

The Master Mediator/Part 1 of 2

Looking My Way: Identity in Mediation

BY ROBERT A. CREO

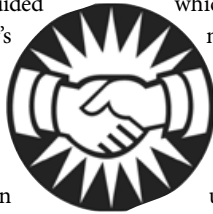
The question of identity has intrigued me over the years as I have struggled to contemplate the various frames of self and apply my understanding to what happens in the mediation room. In the 1980s, when I expanded my work as a labor arbitrator who sometimes mediated to a mediator of litigated cases in all areas of the law, I was trained and guided by William Ury and Roger Fisher's seminal "Getting to Yes: Negotiating Agreement Without Giving In" (Houghton Mifflin, 1981) and its now well-known fundamentals. Their method of "Principled Negotiation" can be distilled to four basic points:

People: Separate the people from the problem.
 Interests: Focus on interests, not positions.
 Options: Generate a variety of possibilities before deciding what to do.
 Criteria: Insist that the result be based upon some objective standard.

The starting point of separating people from the problem is nicely elaborated in the 1981 edition:

We are creatures of strong emotions who often have radically different perceptions and have difficulty communicating clearly. Emotions typically become entangled with the objective merits of the problem. Taking positions just makes this worse because people's egos become identified with their positions. Hence, before working on the substantive problem, the "people problem" should be disentangled from it and dealt with separately, *Getting to Yes*, at 10 (1981)

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 Panel of Distinguished Neutrals.



POSITIONS, INTERESTS & IDENTITY

This at first struck me as odd, but as a young, inexperienced lawyer and neutral I was not going to challenge conventional wisdom in my quest for the "BATNA" (Best Alternative to a Negotiated Agreement). My interpretation, which I contend is the approach taken by most mediator training courses, was to vent the emotion to remove it as a barrier, and then push to morph the all-too-human participants into purely rational creatures who rely upon objective standards to choose a BATNA from a menu of creative options generated during the mediation process. For many years, this worked for me. Kind of.

There seemed to be a lot of other things happening at the mediation table that did not fit neatly into this model of the "economic man" or maximize behavior as a rational being without regard to emotion. It reminds me of the Godfather—nothing personal when people are killed, just business. People who make business decisions rather than emotion-driven choices are considered to be on the right path. I could not always put my finger on what was happening or articulate it clearly, but it did not seem that people were leaving their personality, emotions, values, risk tolerance, time pressures, litigation fatigue, and other factors outside the caucus doorways when they settled cases. To the extent that the interest-based negotiation model was linear, this just wasn't what was happening in most of my cases. Parties were emotional not only at the beginning, but also in the middle and usually at the end, even if the emotion was not apparent. People seemed to be considering all sorts of factors, many of which I felt fit the conventional definition of "irrational," rather than prudent. The outcome might well be perceived as prudent, but how the parties got to the final decision was not a lesson in logic. This led me on a decades-long, cross-disciplinary course of study into human nature, cognitive psychology

and neuroscience, which I endeavor to share—and test—with you here each month. Decisions are multi-faceted; they involve hard-wiring and personal circuitry, as well as inclinations based upon experience and context. Decisions are holistic and nonlinear in that there are a bundle of things going on at any one moment while we gather information, analyze, reflect, check our guts and ego, and decide, sometimes without buyer's remorse. Our ego—our self-esteem—is a pillar of any choice we make, especially when facing the uncertainty inherent in conflict.

I have come to disagree with *Getting To Yes* that "egos" becoming identified with the positions and conflict is problematic. It is instead common. In a normative sense, I now think it neither good nor bad, though it can at times be ugly. Identity-driven decisions are a reality. This is true of individuals, organizations and small groups, particularly those sitting on the same side of the negotiation table.

HUMAN NATURE, AFFILIATION & IDENTITY

An appropriate starting point may be the three rhetorical questions attributed to Rabbi Hillel the Elder (c. 110 BC –10 AD), which are often translated as:

1. If I am not for myself, who will be for me?
2. If I am only for myself, what am I?
3. If not now, when?

Although there are volumes of scholarly articles and commentary on these three questions, I am going to focus on my own lesson taken, which is that we must define ourselves in a pluralistic way that accounts for our self-interest in the context of being concerned for others and community. We must reflect carefully upon the time to act, but understand that what is usually demanded is engagement and authentic action.

Each of us creates multiple identities from the affiliations that draw us to groups and enti-

ties. Social identity theory contends that aspects of an individual's self-concept is derived from group membership, and that people are intrinsically motivated to achieve positive distinctiveness or positive self-concept while maintaining positive social identity with the group. Although not all scientists agree, some researchers support the "self-esteem hypothesis," which postulates a direct relationship between positive social identity with the group and self-esteem.

