

**MESSAGE FROM  
TAPM PRESIDENT  
RICHAD MURRELL**

**SEPT 2011**

**Inside this issue:**



Dispute Resolution is definitely making inroads in all forms of traditional conflict management. On the website Auctionbytes.com, an interview with Colin Rule, recounted the efforts he supervised in resolving buyer-seller disputes while working for eBay. This process, referred to as Online Dispute Resolution or ODR, evolved into a system that is now being expanded as a commercial service. An excerpt from that interview follows:

Colin Rule: Modria stands for "modular online dispute resolution implementation assistance." We're looking to help businesses design great problem resolution systems, working out issues quickly and effectively. In addition to standard online dispute resolution (ODR) - approaches like negotiation, mediation, and arbitration - we're building automated systems to help with problem diagnosis, self-help, and even crowd-sourced expert evaluation and appeals, like ebaycourt.com. Outside of ecommerce, we're looking at privacy disputes, reputation disputes, public disputes, and a variety of other kinds of disputes as well. More information is at [www.odr.info](http://www.odr.info). [Auction Bytes](#) (June 26, 2011)

It is exciting to be involved with such an innovative field of service. We as practitioners of alternate dispute resolution should continue to hone our skills and look for ways to convene parties in conflict in processes adapted to their environment. The presentation given by Dr. John Peters on "The Art of Thinking Together" on September 15, 2011, was another opportunity to expand our toolbox. If you were unable to attend, Dr. Peters will be presenting at the ADR Commission's Ninth Annual Advanced Mediation Techniques Workshop on October 21, 2011. For details please visit [www.http://www.tsc.state.tn.us/calendar/adr-commission/2011/10/21/ninth-annual-advanced-mediation-techniques-workshop](http://www.tsc.state.tn.us/calendar/adr-commission/2011/10/21/ninth-annual-advanced-mediation-techniques-workshop)

As always, you are encouraged to become actively involved in our committee structure to help move mediation forward in Tennessee. If interested in joining a committee, please click email Lisa Smith, TAPM Administrator, [tapm@tennmediators.org](mailto:tapm@tennmediators.org).

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**MEET THE MEDIATOR****MARY ANN ZAHA**

I have had a private practice in Chattanooga since 1998. Primary services are in family mediation, with some civil work. In addition, provide Parenting Seminars and conflict resolution trainings for private businesses and agencies. I received a Master's Degree in Conflict Resolution from Antioch University in 1996. Prior to moving to Tennessee I provided mediation and conflict resolution training in Oregon for Fire Departments, Juvenile Offenders and merging businesses. I completed a year internship with Clackamas County Court Connected Mediation and Reconciliation Center, with a focus on Divorce Mediation.

I currently serve on Fortwood Neighborhood Association board, Tennessee Lawyers Fund for Client Protection Commission, TAPM Board Member.

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

My most frequently used tool is questions! I ask the questions they really want to ask. My favorite tool is waiting out silence, resisting the need to fill in the gaps. My most used tool comes easily for me, my favorite tool I continue to work on.

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

I have no idea. I have a hard time relating to this question.

**What is your pet peeve?**

My safety gap between the cars in front of me is filled in by a driver (car) from behind me.

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

My husband Mike Peterson and I have been married for 35 years in October. We have two grown sons ages 27 (gourmet mushroom farmer) and 30 (soon to be a medical student). We house two black rescued feral born cats.

**What are your hobbies?**

TRAVEL!!! My husband and I love the discovery of different cultures. While at home I try to garden, seek new music and focus on family and friends. I also like to collect art with feelings.

**Why did you become a mediator?**

I read an article about it in 1982. It sounded perfect for someone like me who was known at the time to be indecisive about taking a side.

**What is your favorite mediation read?**

The Courage to Confront by Richard Mayer

(ZAHA Continued on page 3)

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**What is your phobia?**

Guns

**What is your favorite vacation spot?**

Bali

**Personal or professional accomplishments you are particularly proud of:**

Developing a full time practice in Chattanooga when at first Meditation and Mediation were confused.

Traveling for five weeks in India without a plan.

Earning an undergraduate degree after dropping out of high school in the 10<sup>th</sup> grade.

