The Master Mediator / Part 2 of 2 On Emotions and Decisions

On Emotions and Decisions

BY ROBERT A. CREO

Last month, Master Mediator columnist Bob Creo looked at the role of emotions in conflict resolution decision making. In Part 2 this month, he factors in the effects of shame and guilt.

* * *

"My behavior toward my mother is shameful. I am filled with shame."

I felt the heaviness in mediation part Bill's heart, and his vulnerability. His wife, and his lawyers and advisers, were silent as I weighed my response. Bill's eyes and mine were locked together.

I heard these words late in the day in a mediation caucus from a middle-aged man in a case between brothers who were partners in a real estate venture.

John and Bill inherited a family real estate operation from their deceased father that John, the younger brother, was running on a daily basis in their hometown after Bill moved away eight years previously. Bill, who had been active, was now passive, yet maintained an equal ownership interest.

Conflict had arisen between the brothers over accounting and expense claims by John, and the equal division of profits despite the unequal division of actual managerial work. At the time of Bill's move, their mother was perceived by him to have sided with John, so Bill had not seen her since that time.

The mother still received some income from the business. The mediation location was a few miles from where she lived. The brothers had not spoken to each other for months, and Bill refused to meet in person with John at my proposed joint session at the start of the mediation.

Despite my advice and best efforts at process management, the mediation commenced in two separate offices about one mile apart. I was ferried between the two locations for caucus. It was a process scheduled on two consecutive days. I agreed with the counsel to conduct it this way upon the understanding that a joint session would be held once it would not be counterproductive.

THE NEUTRAL'S RESPONSE

In response to Bill's statement, I said to him and his wife,

> Nothing would please me more than if the two of you got in your car and drove over to see your mother right now. I can confidently speak on behalf of your brother and sister-in-law that, regardless of the outcome of the mediation or litigation, this would thrill them. If your lawyers do not object, let's break now while you go do that. I will return to your brother's law firm and wait to hear from you.

Bill smiled, stood, and shook my hand. He said, "This is my decision, and not the lawyers. Thank you." He and his wife walked out to go see Bill and John's mother.

THE OUTCOME

Robert A. Creo

The process continued into the evening with a joint session.

We made progress, continued the next day, and held additional sessions that were conducted over many months. Ultimately, I served as an arbitrator to finalize some aspects of the buyout of Bill by John. Their mother eventually moved to spend the last days of her life living with Bill.

Many times during the process Bill thanked me for not interfering with him owning his shame, and for not patronizing him by discounting it. He appreciated that his courageous act of exposing his innermost feelings was met by authenticity and empathy. He also said he appreciated my simple and unequivocal response to immediately go see his mother.

As intended, it acknowledged the legitimacy of his shame: I was not giving him a pass, it was shameful.

We all respected him having the courage to open up to all of us in the room. We all felt for him. Most important, it was time to take affirmative action in the bright light of hope. Hope is an antidote to vulnerability, and underlies all courageous actions.

A STATE OR CONDITION

Most of us understand shame consistently with how Charles Darwin framed it. He contended that shame was universal and existed across cultures. He wrote about shame, including the physical manifestations of it, stating that shame often involved blushing, confusion,

The author is a Pittsburgh attorney-neutral who has served as an arbitrator and mediator in the United States and Canada since 1979. He conducts negotiation behavior courses that focus on neuroscience and the study of decision-making, and was recognized by Best Lawyers in America as 2014 Mediator of the Year for Pittsburgh. He is the author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of *Alternatives*' editorial board, and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com.

downward-cast eyes, slack posture, and lowered head, and might be seen as a warmth or heat in the facial area.

Darwin also described a "sense of shame" as being a consciousness or awareness of shame as a state or condition. He noted that being cognizant of shame may occur when facing embarrassment, dishonor, disgrace, inadequacy, humiliation, or chagrin. See "The Expression of the Emotions in Man and Animals" (London: John Murray, 1872)(available at http://bit.ly/1c9Y4YJ).

DISTINGUISHING GUILT

According to author Brene Brown, a professor at the University of Houston Graduate College of Social Work, the majority of shame researchers and clinicians agree that the difference between shame and guilt is best understood as the difference between "I am bad" and "I did something bad." She writes:

> Guilt = I did something bad.
>
> Shame = I am bad.
>
> Brown contends:
>
> When we apologize for something we've done, make amends, or change a behavior that doesn't align with our values, guilt—not shame—is most often the driving force. We feel guilty when we hold up something we've done or failed to do against our values and find they don't match up. It's an uncomfortable feeling, but one's that's helpful. The psychological discomfort, something similar to cognitive dissonance, is what motivates meaningful change. Guilt is just as powerful as shame, but its influence is positive, while shame's is destructive. In fact, in my research I found shame corrodes the very part of us that believes we can change and do better.

