

The Master Mediator/Part 2 of 2

## Looking My Way: Identity in Mediation Who is in the Mediation Space?

BY ROBERT A. CREO

*In last month's issue, Master Mediator Bob Creo explored how our inbred, learned, and self-proclaimed affiliations compose plural identities, which are integral to our self-esteem and decision making, and suggested that instead of making a futile attempt to disentangle the people from the problem, identity must be considered during the mediation process. How we perceive our roles is integral to the choices we make and actions we take, since each of these roles has its own image, codes, principles and rules. Here he examines how mediators can harmonize an outcome with identity and when self-determination may require participants to compromise their core identities.*



**I**n their work on transformative mediation, Professors Joseph Folger and Robert Baruch-Bush frame the platform

The author is a Pittsburgh attorney-neutral who has served as an arbitrator or mediator in thousands of cases in the United States and Canada since 1979. He conducts courses on negotiation behavior that focus on neuroscience and the study of decision making. He is author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of this newsletter's editorial board, and the CPR Institute's Panels of Distinguished Neutrals.

of mediation in terms of "Recognition" and "Empowerment," which are integral to "Self-Determination" ("The Promise of Mediation: The Transformative Approach to Conflict" (Wiley 1994; Jossey Bass 2004)). These terms are often used in conjunction with concepts such as self-esteem, ego, values and principles. Regardless of the nomenclature or the ways we self-describe our identity, identity is an integral aspect of the decisions made at the bargaining table. Each participant brings his or her own identity to the table, and the team of individuals comprising a party or representing an entity may form a collective identity, even if only for the purpose of the dispute or the life of the litigated case.

A colleague of mine in Toronto had a case involving the death of a young boy as a result of medical negligence. Since his parents' primary goal was for the hospital to acknowledge responsibility, they refused to accept a release that contained language denying liability. The hospital made a seven-figure proposal, which the parents' lawyer recommended accepting. The parents would not, however, accept what they considered "blood money," and insisted that any funds remaining after payment of attorneys' fees and costs were to be donated to charity.



Robert A. Creo

Their role as parents and their religious and cultural beliefs dictated a self-determined outcome consistent with an identity that recognized who they were in the context of their community.

I see identity-driven decisions being made in all areas of substantive practice, but especially in employment, personal injury, and commercial disputes involving entrepreneurial entities and individuals. Employment termination or demotion claims involve challenges to the core of a

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## The Master Mediator

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person's prime identity, and "ego" and "self-esteem" are always an underlying interest. In many cases, despite overwhelming evidence of poor performance or misconduct, an employee is in denial about the reasons for termination.

Other identities are also in play when the role of economic provider is at risk and the entire fabric of a family is affected by the loss of gainful employment. In an economy where there are more workers than jobs, people struggle with the uncertainty of unemployment. When identity is weakened, the lawsuit is often a refuge or safety net protecting self-esteem. When denial is a coping tool, confidence in the viability of one's legal claim seems to increase over the length of the litigation. A plaintiff's own lawyer is often unable to be direct about how the evidence might be perceived by an objective person, and in cases that favor the other party, counsel tends to rely upon the mediator to evaluate how the evidence may look to a judge or arbitrator. As an experienced arbitrator, I strive to provide any such assessment in an authentic and transparent manner during the private caucus, with appropriate preambles that are compassionate and empathetic and customized to the key identity concerns of the principals.

In many employment cases, the former employee still identifies with the employer and feels genuine dismay at no longer being part of the team. Their language is often laced with "we" when referring to past events, even when they have not been employed by the defendant for years. Working for top organizations instills individuals with pride and affiliation. In one case involving an age discrimination claim, a man who had started at a large company at age 18 and worked his way up into middle management was terminated when his department was downsized in response to economic conditions, while younger employees were retained. It was difficult for him to come to grips with the idea that his strident loyalty to the company over decades of service was not respected when cutbacks became necessary. He explained that despite his poor treatment by a younger

'[I]dentity is an integral aspect of ... decisions made at the bargaining table ... [and] mediators should seek to understand how the way we perceive ourselves plays out....'

and newer director of his department, he was a "company man" and would remain so until the day he died. The case did settle and the compensation and settlement document terms were framed in a manner that restored the plaintiff's self-esteem and respected his identity.

In catastrophic personal injury cases involving hard-working men and women who were the sole or primary support of their families, the role of provider and parent usually plays out in future security for not only themselves but their family. I frequently hear how humiliating it is for grown adults not to be able to care for themselves and what a burden they feel they are on their spouses and children. This is even more acute when basic life functions such as eating, dressing and walking are difficult or impossible without assistance. I often talk to the family about the change in roles and the feelings engendered about the dependency created by the injury. In many cases, the person is fully functional but is unable to work because of physical limitations caused by the trauma or alleged medical malpractice. People express anger, frustration, shame, and a host of other emotions when discussing their limitations. Often there is a comparative or contributory negligence defense that places some or all of the blame on the injured person. This is especially challenging for a mediator when there is substantial validity to these defenses. It is, however, the duty of a mediator to facilitate these difficult conversations and engage in the sense of loss and uncertain prospects of transitioning to new identities.

People who are self-made in business or have risen through the corporate hierarchy to leadership positions make identity-driven decisions. As a young in-house lawyer for a corporation, I was always struck by the language of the CEO who referred to corporate decisions or policy in the first person. He would say "I will do this" rather than describing the company acting. The self

and business roles blur, and an identity is formed in which most decisions must be consistent and reflect the core attributes of this identity. Reputation and the legacy of the founders and leaders are paramount and usually trump economic or other rational reasons to settle a claim.

In business cases, I often discuss how the uncertainty of litigation affects the corporate ego and ask about the corporate risk tolerance. One case involved two brothers whose mantra was "do the right thing," and who made litigation decisions in the context of values and morality. This came into conflict with the practicality of settling nuisance cases or claims against them when the outcome was uncertain. It creates cognitive dissonance when economic sense pulls one way and values tug the opposite direction. I often frame the query to these business leaders in terms of identity by asking if their core identity, leadership, or personal reputation are going to be diminished by a practical decision to settle without an admission of wrongdoing. A common answer is that the payment of money constitutes an admission in the practical sense. I may ask them to consider and prioritize other anticipated challenges or battles that may need their personal time and attention, asking themselves, as a leader with employees depending upon their judgment and relying upon them, what makes sense in both the short and long term.

In one case, a business was expanding and hiring new employees, and the CEO decided that his role required his energy be directed toward the future rather than toward claims arising in the past. The settlement amount was minimal in the context of what was on the horizon, and he decided to concentrate on being the leader of the future rather than the defender of the past.

Identity-driven decisions are common, and negotiators, lawyers, mediators, risk managers and executives should seek to understand how the way we perceive ourselves

plays out in self-determination. Mediators should engage the participants in a transparent manner by exploring how any decision or outcome affects their pluralistic identities. My experience is that if identity might be com-

promised by a term or condition of a settlement, an acknowledgment that prudence and avoidance of uncertainty justifies settlement leads to closure without seller's remorse. Most mediators can recount numerous times when

months or years later the participants have communicated the relief that came from resolution in mediation.

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