



Mediation: More Than a Litigation Tool

Larry W. Bridgesmith
TAPM President 2010-2011

Last month I was privileged to be invited to address the North Carolina State Bar’s Dispute Resolution Section in Greensboro. I was specifically requested to speak on the growth and expansion of mediation as a commercial and community development instrument outside the litigated case. What I discovered was that North Carolina mediation practitioners are as creative and innovative as our colleagues in Tennessee. In addition to meeting “old friends” like Andy Little and Straus Professor Tony Miller who were also on the program, I met many new friends who are working hard to improve their skills and build their practices. Roughly half the attendees were lawyers and the others were not.

What we all have in common is the growing awareness that mediation is a practice that has applicability in board rooms and back rooms as well as court rooms. The role of the mediator is growing and with it the opportunity to build a career and assist our communities grows as well.

Coaches, facilitators, organizational system designers and ombudsmen are but a few of the mediative-type applications professionals in our field perform for their clients and employers. The tent is wide indeed that covers the work our colleagues do in this discipline we call mediation.

Among some of the more creative applications of mediation skills of which I am aware include personal coaching of physicians to improve their “conflict capacity quotient”. Many of our colleagues are trainers and facilitators of difficult conversations. Biomedical ethics is a growing field for the application of mediation skills. From police departments to public schools to hospitals and churches, mediators are finding numerous applications for the problem solving skills that people and the organizations to which they belong crave.

TAPM exists to serve all these varied applications and the professionals who provide them. As central as court annexed mediation will always be to our field, the more creative we can be in generating interest in the many forms of managing conflict in our businesses, communities and families the greater the value our “profession” will provide to society. We will be very interested in hearing from TAPM members about the various forms they have seen mediation take. As my term as TAPM president proceeds, I would like to feature your experiences with “outside the box” mediation approaches to problem solving that you have participated in. Please let me know of those experiences.

In the meantime, count on the fact that the Tennessee Association of Professional Mediators will seek to serve the interests of the mediation community in whatever roles its members choose to perform in furtherance of a peaceful and effective social order.

May
2010

Inside this issue:

President’s Message 1

Larry Bridgesmith

Meet the Mediator 2
Jonathan Stein

Mediation Applying Personality Theory 4

The Tennessee Vision Mediation Project 8

Worker’s Comp Mediation Review of Civil Peer Group Mtg 9

Mamie Huff

MEET THE MEDIATOR JONATHAN STEIN



Jonathan Stein is an attorney-mediator currently pursuing his second career. He received a bachelor's degree in Computer Information Sciences, and worked as a systems programmer/analyst for seven years. Thereafter, Jonathan attended law school on a merit scholarship where he was first exposed to ADR methods, and served as an Editor of the Law Review. Upon graduation he took an associate position with Cullen and Dykman, one of the oldest law firms in New York, working with the commercial litigation practice group. After several years Jonathan departed Cullen and Dykman to work with a distinguished solo practitioner handling appeals before opening his own firm.

Jonathan moved to Nashville six years ago, and has joined the Tennessee bar. He continues to serve clients in a variety of civil matters out of his Brentwood office, and complements his legal work with a growing mediation practice. The Law Office of Jonathan L. Stein focuses on: civil/commercial litigation, domestic relations, wills & estates and intellectual property. Although an experienced litigator, he encourages clients to resolve their disputes with ADR methods whenever possible.

Jonathan is listed as both a General Civil and Family mediator pursuant to rule 31 of the Tennessee Supreme Court. He serves as the Chair of the Nashville Bar Association's ADR Committee, and TAPM's Legislative Action Committee. Jonathan serves the federal bar as a member of the ADR Panel for the Middle District of Tennessee. Finally, Jonathan is a volunteer mediator for the Nashville Conflict Resolution Center.

What is in your mediator tool kit? What is your favorite or most used tool?

Story Telling. Often I tell short stories (typically only a minute or less in duration) of personal experiences and the pertinent life lessons I learned to illustrate a point to a party. In this manner I can diffuse tension and hopefully plant a seed of compromise by analogy. It is a useful method of breaking impasse.

If you were a superhero/mediator what would be your name and slogan?

The Conciliator
I will bend like a reed in the wind.

What is your pet peeve?

Fox news "correspondents" like Glenn Beck who engage in propaganda and fear mongering.

Are you married/do you have kids/pets etc?

