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PRACTICING THE SKILL OF MEDIATION IN ENGLISH FOR LEGAL PURPOSES

Abstract. This article deals with mediation in language teaching, focusing on how the practice of mediation – as a specific language skill – can be incorporated in the syllabus. The chapter defines the skill of mediation as an emerging concept in language education, and discusses its potential for effective teaching of English for Specific Purposes in general and English for Legal Purposes in particular. The first part of the text seeks to answer several questions, aiming to determine whether mediation is relevant in the context of legal practice and whether it has a place in an English for Law syllabus. The second part addresses a more practical concern of how the skill of mediation can be practiced by students. The article makes a case for assigning mediation a much more central place in the classroom, giving a number of specific examples of how this soft skill can be developed in the teaching of ESP and ELP.

Keywords: legal English, ESP, ELP, mediation, communicative skills, CEFR.

1. Introduction

The field of English for Specific Purposes (ESP) has had a long tradition of paying a close attention to the needs of language students. First established as a discipline in the 1980s (Hutchinson and Waters 1987), it was further developed by numerous scholars (e.g. Dudley-Evans 1998; Harding 2007) who have emphasized the learner-centred approach, typically basing their frameworks on careful needs analysis (Basturkmen 2006, 2013). The field of legal ESP, also known as English for Legal Purposes (ELP), has also received significant input from genre analysis (Swales 1990; Bhatia 2004). The concentration on “specialized discourse” (Gotti 2003) has allowed ELP scholars to benefit from many findings on the genre characteristics of legal texts and the peculiarities of typically written legal texts and various legal discourses (Bhatia 1987; Bhatia et al. 2008; Gotti and Williams 2010). Some of this research has been turned into practical advice on how to design teaching materials (see, for instance, Bhatia 2002).

Traditionally, some of the practical considerations of ELP have concentrated on language skills that have to do with legal stylistics (e.g. the drafting of contracts and legislative texts), language reception (e.g. extraction of information from texts, particularly in view of the specific genre characteristics of legal texts in view of their syntactic complexity and density of terminology, cf. Bhatia 1987) and language production (e.g. drafting documents in a foreign language, which is a skill increasingly needed in a globalized economy that involves multinational legal teams).

Increasingly apparent, however, is a shift in ELP teaching towards soft skills. For instance, many recent textbooks of ELP have started to emphasize soft skills, in addition to teaching the traditional legal English content (Krois-Lindner and Translegal 2006; Krois-Lindner and Firth 2008). That is only natural in view of modern patterns of international communication, particularly among highly educated professionals, such as law school graduates. In a globalized economy and integrated Europe, such professionals not only increasingly work in multinational teams, but also need to mediate texts and information originating in different linguistic environments.

The skill of mediation, thus, is highly relevant in the legal context. The interaction with clients – in both spoken and written form – represents a substantial part of the workload of many lawyers. This communication is marked by shifting levels of expertise, where legal professionals should be able to explain complex legal concepts in ways that are intelligible to clients, thereby enabling them to make relevant choices on the basis of such mediated knowledge. Importantly, this concerns mediation both within a single language and across various language (see below).

As such, the soft skill of mediation should come to the focus of ELP teachers and be practiced in legal English classrooms in more systematic ways. In some cases, this will include the modification of existing or the preparation of new materials that can be used in Legal English classrooms to practice various aspects of mediation. As I show in the second part of this text, such self-developed materials can be meaningfully included in the Legal English syllabus, in order to teach students the main mediation strategies as explained in detail in CEFR ID (90). Arguably, mediation as a soft skill that is fundamental not just for inter-language communication (as originally proposed in CEFR) but also for intra-language communication across different levels of expertise. As such, skill is of paramount importance in language-learning situations that involve the teaching of languages for specific purposes (Chovancová 2016).