**Where are you from and how did you end up in Tennessee?**

I was born in Seattle Washington and lived up and down the west coast prior to my move here with my husband in 1994. He works in Nuclear Power.

**Please complete these sentences:**

%I have a burning desire to know that my children are who they want to be, not what I or someone else wants them to be.+

%People tell me I look like Helen Carter (probably they mean her mother).+

%If I could have a 30 minute conversation with anyone (alive or otherwise, famous or not), I would want to speak with my Mother.+

**What is your favorite TV show?**

Don't have one at the moment.

**What is your favorite food/restaurant?**

In Chattanooga, St. John's or a COSCO Hot Dog.

**What is your favorite flavor of ice cream?**

I had the best ice cream ever while in India and I have no idea what flavor it was.

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

I love doing what I do. It is perfect for me as I never stop learning and people share the gift of a part of themselves with me. Perhaps if I had had a different start in life I would have explored Neurology.

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## AN IN-HOUSE COUNSEL'S PERSPECTIVE ON MEDIATION OF EMPLOYEE/EMPLOYER DISPUTES

By

[Ruth Hillis](#)

The first time I attended a mediation of an employment dispute I was convinced that it was a waste of time. The company's time. The mediator's time. The employee's time. And my time. I knew that my client, a senior executive for the company that employed me as in-house counsel, was entrenched in her position that the company should be paying nothing to the employee for his claim of special severance benefits under his employment agreement. She believed that he had been insubordinate and had failed to deliver promised financial results. The terminated employee was equally certain that he was entitled to a hefty severance payment for termination without cause and that the senior executive had acted in bad faith and was rude in the bargain. Even the lawyers for each side were barely speaking to each other.

However, the court ordered us to try. On the appointed day we faced each other across a conference table in neutral territory, armed and dangerous with our respective versions of the facts and the law that should convince the other side to give up and go home empty handed. Eight hours later, the senior executive and the terminated employee signed an agreement. They were each satisfied, although neither was ecstatic. All of us lawyers were relieved of the burden of further discovery, trial preparation, deposition scheduling and posturing. The court was relieved of one more time-consuming case. The terminated employee was free to accept employment with a company that would truly appreciate his unique gifts. The senior executive could return to running a business instead of spending inordinate amounts of time searching her memory and her files for information that contributed nothing to her bottom line.

I fell in love with mediation that day. It was democracy at its best, theater at its most dramatic, and a carefully choreographed dance. In many ways, it was a mystery to me, but I was impressed by the fact that it worked. It has worked in virtually every employment mediation in which I have participated. My expectations have now shifted dramatically from that of skeptic to true believer.

The following comments were originally prepared for a presentation I made to a TAPM civil mediator training session last year. They are my observations from the perspective of a frequent user of mediation services to resolve employment-related disputes. They are my suggestions based on what I've seen work of things any mediator can do to improve the likelihood of a successful mediation of an employment dispute:

Believe that mediation will resolve the dispute. Your confidence in the process will encourage and support the efforts of all of the participants. Furthermore, your confidence would be justified. Employment-related mediations are successful in a very high percentage of cases.

Disputes alleging violations of federal non-discrimination laws are among the most contentious types of employment disputes. However, the EEOC reported a 70% resolution rate for the 123,000 employment discrimination cases mediated through that agency for

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the period from 1999-2009. Private mediations of employment disputes are likely resolving at an even higher rate. In that first mediation when I entered the room as a non-believer, the mediator advised us during opening statements that he had successfully mediated 95% of his similar cases. He had my attention from that point forward. So, I would suggest that disclosing your success rate in similar cases at the outset of mediation might encourage the participants to believe in the process and stick with it to the end.

Make sure that the right people participate in the mediation. Who should participate may be a more complex issue than appears at first glance. Do not assume that the parties will get it right without guidance or that the obvious participant is the best representative. Certainly, in an employment-related dispute, there will likely be an employee who has initiated a complaint and there will be an employer. However, there may be a number of available choices for representatives of each party at the mediation. Those choices should be explored with the parties, or their legal counsel if they are represented, so that the representatives who are best equipped to settle the dispute attend the mediation. In-house counsel are likely to have better knowledge regarding the strengths and weaknesses of the potential employer representatives because of their working relationships and better access to information about those individuals.