I'm Divorced (everyone gets a Mulligan right?) with no children. I inherited a cat when my mother passed away.

What are your hobbies?

I like to stay active and really enjoy the outdoors. My hobbies include: golf, volleyball, ultimate Frisbee, white water rafting and hiking.

(STEIN Continued on page 3)

(STEIN Continued from page 2)

Why did you become a mediator?

To assist clients resolve their disputes in a civilized, expeditious and efficient manner.

What is your favorite mediation read? A Handbook for Resolving Business Disputes

What is your phobia? I don't do fear!

What is your favorite vacation spot?

Jamaica. I love the crystal clear water of the Caribbean (being a former Lifeguard), the warm sun and the beautiful beaches. The people of Jamaica are fun and friendly.

Personal or professional accomplishments you are particularly proud of:

Graduating law school magna cum laude, passing three bar exams (Connecticut, New York and Tennessee), and volunteering for Big Brothers Big Sisters.

Where are you from and how did you end up in Nashville?

I was born and raised in the suburbs of New York City, and lived most of my life in the Northeast. I moved to Nashville six years ago so I could be closer to my family and assist in the caretaking of my mother who was battling cancer.

Please complete these sentences:

"I have a burning desire to travel the world."

"People tell me I look like Dr. Drew."

"If I could have a 30 minute conversation with anyone (alive or otherwise, famous or not), I would want to speak with Thomas Jefferson."

What is your favorite TV show? The Daily Show with Jon Stewart

What is your favorite food/restaurant? I love Thai food. I'm still looking for a great Thai restaurant in Nashville (recommendations are always welcome).

What is your favorite flavor of ice cream?

I love Rocky Road and Coffee. Actually my favorite flavor is One Sweet Whirled, but Ben & Jerry's discontinued the flavor.

Knowing what you now know about life etc., would you choose the same career path? If not, what would you like to do?

I would have gone directly to law school instead of pursuing a career in computers first.

MEDIATION APPLYING PERSONALITY THEORY

Bill Rusak

Mediation, unlike other ADR processes, is a very active and engaging experience where the parties look to the mediator to guide them to their BATNA. Except for court-directed mediation, I assume most parties go to mediation with compromise and agreement in mind, therefore, having this in place facilitates our job. The process is simple and yet complex in both form and substance requiring both art and science. Mediators draw on a lot of resources and skills and it is in this context that I propose formalizing the inclusion of the human dimension, the one of personality theory. Using this to manage the patterns of behavior and actions of both the mediator and the parties can be very effective and efficient.

A great deal has been written on the subject of personality Types, Styles and Behaviors that are naturals for mediation. This process starts with a mediator's self-assessment to "know thyself", your own "Type". S. Montgomery describes "Type" as "... the inherent personal style, a predisposition that forms the basis of all our natural inclinations: what we think and feel, what we want and need, what we say and do". To "know thyself" has shaped my reaction and responses with the parties and, at the same time, using this know-how gives me insights into the respective parties' Type, Style and expected Behaviors.

When referring to Types, I go beyond the simplistic labels of "A" or "B" personality or "left brain/right brain" with its implied meanings. There is a general consensus that there are four basic Types of people. It is in our DNA and we can't change it. As well, there is no best Type and no one Type is better than another; as a matter of fact, we are a blend with a dominant and secondary Type influence.

Mediators assess the merits and carry out risk and SWOT analyses and decide what process tactics are best. Why not do this for the Type, Style and expected Behaviors. This is not to engage in manipulation, profiling or stereotyping; it is to be able to slip into the parties' frame of reference and speak their language. This will be additive to communications and gain the parties' confidence which translates to more understanding and trust that are critical to the process. High-level specialized training is not required, just getting a sense of the concept and its parts will supplement what we already do. Formalizing personality theory strategy simply makes us more prescriptive and deliberate and, therefore, more professional.

TWO STEP APPROACH:

The two-tiered approach is: first, you figure out the Type for a high level "take" on the personality; secondly, you gain knowledge of the Style to understand the parties' priorities of goal achievement versus the importance of relationships, which is the essence of mediation. This leads you to understand what constructive and/or destructive Behaviors to expect. When you consider the various stages in mediation – joint session, caucus, vetting and venting, fact finding and issue definition, etc. – appropriate application of this know-how in dealing with the parties improves interactions and further engenders trust and success.