2. Mediation and ESP

In its linguistic sense, the concept of “mediation”¹ emerged in the 1990s in connection with the Common European Framework of Reference for Languages (CEFR, 2001). This document distinguishes between four types of language activities that should be in the focus when assessing the proficiency levels of foreign language users. Mediation was thus aligned with three other forms of language activities, namely reception, production, and interaction. In the concept offered by CEFR, mediation consists of the skills of translating and interpreting and, thus, does not concern language behaviour that has been seen as central under the earlier dominance of the communicative approach to language learning, even though CEFR lists such activities as summarising and paraphrasing texts and hints at the possibility of intra-language mediation, cf.:

In mediating activities, the language user is not concerned to express his/her own meanings but simply to act as an intermediary between interlocutors who are unable to understand each other directly, normally (but not exclusively) speakers of different languages. (CEFR 2001: 87, Section 4.4)

In its original form, however, CEFR did not provide an entirely adequate definition of mediation, which was thus left without any elaboration in the form of more detailed descriptors. For that reason, the notion of mediation has not enjoyed the attention it would deserve and has – until quite recently – remained on the periphery of the interest of educational policy makers and language learning professionals (for some exceptions in the field of ESP, see Dendrinos 2006; Chovancová 2016). Nevertheless, the initial conceptual inadequacy contained in CEFR, which appeared to place too much emphasis on the “intermediary” role of mediators and the mere “transfer” of meanings (see criticism in Byram and Hu 2013) has now been addressed by a project of the Council of Europe’s Language Policy Unit (North and Piccardo 2016a, b). Completed in April 2016, the project amended the definition, thus putting language professionals in a much better position to deal with this phenomenon.

In this paper, I adopt the analytical framework of mediation proposed by North and Piccardo (2016a) in the above-mentioned document. They develop the descriptive scheme and illustrative descriptors for mediation within CEFR by elaborating the various aspects of this skill and setting the target competencies of learners. The rationale for developing this scheme was to assess – more adequately – the linguistic competence of L2 speakers according to the official “Common Reference levels” (i.e., A1, A2, B1, B2,

C1, C2) that are used to measure the communicative competencies of foreign language users. In this way, the proficiency levels can be more adequately linked to learners' actual communicative behaviour.

Mediation is seen as including two key notions: (1) the co-construction of meaning in interaction and (2) the movement between the individual and social levels in language learning (North and Piccardo 2016a: 4). This approach acknowledges the fact that the construction of meaning is a dynamic process that depends on the cooperation between all the parties involved in a given act of communication – a fundamental premise of various interactional approaches to human interpersonal communication (Locher and Graham 2010) as well as in language pedagogy (cf. the notion of collaborative learning; Gibbons 2003). In addition, this view holds that language learning is concerned with the interface between the individual and the social. Thus, for instance, where an individual strives to produce a successful act of communication, he or she inevitably does so within the broader social and discursive context manifested through the various discourse types, genre conventions, as well as pragmatic competencies that language users need to navigate (cf. Bhatia 2017).

The new CEFR sees the social aspects as having a central role in the process of mediation. In this version, the new CEFR goes beyond the traditional view of mediation: it is no longer seen merely as a synonym for “translation or interpreting” (as in the previous version). Instead, the term has attained a considerably wider scope. Indeed, mediation is now recognized as being comprised of four different types, namely linguistic, cultural, social, and pedagogic (North and Piccardo 2016a: 8–12). This systematization acknowledges the multi-dimensional role that the skill of mediation plays in diverse communicative contexts.

3. Mediation in legal English

So far, little has been written about mediation in language teaching, perhaps with the notable exception of Dendrinos (2006), who deals with the aspects of both teaching and testing. Similarly, the application of mediation in the field of English for Specific purposes (ESP) has yet to be fully explored. First attempts have, however, been made, e.g. concerning mediation in Legal English classes (Chovancová 2016). More specifically, this concerns the designing of mediation activities in both printed and self-made materials for students of law, aimed at addressing the information gap created by a necessity to mediate information across different languages, e.g.

processing in a source text (e.g. a law or some other legal text) in one language and rendering the information in another language. Clearly, this goes beyond translation and interpreting because critical thinking and specific cognitive skills are required (cf. the illustrative descriptors in CEFR).