To assure both the psychological and physical comfort of the parties, you may need to discuss with the parties whether the total number of participants should be limited and whether there should be a roughly equivalent number of representatives for each party. It is crucial that the representatives who attend have actual settlement authority and that they are not just participating on a theoretical basis. Both the employee's and the employer's legal counsel should generally attend the mediation. In many of the employment dispute mediations that I have attended, the employer has been represented only by internal legal counsel - not by both internal and external legal counsel.

**Employee Representatives:** If there is only one employee complainant, that individual will likely be necessary to the mediation. However, in class actions or in other disputes where a group of employees has filed a similar complaint for which a common resolution is sought, it may be appropriate for one or more individuals to represent the group of employees. Spouses and other family members of employees also frequently request to be present at employment-issue mediations. In some instances, the family member merely desires to be present in the room for moral support. In other instances, the family member may feel that they have been as affected by the dispute as the employee and may want a say in the crafting of a resolution. Family members may feel that the failure to pay compensation was a personal wrong to them because of the effect the lack of income had on the family. Or they may feel that their family has been embarrassed by the company's dismissal of the employee or by disciplinary actions or other actions taken in the course of the employment. So, they may want to take an active role in the evaluation of proposals and in crafting proposals for resolution - and the employee may either want them to participate in that manner or understand that they need to allow that participation to avoid conflict in the home. Employees who are handicapped or impaired physically or mentally may

*(Employee/Employer Disputes Continued on page 6)*

*(Employee/Employer Disputes Continued from page 5)*

need the assistance of health care professionals or other personal caretakers or advocates in the room.

**Employer Representatives:** The best representatives for the company may not be the individuals who were most directly involved in the activity that lead to the employee's complaint. If that person is the employee's supervisor, he or she may have a personal interest in the outcome that would prove contrary to the interest of the company during mediation. For example, if the employee's allegations (if true) could lead to the termination of the supervisor or to disciplinary actions against the supervisor, the supervisor might promote a quick settlement that avoided full disclosure of the underlying issues.

The employer will need to determine how high up the chain of command to go to fill the mediation representative slots. It may not be necessary to send a senior executive or a member of the Board of Directors to represent the company's interests if the amount at risk in the dispute is relatively minor. However, there will be times when, due to the amount at issue or the nature of the complaint (such as allegations that could seriously damage the company's reputation), the involvement of such high level participants is necessary. Sometimes the only way to make the point to the employee that the company takes the dispute seriously and is giving resolution of the dispute a high priority is to engage the highest level executives or Board members in the mediation.

Company insurers, such as fiduciary liability, directors and officers, or workers compensation insurers, who may be required to contribute financially to the resolution of the dispute, should be consulted in advance of the mediation to determine their necessary level of involvement. Their representatives may want to attend the mediation in cases of significant potential liability or they may pre-authorize a maximum settlement amount with the company's representatives or make themselves available for settlement discussions by telephone during the course of the mediation. In any event, the mediator should know who these representatives are and receive assurances from the employer that a process for obtaining any necessary approvals from such entities has been worked out in advance of the mediation.

When you are preparing for the mediation and developing your mediation strategy, think about the likely emotional conflicts and what might resolve them.

An employee who has been terminated, denied promotion, disciplined, or denied compensation or benefits may feel cheated, angry, humiliated, unappreciated, rejected, confused, betrayed. He or she is likely not going to feel that a check alone will resolve the conflict.

Going into the mediation, the employee may be surprised to learn that some or all of the employer's representatives feel just as intensely about the dispute and are feeling just as much emotion against the employee. The employer in these disputes is never just a legal entity. The employer is a collection of people. The representatives of the employer at the mediation may be just as heavily invested emotionally in the outcome as the employee who filed the complaint. They may be the accused, so the outcome of the mediation could have a direct effect on the circumstances of their employment or their compensation or profits if they are owners or executives of the company. If they are rep-

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representatives of the Human Resources or Employee Relations departments, or in-house legal counsel for the employer, they may have spent months or even years working on the defense of the employer's position, diverting time away from projects that interest them or that could increase their compensation. If they believe the employee's accusations to be false, they are probably quite angry with that. If they believe the accusations are true, they may be working from a position of great fear.