FOUR STANDARD "TYPES":

Types are called temperaments, personalities, etc. Scholars, psychologists and practitioners like Jung, Kearsley, Miscisin, Myers, Hippocratese, Plato, etc., have researched and written about the subject. These notables use different titles such as colors, animals, professions and personalities. I use Kearsley's or True Colors. For the purpose of this article, I will simply refer to them as a, b, c and d with a brief definition.

(RUSAK Continued on page 5)

(RUSAK Continued from page 4)

FOUR TYPES:

- a. Artisan/Orange/Perceiving – A person who is tactical, has a flair for action, takes initiative and risk, is decisive, spontaneous and playful, flirts with rules, lives in the now world, talks about the “what” and gets it done.
- b. Guardian/Gold/Judging – A person who is logistical, enjoys interpersonal interaction, is organized, sensible and judicious, dependable, follows rules, deals with today and talks about what it is and gets it done by the rules.
- c. Idealist/Blue/Feeling – A person who is diplomatic, a good listener, very empathetic to others’ issues, sensitive, needs to be liked, intuitive and fervent, likes the status quo, lives in a desired world and talks about possibilities, needs involvement and is all about doing what is right.
- d. Rational/Green/Thinking – A person who is strategic, cerebral, a planner and analytical, seeks perfection, critical and dismisses, predictable, hides emotions, relies on theory and abstract ideas, talks about what is possible and strives for progress doing what is necessary.

Let’s look at a situation using this know-how in typical mediation – delivering a first offer, working to develop an offer, reviewing a MOA, handling surprise revelations, etc. A mediator would use a different approach with Type “a” than Type “c”. The former is pragmatic, does what has to be done, is not detail-oriented, etc., as the latter is more contemplative and measures all up against a personal code of ethics, right and wrong, relationship biased, etc. Type “b” would be diligent and cautious wanting to know what the right thing is according to protocol or policy, while Type “d” would need intense detail and analytics with an end point in mind. This is a simplistic illustration to make the point that we would reframe issues and alter our delivery with each Type.

Mediator: The ideal Type profile for a mediator would be the combination of (a)’s tactical and optimism, (b)’s logistics sense and protocol, (c)’s diplomacy, and (d)’s strategic and analytics. We are not and cannot be all four but “knowing thyself” makes us mindful of our strengths and weaknesses and how we can employ this to serve the parties.

FIVE “STYLES”:

The Style is the behaviors we engage in during conflict situations. The Style is rooted and has its genesis in culture, education, family, religion, demographics, etc. Style essentially boils down to two things: value of goals and the importance of relationships. I use a simple forced-choice questionnaire that quickly depicts a person’s Style from these two variables but this is not necessary. To determine the Style absent the questionnaire, I listen carefully and observe behavior for the signals that give me a sense of what to expect and/or prepare.

Imagine a matrix with four boxes with goals on the vertical Y axis and relationships on the horizontal X axis. Then position Style #1 in the top left box, #4 in the top right box and #2 in the lower left box, #3 in lower right box and #5 square at the middle intersections.

1. A win-lose approach to achieve the goal and abandon the relationship.

(RUSAK Continued on page 6)

(RUSAK Continued from page 5)

2. A lose-leave approach of total avoidance of conflict, abandon the goal and the relationship.
3. A lose-yield approach to abandon the goal and preserve the relationship.
4. A collaborative win-win approach to “let’s work it out”.
5. A compromise approach is to negotiate resulting in ½ win ½ win.

Mediator: The Style alerts you to what constructive and destructive, active and passive Behaviors to expect. In the imaginary matrix, those Styles in the left side of the box tend to have weaker constructive and stronger destructive behaviors while those on the right side tend to have more constructive and weaker destructive behaviors.

“BEHAVIORS”:

The Conflict Dynamic Profile has a self (Individual) and/or 360-degree assessment instrument. For our purpose here, it suffices to understand the type of Behaviors. These Behaviors can be either “affective” which are destructive or “cognitive” which are constructive. Affective Behaviors move from the issue and get into personalities and escalate tension and conflict while cognitive Behaviors focus on issue resolution. These constructive and destructive Behaviors additionally fall into two categories: active/overt or covert/passive.

FIFTEEN BEHAVIOIRS:

Seven Constructive Behaviors:

Perspective taking – Putting oneself in the other’s shoes...
 Creating solutions – Working on issues not personalities ...
 Expressing emotion – Speaking openly...
 Reaching out- Taking the first step...
 Reflective thinking – Thinking of the best response...
 Delay responding – Taking a time out...
 Adapting – Waiting for a better opportunity...

