

Reframing the Mediation Lexicon

by

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Words matter. So we concentrate on language choices in basic mediation training. We teach about using neutral words. We spend a good deal of time teaching about reframing. But, what have we really learned about the nomenclature we use as mediators? Do the words make sense? Are they understood? Do our “mediator words” have negative connotations? Are some of these words almost sinister? Is our mediation lexicon in need of reframing? Is it stale?

As I was beginning to ask these questions, I was inspired to walk my own talk and ask world class mediators what words they use, do words really matter, what alternative words would they suggest, and were my suggested alternatives really such good ideas. The responses I received were frankly brilliant. With permission, much of the feedback is directly quoted and attributed in this article.

The general consensus is that mediators use tired, stale words and there is room for improvement. We should follow our own advice and bring innovation and creativity to our mediator lexicon.

Words Influence

In terms of the import of a mediator’s choice of words, Eugene Moscovitch (California) elegantly captured the significance as follows:

“Our words are really the only tools we have... they are the essence and almost the entirety of our craft. They are the surgeon’s operating equipment, the diamond cutter’s blade and lens, the gently placed needles of the acupuncturist, and (on a good day) the healing light from above. I find that I am constantly pushing myself in the direction of trying to find that ‘perfect’ way of saying something important in a way that the recipient can actually hear what I am saying.

Karin Hobbs (Utah) goes on to say:

“A good mediator is like a good ham-radio operator: each has the ability to send and receive on all frequencies. The effort to examine how our stereotypical jargon may be weighing the odds against us is an extremely valuable one which will truly allow us to broadcast and receive on a broader band.”

Jeff Jury (Texas) examined the significance of words somewhat differently. Jury opines:

*“Your article caused me to remember the words of Gandalf in *The Hobbit*, explaining why Beorn calls his home *The Carrock*. ‘He calls it *The Carrock* because that is his*

word for it.' We grow words, and choose words, to describe people, places, and things. I agree that some words, once new words describing new things in our field, have become tired and contaminated with biases and connotations as they are presently used to describe our process."

Traditionalists, please relax. I am not advocating replacing these words. We need a common language for our tribe. We may continue to use these words between ourselves as familiar reference points. But, should we use these words with parties, advocates or consumers of mediation services? Are there alternative words? Better and safer words? Words that help us better achieve the mission of mediation? More creative words?

Several trends in mediation have triggered my inquiry. The alarming trend to disregard the joint session made me wonder if we might call it something different, more inviting. The societal contempt for the word "compromise" motivated me to seek different word choices in negotiations. And, mediation, a process that is supposed to be fluid, yet flexible and creative, has become static and predictable in both theory and practice. How long may we actually talk about bracketing, Riskin's Grid, and mediator styles or proposals? The last decade has produced little that is new and creative in the field mediation.

So maybe a little deconstruction is in order. Maybe we need some new words to move us in new directions. When I gathered up our mediation lexicon, I found over a hundred words. I have left many unframed to allow you some fun over a glass of wine or a good single malt. David Bowie spoke of changes and Lennon asked us to imagine. So put on your slippers and walk down the yellow brick road. You're not in Kansas anymore.

The Oddest Words Ever

A quick confession: I very much like many of the words we are about to examine and – not always for good reasons. These words were my guideposts as a fledgling mediator and I have used them frequently in books and articles. Here are some of my very favorite mediator words.

Consider what a human being with no knowledge of mediation might think about a "joint session." What does it mean? Some might guess one has a joint session while meeting with a chiropractor or orthopedist. Some might speculate a joint session is a meeting involving plumbers. And, of course, some might think a joint session occurs in a dimly lit room, with Jimi Hendrix blaring, and copious amount of marijuana being consumed. You have to admit, a joint session is an odd combination of words beyond the comprehension of most mere mortals.

Then, we have a "private caucus." What would someone unfamiliar with mediation make of this term? Maybe, a person would think this: "Billy Bob, having lost primaries in Florida and Colorado, is having a private caucus with superdelegates to convince them to flip their vote at the Convention." One might guess a "private caucus" is an illicit meeting with a lover. "Private caucus" sounds sinister, sneaky, and conjures up images of a smoke-filled room. What is a caucus anyway? How many citizens actually know? Whatever it is, it is "private."