However, mediation also applies to individuals working in one and the same language. Such intra-language mediation (Chovancová 2016: 23) actually constitutes a quite common everyday communicative skill, though it is particularly necessary in some professional contexts. In this type of mediation, an individual needs to communicate across different levels of expertise, producing “alternative textualizations” (Cornelius 2010).

In the following, initially intra-language mediation is illustrated with a concrete activity developed for first year law students (section 3.1), and then sample tasks are provided that deal with the various dimensions of mediation: linguistic (section 3.2), cultural (section 3.3), social (section 3.4), and pedagogical (section 3.4), which can be designed around the main activity shown below.

3.1. Mediation and role play

Firstly a sample activity to see how an aspect of mediation can be introduced through role play can be considered. While one of the traditional tasks involves inter-language awareness (terminology translation), the role play task extends the learning situation to intra-language mediation since it involves communication in English only.

Example 1

Background: a lesson on property law for first year students in the second term of their study. Language level B2. The topic is the law of probate. The task is to become familiar with the textual and structural template of last wills and testaments (as well as some of the legal background to this issue).

First, students are presented with an authentic template of a last will and testament (offered by legal practitioners free of charge to the general public in Florida, USA). The initial task is to become familiar with the material. This is done by means of a translation activity, with students being asked to translate key terms from or into their mother tongues. This quite simple and straightforward task ensures that the students go through the document carefully, making themselves aware of the technical vocabulary and, more generally, the overall content (structure, customary content, typical formulations, etc.).

However, despite having “gone” through the document when performing the above-described task (i.e., skimming through the document, and translating the highlighted terms), their reading can be very superficial. A follow-up task was therefore designed with the intention to make the students study the document in depth, a task that could come under the term of “mediation”.

In a role play format activity, one student is assigned the role of a lawyer while another acts out the role of a client – an elderly citizen. The “lawyer” is asked to give advice to the “client”, who wants to dispose of his or her property by will. The “lawyer” is to guide the prospective testator through the template, explaining all relevant information, adapting the language so that the client can fully understand the content.

In this way, students practice multiple skills. The task involves not only the transmission and mediation of information, but also other important soft skills such as reformulation and explanation. Students playing the role of the lawyer need to be aware that their counterpart, the client, is a non-lawyer. Moreover, because in this particular task (in order to emphasize the point), the client is also an elderly person, it is not just that the information needs to be given in an understandable way but also the communication partner is to be treated with care and respect.

3.2. Linguistic mediation

A prominent place among the various aspects of mediation is held by the linguistic aspect of mediation. As North and Piccardo (2016a: 8) point out, students need to know “how to translate and interpret, more formally or less formally, or transforming one kind of text into another”.

In any communicative act, the two key factors that will determine the choice of linguistic means and the level of formality in a given situation are the context of situation and the recipient of the utterance. For law students, this means that they have to be linguistically sensitive, being able to adapt their style according to the speaker and the situation. Upon assessing these contextual variables, they have to be able to opt for legal terms and other features of legalese when talking to another professional, and automatically add explanations for the sake of clarity when talking to a client, adjusting the level of formality accordingly.

Relevance for the sample activity

In the sample activity above, there are several instances of possible linguistic mediation that can be used by students/teachers to develop awareness of the right degree of formality and the extent to which professional

language needs to be changed. The text, even though a relatively simple but potentially legally binding document, can be filled in by an informed laymen, provides ample opportunities to practice this type of mediation.

Particularly relevant in the context of the above-described activity is intra-language mediation. It is realized through the necessity to summarise an L2 text in L2. This concerns, for instance, the way terminology is handled by students when mediating the text for their colleagues. Since the template of the last will is rich in legal terms, it is therefore ideal for practice of linguistic mediation. Thus, students need to learn to assess which terms are key to the understanding of the text and which are likely to be difficult for their client. For instance, the student “lawyer” may seek to explain the phrase “simultaneous death of spouse” as “this means if you and your wife/husband die at the same time”. Alternatively, the practicing of reformulation and explication of terminology may be initiated by the “clients”, who can ask the “lawyers” to clarify certain terms of phrases.