Eight Destructive Behaviors:

Winning – At all cost...
 Displaying anger – Emotional reactions...
 Demeaning others – Sarcasm...
 Retaliating – Actively or passively...
 Avoiding – Physically...
 Yielding – Surrendering...
 Hiding emotions – Bottling up...
 Self-criticism – Playing the tapes over in your mind...

Mediator: Mediators practice active behaviors of perspective taking, creating solutions and the passive ones of delay responding and reflective thinking. A mediator’s familiarity with these behaviors can be

(RUSAK Continued on page 7)

beneficial in dealing with the parties.

HOT BUTTONS:

Another element is Hot Buttons which are things people do and/or say that are provocative, upsetting, arouse anger or pose a threat. The reactions to these usually instinctively manifest themselves in displaying active or passive destructive Behaviors.

These Hot Buttons are:

1. Unreliable people
2. Overly-analytical people
3. Unappreciative individuals
4. Aloof attitudes and behaviors
5. Micro-Managing
6. Self-Centered individuals
7. Abrasive and sarcastic
8. Untrustworthy
9. Hostile individuals

Mediator: For a mediator, knowing your own Hot Buttons is important as it helps you control your default responses. Also, this know-how helps you work with the parties facilitating transitions that defuse emotions.

It wouldn't be a stretch to suggest that in some cases the reasons that the parties are at the point of mediation is because they themselves were unable to understand each other's Type and have not been able to slip into each other's frame of reference and speak each other's language. Not unlike an appropriately placed sincere apology, helping the parties' get into each other's context and work things out can be quite salutary. In the course of my corporate work, participants have frequently stated that although they have had the benefit of good education they haven't been exposed to the simplicity of the concept and its application. I have received comments like "it is so obvious", "now I understand it", "I will pass this on" or "I wish I knew this earlier in my career".

Conflict is an inevitable aspect of personal and ADR lives and just understanding the concept of "personality theory" can add another arrow to our quiver. Center for Creative Leadership research in the corporate world showed that there is a strong correlation between conflict management skills and career success which I am convinced would also apply to mediators. As a final point, in Platinum Rule, Alessandra offers that the Golden Rule of "treating others as we would like to be treated" doesn't work as it presumes that we are all the same Type, which we are not. Our goal as mediators is to get the parties their BATNA by using all available skills and knowledge and I propose that consciously adding the human element of personality theory will ratchet-up our value to the process and enhance success.

(RUSAK Continued from page 7)

William K. Rusak is owner of HR & ADR Services, a conflict management consulting company, where he has served many blue chip companies. Bill is a mediator and arbitrator with AAA, TN Rule 31 mediator and conflict management consultant. He comes from the corporate world working with many cultures internationally and currently has transitioned out of a corporate role to resume his consulting activity. He serves on the Advisory Board of The Center for Conflict Dynamics.

Comments and inquiries.

HR & ADR Services LLC – adr2mediate@aol.com, 615-948-7019

Sources of additional in-depth information on this topic

Behaviors – “Conflict Dynamic Profile” – Center for Conflict Dynamics

Types – “People Patterns” – Kearsley

Conflict mode instrument - Thomas-Kilman

Myers-Briggs style assessment

Golden Rule – “Platinum Rule” - Alessandra/O’Conner

Styles – “Changing Your Management Style” – Benfari

**Workers Comp Mediation:
Richard Murrell Speaks at Civil Mediators’ Peer Group Lunch & Learn**

Marnie Huff*

TAPM mediators and guests appreciated Richard Murrell’s presentation, “Mediation in Tennessee Workers Compensation,” at the April 2010 Civil Mediators Peer Group lunch & learn program. In fact, an experienced Workers Comp advocate at the luncheon noted that he definitely learned new information.

Richard Murrell is a walking encyclopedia on the State’s Workers Comp mediation program and is Assistant Director of the Benefit Review Program, TN Department of Labor and Workforce Development. He also serves on the TAPM Board. For a helpful summary of the State Workers Comp Mediation program, see Richard’s article previously published in TAPM’s e-news September 2009.

Future meetings. Watch your email for announcements of future TAPM Civil Peer Group meetings. Most will include one hour of CLE/CME credit. The day we meet will probably change to Thursday.