So, it must be secret, under the table, and even conspiratorial. A mediator may promise a “private caucus” is “normal;” but, what do mediation consumers really think?

You get the idea. Our words are strange and in some ways potentially counter-productive to our mission of building trust and buying into the process. A joint session is meaningless to the average consumer and a private caucus sounds almost underhanded. We have to find alternative words and terms which enhance trust building and encourage confidence in the process. Let’s begin.

Out with the “Joint Session.” In with the “Learning Conversation.”

In various parts of the United States, the joint session is vanishing or has vanished. Of course, the verbage “joint session” is not the cause of this phenomenon. The cause is untrained lawyer gatekeepers who have hijacked the mediation process and mediators who have allowed the gatekeepers to fly the airplane.

Of course, mediators bear some responsibility for this cause and effect. In the early phase of the modern mediation movement, some joint sessions became name-calling, chest-thumping, counter-productive meetings. (Perhaps devoting more than two hours to the joint session and its management at mediator basic training might have alleviated this problem.) As Susan Hammer (Oregon) points out “I find that parties are fearful of joint sessions becoming unstructured, free-ranging, out of control, and counterproductive.”

Could reframing the “joint session” make it more appealing and understandable to the real parties? Could it prompt a second look by the untrained gatekeepers? Isn’t the gathering of the advocates and decision makers intended to be, in part, an opportunity to educate and learn? Let’s recast the joint session and label it properly as a “learning conversation.”¹ The term combines two words virtually everyone knows. Almost everyone likes to learn, lawyers included. Everyone has conversations (although the listening part is often difficult for lawyers).

So who needs to learn at a mediation? Actually, everyone involved. Learning doesn’t require agreement nor a concession or acquiescence on anyone’s part. People learn in groups all the time. Learning may result in new information and reevaluation. Learning is fluid, constant and promotes change. The mediator may model the desire to learn by asking the parties “to help me understand” the components and complexities of the dispute better. In a learning conversation, parties and counsel are not being asked to make an opening presentation or a speech. In a learning conversation, participants add content, context and information. It need not be positional, oppositional or argumentative.

Conversations are more fluid than “one side speaks” and then the “other side speaks.” Conversations offer the mediator an important role – to moderate the conversation, to create balance and, through inquiry, to seek refinement and education for all the participants.

Conversations are different than the basic mediation model rules of no interrupting, active listening, and taking turns. Active listening is also essential in a conversation. In the real world, people have conversations. With conversations, the speakers and listeners change frequently. Participants in conversations react, as opposed to interrupt. A mediator may play a more vital role in moderating a helpful, learning conversation. The job admittedly is more challenging and requires more skill sets. But, a conversation avoids the feelings of “being lectured or scolded,” the primary grievance of attorney advocates with the joint session.

The mediator, as moderator of the learning conversation, may suggest topics; i.e. help me understand the impact of these injuries, or help me understand the causation issues in this dispute. During the learning conversation, the mediator might reframe issues, identify non-monetary interests and create a dialogue that promotes discovery, reevaluation, and even creative problem-solving.

Conversations include more than facts or history. Conversations naturally promote expression of feelings, interests, and emotion. Conversation may also generate options. Learning conversations may promote enhanced understanding and, sometimes, even empathy. Finally, learning conversations provide the true parties in interest with access, participation, a sense of ownership, and direct involvement with the mediation process.

Denise Madigan (California) uses the term “conversation” frequently during mediations, largely to make parties, especially less experienced ones, more comfortable and engaged in the process. But, Madigan thinks “learning conversation smacks of something elementary school teachers would use” and prefers the term “business conversation.” David Hoffman (Massachusetts) uses the term “plenary session.” Hoffman believes it makes sense to have a plenary session in every case to discuss ground rules and whether the conversations throughout the day should be mostly plenary sessions, separate conferences, or some of each. Susan Hammer uses the term “focused conversation” to overcome the fear of things getting wildly out of hand.

Jeff Jury, attributing his small town upper Midwest upbringing, uses the terms “get together” and “meet and greet.” Jury believes these terms almost always invite a constructive inquiry of “what are we going to do?”