Linguistic mediation is a core skill that any lawyer dealing with the general public needs to acquire and internalize. It can be somewhat difficult for first-year students of law, who strain to “speak like lawyers” in order to show that they have actually grasped the concept. In other words, instead of proudly using the newly acquired legal terms and phrases, the students are guided in this activity to reduce the level of expertise and make their utterances and explanations simpler, both as regards specific formulations and terminology.

3.3. Cultural mediation

Linguistic mediation is very closely connected with cultural mediation, which, however, extends beyond the language as such. While language use is inextricably linked to culture, the situation becomes even more complex when two different languages are used. Culturally-related issues then inevitably emerge, requiring the attention of the person involved in the process of mediation. This kind of mediation could be treated within the scope of inter-language mediation.

As lawyer-client consultation is essentially about bringing about an understanding of the relevant legal issue, it also goes under the heading of “cultural mediation”. As North and Piccardo (2016a: 8) observe, “it is a question of working at a level sophisticated enough to preserve the integrity of the source and to get across the essence of the meaning intended”. This goes beyond paraphrasing the text and explaining terminology to lay people (as in linguistic mediation), since the real issue is often a different legal culture, notably the differences between the Civil and Common law countries

which the lawyers need to be aware of. Needless to say, this is sometimes challenging for undergraduate students of law because, particularly at the beginning of their studies, they may lack the knowledge of the relevant legal culture (including their own).

Being familiar (at least to a certain extent) with the history and the development of Legal English in common law countries will help students when dealing with UK or US legal documents, such as the one used in the sample activity. For instance, they will be familiar with various multi-nominal phrases and doublets/triplets. Used to ensure precision, or in some instances just for the aesthetic value of alliteration, such stylistic features are a common occurrence in modern legal texts; yet despite the efforts of the Plain English movement to eliminate some of them, that has led to the situation that civil law countries are nowadays less prone to use strings of words to denote a simple concept in their newly drafted legislation.

Relevance for the sample activity

It is therefore important for a lawyer to be able to address this issue when assisting a client to understand a document, such as the one the illustrated task. For instance, the student “lawyer” may feel it appropriate to explain that the term “*Last Will and Testament*”, which – even though comprising of two separate terms – refers to a single concept and a single document.

Even though the main aim of this activity is to practice speaking skills in English, particularly that of mediation, this is a good instance of “translanguaging” (García and Wei 2014), where additional knowledge resources need to be drawn on in order to ensure successful communication. It would be appropriate for the “lawyer” to explain that in his or her mother tongue, i.e. Czech in this case, the “*Last Will and Testament*” can be translated either as the general “*poslední vůle*” (the equivalent of “last will”) or, more officially, as “*závět*” (i.e. “*testament*”), but not as a combination of both. In some cases, other expressions are possible, e.g. the umbrella term “*pořízení pro případ smrti*”. Some other culture-dictated and language-related peculiarities include, for instance, the capitalisation of key terms in English.

There is also a possibility for some follow-up tasks that may reveal some striking differences in the law between countries. In the Czech Republic, for example, if the last will is written by hand, there is no requirement for the signatures of the two witnesses to be attached. Interestingly enough, the same is true about Kentucky, but that is an exception to the law in most other US states.

3.4 Social mediation

The third aspect of mediation is social mediation, which is closely connected to the above-mentioned cultural mediation. This is acknowledged by North and Piccardo (2016a: 9), who suggest that “[c]ultural awareness, of course, applies within a language as well as across languages and cultures, with consideration of idiolects, sociolects and the links between styles and textual genres. It also concerns relating different sub-cultures: social and professional, within the umbrella culture of a society”. This aspect is thus related to various pragmatic competencies that language users draw on in their everyday interactions with each other as well as the various interactional norms that constitute their professional culture(s). It is thus hardly surprising that “...the comprehension difficulty may not be due to language; it may well be due to lack of knowledge or experience, to a lack of familiarity with the area or field concerned” (North and Piccardo 2016a: 9).