Brene Brown, "Daring Greatly: How the Courage to Be Vulnerable Transforms the Way We Live, Love, Parent, and Lead," 72-73 (Avery 2012).

Prof. Brown has given some of the most viewed ever TED talks on the subject. See "Listening to Shame" (March 2012)(available at http://bit.ly/1HjkZae).

Mediators and advocates can obtain significant insights from the work of Prof. Brown and other scholars writing about shame and guilt.

My observation is that mediators, and most lawyers, are skillful at dealing with guilt. The civil law has numerous doctrines, tools and conventions to attempt to restore the status quo following a wrongful act resulting in harm to another.

Because of The Shame

A new purpose: The transformative nature of mediation solves problems by addressing, head on, emotions we want to avoid.

The focus: Guilt and extreme guilt.

The task: The mediation forum offers an opportunity to save face. That is about healing guilt, shame, and maintaining reputation. Addressing these factors can be a neutral's tool.

Civil litigation is backward looking and focuses on past conduct in a search to determine what happened and who shall pay whom.

Although controversial, the criminal law has used public shaming as a tool for punishment and reintegration of wrongdoers for centuries. Public censure bullies individuals into conformity to group standards while intending to serve as a deterrent to others.

Guilt and shame, however, are present in civil disputes. People have acted and others are harmed or perceive themselves as being aggrieved. It is usually fruitful to probe all emotional platforms, especially shame and guilt.

I usually recommend a direct approach to identifying shame and guilt. Once trust and rapport has been established, a direct question in caucus may be appropriate. It can be addressed in a number of different ways, including with some of these potential useful questions, depending on the nature of the claim and relief sought in court:

1. Are you sorry for any of your conduct?
2. What would you have done differently in hindsight?
3. Do you think the other participant believes you should feel guilty about your actions?
4. Do you think the other participant believes you should feel shame about your actions?
5. Do you think any of the other participants feel sorrow, guilty, or shame for their conduct?
6. If you win this case in court, do you think the other participants will approach you and acknowledge that you were right, and they were wrong?
7. If you lose this case in court, do you think you will approach your opponents to acknowledge that they were right, and you were wrong?
8. If you lose this case in court and it becomes widespread knowledge in the community, will you feel any guilt or sense of shame?
9. If you win this case in court and it becomes widespread knowledge in the community, do you think your opponent will feel any guilt or sense of shame?
10. If you settle this case, will it have any significant impact on your identity or self-esteem?

This engagement must occur at an appropriate time later in the process. It is served with sincerity, empathy, and the non-judgmental skill that is inherent in effective impartiality. The mediator must be prepared to go along the path even if it leads to a dead-end.

'POWERFUL AND FEARED'

Humans live in groups. Shame humiliation is powerful and feared. People conflate a not-guilty or no-liability verdict with exoneration.

So if the system absolves you, then there is little reason to feel guilt or shame. Mediation takes the sting out of wrongdoing by focusing on an answer in the absence of normative assessment. Like the much-quoted Rumi, "there is a field beyond right and wrong, I will meet you there."

One of the criticisms of ADR, particularly arbitration awards, is that the privacy and confidentiality of the process and settlements shield wrongdoers from public view,

(continued on next page)

The Master Mediator

(continued from previous page)
guilt and shame.

These are legitimate views and criticisms of mediation. My own experience, however, processes the behavior through a different lens. I am not so cynical since I believe there is an unspoken transformation which leads a party to resolution.

Participants come with opposite points of view or goals and still settle. This does not happen without someone changing their mind or letting go of an issue or emotion.

I do believe that mediation educates participants and allows them a forum to save face. That is about healing guilt, shame, and maintaining reputation. A settlement is the glass filled midway, which gives permission to participants to view it as half full or half empty.

Settlements often contain terms or conditions, especially in commercial cases where there are future conditions, which do not give a pass to a wrongdoer for prior misdeeds. In many cases, it may allow an actor to move from believing that they are "bad" to "I did something bad and now I am making amends."

