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## Objection: Assumes facts not in evidence

When language crosses cultural boundaries, words can be misread in ways that distort intent and impact, creating legal and relational conflict that often requires careful mediation to bridge misunderstandings.

By Fatemeh Mashouf

Many words have specific connotations, but direct translations can strip away cultural context, leading to a mistaken reading of the speaker's intent. For a basic example, the word "negro" in Spanish means "black"—a neutral, non-racial word that is not inherently derogatory. English speakers, however, may hear the word as a slur. Unless they're familiar with the Spanish usage, they could very well take offense.

Even more tricky, people from other countries do not always understand how Americans interpret commonly used words—even when English is a common language between the parties. I learned this lesson during a trip to the Netherlands when I was giving an anti-harassment presentation. During the presentation, I used the word "subordinates" and noticed one person do a double-take and another's eyes widen. I paused to acknowledge the reaction, at which point someone informed me that the word is de-meaning in the Netherlands.

Sometimes a word is just a word. There is no animus, agenda or hidden intent behind its use. When people in a workplace, at a social event, or during mediation come from different cultures, it's often easy to overlook or misunderstand their communication.

### Impact vs. intent— a matter of interpretation

Intent is the internal motivation or goal behind a person's words or actions; impact is their observable effect, outcome or reception by others. When discrimination or harassment is asserted, the harmful impact of language may matter more than the speaker's intent. Racial slurs are a great example of this—the speaker may not have "intended" offense but if the im-

pact is subjectively and objectively offensive, the speaker may be held responsible for the offense.

But how can a speaker predict the harmful impact of words that have no negative or derogatory connotation in their own culture? And should they be held liable for another person's misunderstanding or misperception of their intent? The law has not adequately addressed this conundrum yet so let's take a stab at it here.

I recently mediated a case where a Mexican employee was called "olagh" by a Farsi-speaking coworker, which directly translates to "donkey." The employee brought a claim for racial discrimination. Of the two Farsi words for donkey—olagh and khar—olagh is more playful, akin to "dummy" and often used between friends. As an analogy, it may be racially offensive for a Mexican employee to be called a "donkey" but not racially offensive to be called



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a “jackass”; though obviously inappropriate for the workplace, it doesn’t necessarily give rise to a race-based harassment claim. The attorneys who brought the case to litigation and mediation never thought to question the terms before investing months into litigation. In this case, I posit that the intent mattered more than the impact because in a race harassment claim, there must be some indicia of race being the root cause of the harassment.

Employment discrimination and harassment law focuses on whether an action created a hostile environment, regardless of whether this was intended. Courts consider implicit bias by examining the frequency and context of an action, as well as who bears its brunt. Both intent and impact matter, so even if the original intent behind language was innocuous, legal liability has historically hinged on the reasonable impact of those words on the victim. However, case law has not adequately addressed circumstances where the intent of the words is fundamentally misunderstood due to a cultural gap.

Indeed, holding an employee accountable for not adequately understanding American English or American culture could itself be a double-edged sword. As in the example of a Spanish speaker using the term “negro,” it simply cannot be that the employee is responsible for offending a non-Spanish speaker based on an entirely innocuous use of the term. An employer could in

fact be held liable for disciplining the Spanish speaker in such a circumstance.

### **Mediating the language gap**

Mediation may be the first time a defendant learns about the impact of his or her words on the plaintiff. It may also be the first time the plaintiff hears what the defendant’s actual intent was. Having the intent and impact flushed out can be critical to lowering the temperature and building a bridge toward resolution.

Even when there was no malicious intent, it is important to address the impact of a defendant’s words in a sensitive and constructive way. If an employee feels disrespected or diminished by a co-worker’s words, even if there was no bad intent, it is crucial to address this impact.

An attorney whose client alleges harassment could take them at their word. But doing so may only compound the disconnect. Attorneys, just like everyone else, have biases and preconceptions; most have cultural blind spots of which they’re not even aware.

Instead of accepting the client’s narrative, counsel would do well to review the allegedly offensive language and explore what was actually meant. Other cultures use words differently and assign different meanings to those words. Even various regions of this country, and different areas within the same state, use language differently.

During mediation, I pay careful

attention to reactions of individuals in a conversation and if I detect even a subtle reaction—widening of the eyes or a look of confusion—I do not brush it off. Mediators and attorneys must be cognizant of the impact of words—especially during the highly complex emotional journey of mediation—to make sure there are no miscommunications or gaps of understanding. If something isn’t making sense during a mediation, don’t dismiss it quickly as just nonsense. Instead, pause a moment and remove your own lens to assess whether some context is missing. It hardly ever hurts to take a pause to call out a possible disconnect and examine its cause.

### **Speaking the same language (no pun intended)**

When clients speak different languages, have different ethnic backgrounds or follow different cultural norms, it can be helpful to bring in third parties who understand and appreciate the significance of these differences. Even a mediator who is not from the same background can provide insight and guidance to counsel and parties who are at odds over language. The mediator can help both sides parse words and their meanings, defusing potential landmines by injecting rational discourse into the negotiation.

Especially in high-stakes, emotionally fraught employment matters, a skilled mediator can help parties see how words can have

meanings far different than their dictionary translations. Many languages have formal and informal ways of addressing others. Using the wrong form in context could imply disrespect or, alternatively, show familiarity or closeness. The mediator can help parties and their attorneys identify this potential indicator to understand the nature of a relationship.

The impact of words does matter, but so does the intent behind those words. When people can find a path toward understanding each other, fences can be mended and relationships restored. Our next column will explore how nonverbal communications such as gestures, facial expressions and other actions can similarly divide and, when handled with care and sensitivity, reconnect parties.

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