Reframing the Private Caucus

Are there words which make the “private caucus” less threatening and, maybe, even something more natural and inviting? Would a change in terminology deflate “caucus paranoia?” Let’s consider words like “huddle,” “gather,” or “confer.”

A mediator, in this regard, might say “After our learning conversation, I may wish to huddle with each side to learn even more about this dispute and its impact.”

“Huddle” is a word most associated with United States football, but is also more commonly used to suggest a meeting or to confer. Huddle, in either context, is a friendlier and

warmer word than caucus. “Huddle” suggests a meeting to develop a strategy or plan. Huddle implies we are all on the same team and working towards a common goal. A huddle is usually a private team meeting, without emphasizing “private” or making the meeting seem sinister.

Who is the mediator in the huddle? In football, the quarterback runs the huddle. Are mediators like quarterbacks? Let’s focus initially on why a mediator is not like a quarterback. The quarterback decides on and communicates the play to his team in the huddle. And, the team in the huddle is the quarterback’s team and the quarterback wants his team to win. The quarterback does not enter the huddle and ask his teammates “What play do you guys think we should run next?”

On the other hand, the quarterback is a leader and manages the conversation in the huddle. Quarterbacks, at least ones, have deep field vision and know when to change a play. Good quarterbacks are proactive and reactive to what is going on while on the field. Good quarterbacks promote team effort and celebrate the successes of their teammates.

A “mediator quarterback” in a huddle attempts to be the catalyst for good decision-making and strategic planning by the team in the huddle. Unlike football, a mediator quarterback solicits ideas, and allows the team to call the play. Like football, the mediator may assist the parties in identifying the “defenses,” or barriers to resolution in order to develop a better path towards resolution. The mediator quarterback might ask the parties to consider “changing a play” or rethinking a response to an offer. The mediator quarterback is in essence a leader who entrusts his team to call good plays and to determine their own success.

“Gather” and “conference” are also alternative, more benign words than private caucus and also have more common meaning and understanding. A mediator might say “at some point I want to gather with each side to learn more and better understand the dispute.” Or, a mediator might wish to host a conference.

Jeff Jury has not used “caucus,” “private meeting session,” or similar words in many years. Jury uses and prefers the verb “visit.” For example, Jury might say “Now I’m going to visit with the people at the other end of the hall.” Jury believes “visit” is a beautifully neutral word. As Jury points out, in most connotations “visit” means:

- a. “to go somewhere to spend time with someone.”
- b. “to go see in order to comfort or help.”
- c. “to pay a call on as an act of friendship and courtesy.”

David Hoffman prefers “separate conference” or “confer separately” better than “huddle.” “Huddle” involves secrecy and planning, which is designed to trick the opponent. As Hoffman suggest “when we confer, we are sharing ideas and information without the idea of partisanship baked into the term.”

Mark Rudy (California) uses the term “private dialogue” as opposed to “caucus” and “group discussion” rather than joint session. Denise Madigan also believes “huddle” evokes competition and “too easily invokes win-lose mentality.”

Is Compromise a Dirty Word?

There is little doubt that compromise has become a negative, almost dirty word – yet mediators continue to use “the C word” during mediation. Is society’s evolving disdain for compromise simply political? Is it societal? i.e. We will never compromise our belief in right to life or we will never compromise a woman’s right to choose? Or, is it that the actual definitions of compromise, both as a noun and verb, and its synonyms are inherently negative? Let’s take a look.

In its noun form, a compromise is an agreement or settlement of a dispute with each side making concessions, i.e. “We reached a compromise.” The “concessions” part is what troubles many people. While the verb form of compromise may also mean “to settle a dispute by mutual concession,” the alternative definitions of the verb form of compromise are far more negative. To compromise might also mean to accept standards that are lower than desired; i.e. by asking us to design an inferior bumper, we were being asked to compromise on safety.

The verb form of compromise may also mean “to weaken” i.e. the less costly steel could compromise the bridge. Compromise as a verb may also mean “to create danger by foolish behavior;” i.e. the captain’s erratic orders created a situation in which troops might be compromised. Compromise as a verb may also mean to damage, harm, or make vulnerable; i.e. Johnson’s comments could compromise his reputation with women.