This is, indeed, transformative mediation grounded in resolution.

ADDITIONAL READING

Brene Brown, Daring Greatly, How the Courage to be Vulnerable Transforms the Way We Live, Love, Parent, and Lead (Avery Reprint, 2015).

Antonio Damasio, Looking for Spinoza: Joy, Sorrow, and the Feeling Brain, (Harvest 2003).

Antonio R. Damasio, Descartes' Error: Emotion, Reason, and the Human Brain, (Penguin Books 2005).

Stephan Hamann, Towards Understanding Emotion's Effects on Memory, 1 *Emotion Review* No. 2, 114 (April 2009) (abstract at http://bit.ly/2beArqj).

Jennifer S. Lerner & Dacher Keltner, Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice, 14 (4) *Cognition and Emotion* 473 (2000)(available at http://bit.ly/2auUTpL).

Andrea Scarantino & Paul Griffiths, Don't Give Up on Basic Emotions. 3 *Emotion Review*, No. 4, 444 (October 2011) (abstract at http://bit.ly/2beB5nA).

Court Decisions

(continued from page 114)
3248016 (N.J. June 14, 2016)(available at http://bit.ly/2ajGRWC), the arbitration clause in the parties' agreement was held to be unenforceable because it failed to include the notice language required by *Atalese.*

In a 5-1 opinion by Associate Justice Barry T. Albin, the N.J. Court held that the language of the arbitration clause was not sufficient to delegate to an arbitrator the decision on whether the case arbitrable. This matter was compared to the U.S. Supreme Court's *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63 (2010), where the contractual language was found sufficient for delegation.

In *Rent-A-Center,* Antonio Jackson filed a complaint in the Nevada federal district court alleging race discrimination and retaliation. Rent-A-Center West moved to dismiss proceedings and compel arbitration. The district court dismissed; on appeal, the Ninth U.S. Court of Appeals held in part that the district court was required to determine whether the arbitration agreement was unconscionable.

In a controversial 5-4 decision written by Associate Justice Antonin Scalia, the Supreme Court held that under the FAA, if a party challenges the enforceability of that particular provision, the district court considers the challenge, and if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator.

But in *Morgan*, the defendant had not requested the arbitral motions with adequate clarity, thus implying that the arbitrability issues were to be decided by the court. "To overcome the presumption of judicial resolution, there must be clear and unmistakable evidence that the parties have agreed that the arbitrator will decide the question of arbitrability," wrote Justice Albin. "Silence or ambiguity in an agreement does not overcome the presumption that a court will decide arbitrability".

Specifically, the opinion says that the "arbitration provision fails to comply with the dictates of *Atalese* because it fails to explain that arbitration is a substitute for the right to seek relief in our judicial system."

Atalese is controversial because it is hard to square with the strong federal policy requiring that agreements to arbitrate be enforced according to their terms. The N.J. Supreme Court has taken a strict position rejecting efforts to compel arbitration if the agreement's language is ambiguous or unclear.

The standard is that agreements must expressly state that the parties are aware that in electing arbitration as the exclusive remedy, parties must clearly and unambiguously waive their Constitutional right to sue.

CONTRARY TO FAA

There's a lot more arbitration action in New Jersey. Last spring, the Appellate Division issued an unpublished decision at *Scamardella v. Legal Helpers Debt Resolution LLC, et al.*, Docket No. A-4170-14T3 (N.J. App. Div. Apr 19, 2016)(available at http://bit.ly/2ahlEwc), that re-affirmed *Atalese*, and strongly rejected the defense contention that the state Supreme Court case is contrary to the Federal Arbitration Act.

An appellate panel affirmed a lower court decision declining to compel arbitration in *Scamardella*, noting that the arbitration clause signed by the plaintiff failed to comply with the minimal *Atalese* disclosure requirements for waiving a jury trial.

Legal Helpers' attorney, John H. Pelzer, a shareholder in the Fort Lauderdale, Fla., office of Greenspoon Marder, told *Alternatives* that the New Jersey appellate panel "had little choice but to adhere to *Atalese* as it did, though we attempted to give the court a way to complete the second level of *Concepcion* analysis that was not done in *Atalese*, and therefore reach a different conclusion."

Pelzer is referring to the seminal consumer contract arbitration case, *AT&T Mobility, L.L.C. v. Concepcion,* 563 U.S. 333 (2011) (available at http://bit.ly/1XZXMwN). The