The Nobel-prizewinning professor Amartya Sen contends that we all have plural or multiple identities, which are diverse. He lists some of these as class, gender, ethnicity/nationality, profession/trade, morals, political, community and family roles. Each group or collective to which a person simultaneously belongs provides a particular identity, but none of them can be taken to reflect the person's only identity or singular membership category. One still has to decide what importance or priority to attach to one affiliation over other categories or groups. When people focus on a singular identity or develop a conformist or herd mentality, this may incite distrust or violence against those outside the group. Professor Sen theorizes that the reality of the universe of plural and diverse identities weakens the role of reason and choice. He states that classical economic theory, which he notes has been discredited, contends that a person acts reasonably and rationally to maximize personal economic benefit or interest. This is a narrow view of a "single-minded, self-loving rational agent," which results from "identity disregard" in the rational choice decision models, see Amartya Sen, *Identity and Violence, The Illusion of Destiny* (box).

Humans have a basic need to bond with others and associate in groups. People are born into certain affiliations, and culture creates other bonds to groups. Education and intentional choices, sometimes strategic to further self-interest, motivate us to join specific groups. These groups have a commonality of interests that then influence our values and subsequent actions. Many of the groups initiate new members with rituals, codes, secrets, symbols, and uniforms. As a Pittsburgh resident and proud member of the Steelers Nation, for example, I often wear my colors on game day, including my Steelers socks. The "Terrible Towel" is a symbolic "rally towel" that is not used to actually dry anything. When I travel

during football season, I attempt to find a local Steelers bar, so I can be with others and watch the game as a community. People are welcoming and engage me based upon my proclaimed affiliation. I often have status in the group because I have had season tickets since 1980. When I was an NFL grievance arbitrator, I declined to take Steelers cases, to avoid even the appearance of impropriety. The Steelers Nation is likely a rich source for social scientists researching social identity theory.

Our inbred, learned and self-proclaimed affiliations compose plural identities, which are integral to our self-esteem and decision-making. 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 choices we make and actions we take, since each of these roles has its own image, codes, principles and rules.

At the tenth annual Lawrence W. Kaplan Lecture in Conflict Resolution in Pittsburgh in November 2013, Randall Kiser presented "Decision-making Expertise: Conventional Wisdom & 10 Ways to Better Decisions" (see <http://linkd.in/1cMswHl>). Kiser's tenth thesis was that at times people had to "drop their tools" in order to make a good decision. He contends that the "tools" and attributes of a trade or profession at times become so ingrained into our identity that this impedes effective decisions.

His lecture described what happened in the Mann Gulch fire of 1949 in Montana, where thirteen forest smokejumpers perished and only two survived. They had parachuted into the gorge about 4:00 p.m. to fight a fire they expected to have under control by 10:00 the next morning. When the foreman observed, several hours later, that the fire had jumped the gulch and was only 200 yards away and moving rapidly toward the men, he yelled for them to "drop their tools" as he lit a fire in front of them, and ordered them to lie down in the area it had burned. No one did so, as they ran, tools and all, with only two of them making it through a crevice unburned. In a detailed 1993 analysis by Professor Karl Weick (see box), one of the factors he concludes leads to faulty "sensemaking" in crisis situations is framed in terms of identity. He notes: "As the fire gains on them, [the foreman] says, 'Drop your tools,' but if people in the crew do that, then who are they? Firefighters? With no tools?" Kiser's

research cites comparable examples, such as sailors who do not remove their metal boots when abandoning ship, consequently drowning when they rip their life raft. Kiser advises that an ability and willingness to "drop your tools" results in better decision making.

Next month's column will explore how mediators can harmonize an outcome with identity and when self-determination may require participants to compromise their core identities. ■

(For bulk reprints of this article, please call (201) 748-8789.)

FURTHER READING:

Charles Duhigg, *The Power of Habit* (Random House 2012)

Sally Mathis & Hakan, "Toxic Decision Process: A Study of Emotion and Organizational Decision Making," 15 *Organizational Science*, 375 (2004)

R.J. Beis, "The Predicament of Injustice: The Management of Moral Outrage," in B.M. Straw & L.L. Cummings, eds., 9 *Research in Organizational Behavior* 289 (1987)

M.A. Hogg & D. Abrams, "Social Motivation, Self-Esteem, and Social Identity Theory," in *Constructive and Critical Advances* (Harvester Wheatsheaf 1990).

Randall Kiser, *Beyond Right and Wrong* (Springer 2010)

Randall Kiser, *How Leading Lawyers Think* (Springer 2011)

Jonathan Lehrer, *How We Decide* (Houghton Mifflin Harcourt 2010)

J.G. March, *A Primer on Decision Making: How Decisions Happen* (Free Press 1994).

Norman Maclean, *Young Men and Fire* (1992).

M. Ruben & M. Hewstone, "Social Identity Theory's Self-Esteem Hypothesis: A Review and Some Suggestions for Clarification," 2 *Personality and Social Psychology* 40 (1998).

Karl E. Weick, "The Collapse of Sensemaking in Organizations: The Mann Gulch Disaster," 38 *Administrative Science Quarterly* 628 (1993).

Amartya Sen, *Identity and Violence, The Illusion of Destiny* (W.W. Norton & Co. 2006) ■