To serve the interest of resolving the dispute, use the information you have about what happened to the employee that led to the dispute, what the role of the other participants was in the development of the dispute, and what roles each of the participants has played in the conduct of the dispute to figure out how everyone may be feeling when they sit down at your mediation table. Try to identify any special relationships between the participants also—whether particularly adverse relationships or previously friendly relationships. Those relationships may help you and the participants to understand and resolve the feeling aspects of the conflict.

In one particularly creative resolution of a dispute in which I was a company representative, the former employee/complainant and one of his oldest and best friends (who was another of the company's representatives) worked out the mediation resolution through private conversations outside of the hearing of the disengaged mediator. What I learned from that mediation is that even in an employment dispute, sometimes all the injured person really wants is to know that he is still loved and respected.

Familiarize yourself with the types of employment disputes and the normal components of such disputes.

Employers and their counsel look for mediators who have resolved similar disputes, understand the elements of employment disputes and have a mediation style that encourages prompt resolution. Understanding the elements of employment disputes enables the mediator to be more creative in the management of the mediation because the mediator understands the options for resolution and what is possible.

An employee's complaint may be related to the employer's failure to follow statutory requirements, written agreements, employment practices, or written employee benefit plans. Employment disputes may also arise from actions that the employee perceives as discriminatory and violative of federal or state non-discrimination laws. The issue may also concern compensation (salary, incentives, company stock, executive pay, vacation pay, severance pay) that was promised in individual agreements, company-wide pay standards or pay practices, or is based on statutory equal pay requirements. The employer's failure to pay out promised employee benefits including pensions, disability benefits, medical benefits, life insurance, or 401k plans may also be the triggering incident in the dispute. In such cases, stringent federal law requirements may govern the alternatives for resolution of the dispute.

The triggering event may take the form of an involuntary employment termination, a contract dispute, a disciplinary action, an employment transfer related to a corporate merger, divestiture or acquisition, an event that affects many employees in a similar

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*(Employee/Employer Disputes Continued from page 7)*

fashion that supports a class action complaint, or a combination of more than one of these triggering events.

Understand how the dispute advanced to mediation. That may help you to understand the level of readiness of the parties to resolve the dispute, as well as their level of motivation to move quickly to a resolution.

Some of the common paths to mediation with regard to employment disputes are:

- By court order during litigation
- By agreement during litigation
- Upon the granting of permission during an EEOC investigation
- Pursuant to an internal company dispute resolution process prior to or in lieu of litigation
- Initiated by Human Resources, Employee Relations or Legal Departments within the company to address an employee complaint before it escalates to litigation
- Pursuant to claims/appeal processes established by claims administrators with regard to disputes about payments under employee benefit plans

6) Establish processes that encourage preparation and engagement by the participants. My experience has been that when both parties are prepared and have a clear idea of the strengths and weaknesses of their respective cases, the likelihood of achieving a settlement during mediation is higher.

Some processes that I believe facilitate engagement and resolution:

- Request pre-mediation briefs/summaries/histories.
- Review the pre-mediation materials to understand the relationships among the participants, the issues, the potential strategies and creative alternatives for settlement.
- Provide information to the parties regarding your style and your processes for mediation prior to the mediation day.
- Provide a mediation environment that facilitates open discussion, privacy, adequate time and space for reflection/decision-making. Space, food, comfort facilitate relaxed decision-making.
- Be prepared to perform a reality check+role.
- Guide participants regarding their preparation steps: choosing participants; confirming settlement authority; preparing their opening statements (even if given only to the mediator)

Identify and address the underlying needs of the parties. Most claims in the realm of employment disputes will be stated officially in the form of a claim for money. Some may demand a reversal of a particular action that affects the employee's status as an employee such as reinstatement if the employee was terminated or a file purge if the employee was reprimanded or disciplined. However, the real key to the employee's satisfaction and cessation of the dispute may lie in something subtle or unspoken. If the mediation process does not reveal that need, it may be very difficult for the employee to agree to a resolution of the dispute.

*(Employee/Employer Disputes continued on page 9)*

*(Employee/Employer Disputes continued from page 8)*

The employer representatives at the mediation likely have a different, but equally important set of needs that must be satisfied before they will end the dispute.