Clearly, this is the area where the legal aspects of the lawyer-client interaction come into play. After all, the difference between the level of expertise and knowledge between the lawyer and the client forms the very essence of legal consultation: the client comes to see the lawyer to obtain legal advice; and much of the service provided by a lawyer to a client is embedded in their social interaction.

Relevance for the sample activity

How is the social dimension of mediation applicable with respect to the activity at hand? The individual involved in mediation acts as an “intermediary” who helps to “bridge gaps and overcome misunderstandings” (North and Piccardo 2017: 85) also between various discourse communities. In the case of the template of the last will – as well as other types of sample legal texts found on the Internet – there is a disclaimer warning the user not to rely on such generic texts entirely and to consult a lawyer. The full wording of the template could be used as an example of useful phrases for social mediation. A different example consists of the legal style that is typical of the professional community of lawyers. Thus, the quote from the template “*I am married to Mary Smith, and all references in this Will to my wife are references to her*”, with all its specificity may illustrate the point. It is an example of discourse used by the sub-group of professional lawyers, and no other professional would put the same information quite like this.

Having discussed the linguistic, cultural and social mediation, which – as has been shown – are quite closely intertwined and equally relevant to the task, attention needs to be turned to the last type of mediation, namely the pedagogic one.

3.5. Pedagogic mediation

Pedagogic mediation offers a somewhat different perspective from the other types of mediation in that it aims to develop the mental skills of the recipient rather than impart relevant information across linguistic boundaries, cultural differences and social norms.

North and Piccardo see successful teaching as a form of mediation, because “teachers and parents try to mediate knowledge, experiences and above all the ability to think critically for oneself”, which, in their view constitutes “cognitive mediation” (2016a: 10).

It may be argued that in lawyer-client interaction, knowledge is facilitated through “scaffolded cognitive mediation”. However, it is not the job of the lawyer to help to develop their clients’ thinking but, rather, to think on their behalf and offer them alternatives. Thus, in my opinion, pedagogic mediation is not quite relevant to this particular context. Nevertheless, it is directly applicable to Legal English teachers and teaching on a more general level, which is an issue that deserves a more detailed attention in the future.

4. Conclusion

As shown in this article, mediation is an important soft skill that has, so far, been largely overlooked in the teaching of foreign languages. However, with the most recent update of the CEFR, this situation is gradually changing and the practice of mediation is coming to be seen as much more central to effective language instruction than previously. With mediation, a speaker acts as an intermediary, helping others to understand information that is linguistically outside their reach. In this way, mediation bridges differences in knowledge and requires the speaker to negotiate meanings across different communicative styles, discourse norms and cultural contexts, both within a single language and across different languages.

In the area of English for Specific Purposes in general and Legal English in particular, the changed orientation calls for the need to modify existing syllabi that tend to focus on precision (particularly in the area of terminology) and learners’ self-expression, while mediation requires the speakers to actively and consciously modify their linguistic output so that it becomes maximally accessible to the recipients. Attention thus needs to be turned to such communicative strategies as language choice, information selection and processing in order to arrive at an optimally comprehensible message. In this process, various aspects of mediation are involved: linguistic, cultural, social, as well as pedagogic.

As regards the practice of the skill of mediation in the ELP classroom, a particularly suitable activity involves interaction with clients. Students can be taught various mediation strategies (as explained in detail in CEFR ID), which are extremely relevant for the practice of law. By roleplaying lawyer-client interactions, students can engage in a communicative practice that will be quite central to their future careers in legal consultancy, advisory, etc. Indeed, this is one of the most important soft skills needed by legal professionals in their interactions with the lay public, i.e. individuals lacking knowledge of legal issues.

N O T E

¹ This is different from the legal term “mediation”, which refers to a form of alternative dispute resolution (ADR).

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