* Marnie Huff provides mediation, arbitration, and workplace conflict management training services. She is a founding member of TAPM. Marnie is a liaison to the American Bar Association Ethics 20/20 Commission, a 3 year appointment by the ABA Dispute Resolution Section. More information about Marnie is at www.MargaretHuffMediation.com.

The Tennessee Vision for Mediation Project

By Keith Dale

I have been listed as a Rule 31 Family Mediator for five years now, but I have only recently begun managing a Community Mediation Center. Last summer I began my training for the Executive Director position and began going to various seminars and training classes which led me to the retreat at the Scarritt Bennett campus in September 2009. The subject was the future of mediation in Tennessee. This particular retreat was for CMC's and the facilitator was Roger Conner from Vanderbilt University Law School. He also met with private mediators and others who were interested in mediation in Tennessee. Though I thought I was the new kid on the block, I was surprised to meet several fellow participants newer to mediation than myself. Never the less, I will share what makes sense to me, why I am participating, and why I think others should too.

The CMC group was filled with other's I could relate to, and it tickled me to see so much of myself in those whom I had just met. It was like I had found my lost tribe of people. And it didn't take much of an imagination to flashback 35 years, and see tie-dyed t-shirts, bellbottom pants which had peace signs and flower patches sown own. I wondered what had happened to these people. But we were all now dressed as mature adults and representing our respective positions, still saying "Peace" in our own way, and holding a core value that I don't think had ever left any of us. And yet, the reason for us coming together was not for reminiscing, but to deal with business. It became evident that we all had the same concerns: how we were going to help our programs survive their current financial dilemma. Yet, we were also concerned that mediation still be promoted across the state and affordable to everyone. And that the quality of our work be respected and fully funded so we could carry on the work we all truly believed in.

Then it was time to meet with those in Private Practice. In Cookeville, not too far into the future, we got together again. As we all came together and worked toward our shared goals and vision for mediation in Tennessee, Roger required us to discuss the elephant in the room. Basically, what our differences might be. And, as with most mediations, there were more differences we had imagined about the other (as the other party may have imagined about us - CMC's) than really existed. And I believe, what we all came to understand, is that no one is getting rich off mediation in this group. Nor is there an opinion that either party thinks they are better than the other based on an economic standard. Yet we could not deny that we may find ourselves vying for some of the same resources, but we became resolved to work together. We decided to expand the knowledge and access of mediation in Tennessee and to work as one to do that. We set goals to establish a standard of quality for mediation, have a process that promoted choice and self-determination for clients. And on this we all agreed. Each part has a plan of action, and frankly, to look at it all at once can seem quite overwhelming. But as each person participates, and more join the process, the project can become less complex and easier to achieve. A year has yet to pass, but the vision is established, the plan is made, and an organized team of professionals are working together to accomplish something extremely beneficial for people in Tennessee. I encourage you to join us. Go to MakeItRealTN.org and read more about our work and offer your support.



TAPM MISSION STATEMENT:

The Tennessee Association of Professional Mediators exists to promote mediation as a valuable and effective process empowering people in resolving disputes.

P.O. Box 150626
Nashville, TN 37215
tapm@tenmediators.org
www.tenmediators.org

**TAPM BOARD
2010-2011**

Larry Bridgesmith
President

Mark Travis
Secretary

Clayton Osborn
Treasurer

Doris Brocker
Director

Richard Murrell
Director

Doug Berry
Director

Jay Barry
Director

Stephen Sheilds
Director

Howard Vogel
Director

Leigh Ann Roberts
Immediate Past President

**"HOT FAMILY LAW CASES"
Approved for 1 Hr. CLE – General Credit
1 Hr. CME Family Law**

**Thursday, June 17
11:30—1:00 p.m.**

Helen Rogers will present the “hot cases” in family law 2009-2010

Steve Cobb, Legislative Counsel to TBA, will present summaries of legislation relevant to attorneys and mediators during the 2009-2010 legislative session.

**\$15.00 Members/ \$20.00 Guests
Cash or check payable to TAPM at the door
Or Pay Online Using MC/VISA INCLUDES
LUNCH!**

TAPM Mediation News will be published on the following dates:

- July 15, 2010**
- September 15, 2010**
- November 15, 2010**

Lisa W. Smith
TAPM Administrator
615-383-TAPM

If you would like to submit an article or be featured as the Mediator of the Month, please let TAPM know by emailing tapm@tenmediators.org.