Following is a list- not exhaustive- of actions/results that an employee may need from mediation to be satisfied with the result. Listen carefully for the expression of these needs during the mediation. They may well be of fundamental importance:

- A formal apology from the company or from a particular representative of the company.
- Employee benefits coverages/payments (disability; retirement; medical; retiree medical; life insurance) to enable the person to transition to another job or to retirement without feeling at risk for unplanned expenses.
- Actions to restore the employee's reputation - public announcements if the employer's action had a public effect; letter of recommendation so that the employee is assured that the employer will not make future employment difficult; a promise not to release information in the employee's file.
- An acknowledgement of the positive contributions of the employee. Long-term employees especially may have a feeling of injured pride and of rejection that needs to be addressed. I have seen an opening statement by the employer representative that acknowledged the significant contribution of the employee reverse months of acrimonious dealings and make the employee immediately open to a reasonable settlement.
- An agreement to use the settlement of the employee's complaint to set a precedent for treatment of other employees.
- An action that will restore the employee's position/status within his or her family. In many cases, the employee may have a realistic view of his or her negative contribution to the dispute but may be continuing it because family members (such as spouses) believe that the employee is blameless and should fight the company all of the way through a court hearing (for vindication). Actions by the company that put the employee in a good light for the family and enable the employee to demonstrate that the company gave in+ may help to resolve the family influence.
- Ending litigation costs, including the time and emotional cost of litigation.
- Obtaining reimbursement for attorney fees and expenses.

Employer Interests:

- Ending/avoiding litigation costs including the time and emotional costs
- Minimizing the dollar cost of the resolution
- Minimizing the exposure of other employees/executives to the litigation process
- Minimizing/avoiding public exposure of controversial issues
- Avoiding setting costly precedents that may apply to other employees
- Enforcing corporate employment/benefits standards
- Achieving a relationship with the employee that is in the best interest of the company (continuation, reinstatement, or termination)

Document the settlement agreement immediately. Discussing the agreement drafting responsibilities with the parties/counsel before the mediation day will help to facilitate an efficient and thorough documentation process. The responsible individuals can bring models or samples of agreements that address likely or possible outcomes so that the time

*(Employee/Employer Disputes continued on page 10)*

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spent in drafting is minimized. If the drafting of the agreement and execution of it are completed by all parties before leaving the mediation session, the likelihood of a later challenge is reduced significantly. The drafting process may reveal additional needs/ issues that require agreement regarding details not discussed during the mediation. For example, tax withholding or liability for tax payment may not be brought up as a separate issue until the drafting stage, depending on whether the parties have previously considered the importance of that issue. The employer may intentionally wait until the drafting stage to tell the employee that the employer wants an agreement that the employee will never reapply for a position with the company and that all details of the agreement must be kept confidential.

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### **MARRS SHELBY COUNTY, TENNESSEE**

MARRS is a direct-service program whose mission is to intervene in the lives of juvenile offenders and help them turn from delinquent behavior to productive lives. Established in 1994, in collaboration with the Memphis Leadership Foundation (MLF) and Christ United Methodist Church (CUMC), MARRS works with first and second time juvenile offenders to equip and empower them to make better life choices and decisions in the future -- thereby preventing future contact or involvement with the juvenile court system. While participation in the program is voluntary, when an offender agrees to participate in the program and signs a restitution agreement, he/she is expected and obligated to complete the program. MARRS services are provided at no cost to the participants.

Referrals to MARRS come from the Juvenile Court of Memphis and Shelby County. Compliance with the mediation and completed restitution agreement serves as an alternative sentencing for juveniles who have committed offenses such as vandalism, theft of property, and other property crimes.

The first formal step in the MARRS program is conducting victim-offender mediation with the victim, the offender, and the offender's guardian. Trained volunteer mediators facilitate the session, in which the interests of the community are balanced with preventing future delinquency of the offender. The victim is actively involved in the mediation and provided the opportunity to speak directly to the offender and explain the impact the offender's crime has had. Offenders are given the opportunity and encouraged to address the victims of their actions and apologize, explain the circumstances surrounding the incident and discuss any other topics they want to discuss with the victim. The floor is then open for a dialogue between the parties, where the parties can ask clarifying questions or address the other parties' statements, providing an opportunity for the victim and offender to better empathize with each other. After the victim and offender have had an opportunity to reconcile, they then negotiate a restitution agreement. Because most offenders are too young to make monetary restitution, many mediation agreements require additional community service hours. Victims have input on the number of hours and location of the community service.

