyond the scope of this article, but interested readers may refer to pages 20 – 26 of *Bypass Court: A Dispute Resolution Handbook*, 2nd ed. (Butterworths, 2001) by Genevieve A. Chornenki and Christine E. Hart, or pages 21 – 26 of *The Corporate Counsel Guide to Dispute Resolution* (Canada Law Book, 1999) by Genevieve A. Chornenki.

[vii] This difficulty often flows from the fact that "recognition" is the opposite of what adversarial proceedings call for. For the purposes of trial or arbitration, counsel concedes uncontested or inconsequential points and understands the other person's point of view to be able to rebut it, not satisfy it.

[viii] A table showing the relationship between recognition and settlement is reproduced at page 130 of *Bypass Court*. The results are not "scientific" but they were compiled from the actual mediations.