As you have seen, the vast majority of definitions of compromise as a verb are bad while the synonyms for compromise are even worse; i.e., sellout, copout, dishonor, embarrass, give in, expose, concede, injure. Compromise, either its definition or its synonyms, is very negative. We need to find alternatives that do not have such negative implications.

Three words without these negative connotations are “accord,” “compact,” and “arrangement.” An “accord” is an official agreement or treaty or it could mean to give or grant power or recognition. A “compact” is a formal agreement or contract between two or more parties. An “arrangement” is an agreement with someone. These three words suggest an agreement without highlighting concessions, injury or damage.

A mediator might say “if we work hard and develop options, we will hopefully reach an accord (compact, arrangement) at the end of the day. Parties especially should not have a knee jerk reaction to “accord,” “compact,” or “arrangement.”

Jerry Weiss (Ohio) is not certain that “compact,” “arrangement” or “accord” adequately describes the importance of people going beyond their previously defined positions. Weiss discusses compromise in a way that does not generate the shudder mediators are concerned about. Weiss discusses compromise “within the context of monetization of the intangible

virtues that might be reached through the mediated resolution: certainty, finality, foreseeability, predictability, closure and control.”

Bennett Picker (Pennsylvania) prefers using the term “opportunity.” “Opportunity” suggests solutions not available in litigation or arbitration and studies in psychology establish that no one wants to lose an opportunity. Tracy Allen (Michigan) and David Hoffman both use the term “solution.” Allen also refers to solutions you can “live with.” Susan Hammer uses the terms “choice” and “trade-offs” instead of compromise. Hammer might say “you will have a choice to make at the end of the day and there are trade-offs the parties may make.”

The Lightning Round: Demand, Facilitate, Weakness, To Name a Few

Why do mediators even use the word “demand” to describe what is in essence an offer. “Demand” is a brusque word and implies authority. How then might any party receive an offer favorably? i.e. “Their opening demand is five million dollars.” This mediation lexicon problem is actually easy – refer to all demands as proposals or offers. Do not use the word “demand.”

Another mediation word that mediators should eradicate is “weaknesses”; i.e. “What do you see as the weaknesses in your case?” Most parties, and especially lawyers, feel vulnerable and defensive when one asks about weaknesses. Substitute “worries” or concerns” for “weaknesses”; i.e. “I understand you are very confident about your position but is there anything that worries you?” A worry is a concern and not a capitulation and most people worry about many things. People are more forthcoming describing their worries and concerns as opposed to their weaknesses.

Mediators should also stop using the word “facilitate;” i.e. as in “I will facilitate a process that will allow you to better understand each other’s positions.” Most consumers of mediation services have no idea what facilitate actually means. For those who use the word “facilitate,” it means to make an action or a process easier. More common words that may be substituted for facilitate include “assist,” “aid,” “promote,” and “encourage.” A mediator might say “I will assist the parties in having a thorough conversation of the issues in dispute.”

Other Mediation Words in Need of Reframing at Your Next Cocktail Hour

Tracy Allen riffed on other words and terms, and different ways we might define them. For example, mediation is a forward looking process. The past is what brings you here but it is the future you can control. Or, consider describing a “mediator” as a negotiation coach or the traffic cop of the negotiations.

Hopefully this article has inspired you to consider reframing our mediation lexicon to use more comprehensible, non-threatening, and more encouraging words. As promised, I left

many words for you to ponder at your next summit, happy hour, or class exercise. I submit the following words for your consideration:

- Risk
- Impasse
- Settlement
- Impartial / Neutral
- Closure
- Empowerment
- Reframing

Conclusion

The modern mediation movement is in dire need of innovation, creativity, reevaluation, and dare I say it, transformation. After an exciting and innovative two decades, the past decade has been flat and static. Changing the lexicon of mediation will not be earth-shattering; but, perhaps it will be the beginning of more significant innovation and creativity in the mediation process. Hopefully, the deconstruction of some of the core elements of the mediation process will come to a timely end and the next generation of mediators, academics and thinkers will bring new enthusiasm, energy, and innovation to the mediation process.