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MARRS partners with numerous organizations in the community to provide MARRS youth with meaningful, impactful opportunities to learn responsibility and accountability while, at the same, giving back to their neighborhood or community. MARRS collaborative partners receive increased capacity to fulfill their mission and increase their impact in the community.

To further help change offenders' thinking and prevent future delinquency, MARRS has incorporated a second phase into its intervention and empowerment of juvenile offenders: Character Development & Leadership training. To help modify their attitudes and consequently, their behavior, in addition to community service, offenders receive 16 hours of formal training on the personal traits and characteristics necessary to make better decisions in the future. Offenders are trained and counseled on honesty, respect, integrity, self-control, responsibility, leadership, character, and specifically on developing a proper attitude. In addition, MARRS provides offenders with educational and life skills that will help them succeed in life. These skills range from the importance of eye contact and a firm handshake to table manners; note-taking; timeliness; study skills; interview skills; dealing with peer pressure; demonstrating respect for the opposite sex in relationships; ethical behavior and anger management. An additional component of the transformation process is exposing the youth offenders to the Arts, Sporting Events and parts of the community they may not have ever seen or experienced. By broadening their horizons and mindsets, MARRS further helps change the thinking and attitudes of youth offenders.

As an additional condition of the program, all offenders are required to write a genuine apology letter to their victim. For some youth, this is completed before the mediation and delivered in person. For others, their attitude does not change until they have been in the program for a while.

The MARRS staff monitors the successful completion of the mediation agreement and mentors the youth offenders to prevent future delinquent behavior. When the Character & Leadership Development training, community service hours and all other components of the Restitution Agreement (i.e. monetary restitution) are completed, MARRS forwards the case back to Juvenile Court and informs the Court that the individual has successfully completed the program. While the juveniles' required involvement with MARRS ends with their satisfaction of the terms of the Restitution Agreement, the relationships they formed during the program do not. MARRS has had numerous past participants stay in touch with MARRS and come back to the MARRS staff for mentoring and guidance. As a result of the benefits of these relationships, MARRS is modifying its program to include even greater follow-up with participants after they graduate from the program.

The MARRS program provides citizens of Shelby County with a variety of opportunities to serve. Opportunities include becoming a:

**Volunteer Mediator** by facilitating mediation session between the victim and the offender.

**Community Service Volunteer** by helping staff supervise youth during community service activities or projects.

**Outreach Volunteer** by helping staff chaperone and supervise youth during outreach activities, or

**Character Class Volunteer** by helping to facilitate character development and leadership classes.

For more information on the MARRS program go to the organization's website ([marrsmemphis.org](http://marrsmemphis.org)) or call Bridgette Bowman, Program Director at (901) 261-2165.

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## HAPPENINGS IN THE MEDIATION COMMUNITY

### **NBA CLE—SEPTEMBER 27, 2011**

Join your colleagues on **September 27** for our annual Mediation Institute. The program will feature presenters experienced in construction disputes and family law disputes. Additionally, this seminar will address the ethical rules in mediation and the manner in which they are enforced by the Alternative Dispute Resolution Commission.

Visit <http://nashvillebar.org/CLE/092711.html> for details and registration.

### **ADR Commission's 9th Annual Advanced Mediation Techniques"**

**Oct 21, 2011**

**For Details & Registration, visit:**

<http://www.tsc.state.tn.us/calendar/adr-commission/2011/10/21/ninth-annual-advanced-mediation-techniques-workshop>

### **ABA Section of Dispute Resolution 9<sup>th</sup> Annual Mediation Training Institute**

**November 3-4, 2011**

**San Diego, CA.**

**For Details & Registration, visit:**

<http://www2.americanbar.org/calendar/9th-annual-advanced-mediation-and-advocacy-skills-institute/Pages/default.aspx>

### **SAVE THE DATE**

**MARCH 9, 2012**

**TAPM's Annual Meeting & CLE/CME**

**Dr. Judy McFarland**

**presents**

**"The New Lawyer : Enhancing Our Skills as Negotiators and Advocates"**



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

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