



Message from TAPM President, Larry Bridgesmith, J.D.:

The World Clamors for a New Kind of Problem Solver: Mediators are you listening?

Recently I have run across a variety of articles, books and conversations that convince me that mediators can be in the drivers' seat for significant cultural change if they care to be. You say, "Whoa, I didn't sign up for that!" Great. Skip this message and read the next newsletter piece.

However, if you're still with me, I heard Jonathan Tisch last week at the Nashville Business Journal business breakfast speak on "the power of partnership". A phenomenally successful financial investor (Loews Corporation), hotelier (Loews Hotels), NFL owner (alas, the NY Giants), educator (trustee Tufts University), Emmy nominated TV Host (CNBC, Fox and PBS "Beyond the Boardroom" series) and philanthropist (\$40 million endowment of Jonathan M. Tisch College of Citizenship and Public Service). Speaking out of a philosophy of abundance rather than scarcity, Tisch regaled the "power of we" (his first book) and the "power of partnership" (his most recent book). Distilled to its essence Tisch told a compelling story of collaboration over competition, of service over sales and giving over getting. Sound a bit counter-cultural? You bet. However, as synthesists and facilitators of value creation rather than pie splitting, mediators should sit up and take note.

You may have read Daniel Pink's A Whole New Mind: Why Right-brainers Will Rule the Future. If you haven't you really need to. However, if you don't have time to read both, you really need to pick up his latest work, Drive: The Surprising Truth About What Motivates Us. Pink explores the power of internal versus external motivation and declares that intrinsic motivation is the most powerful incentive to change. Wait a minute! That's mediator-speak. "Going below the line", is our stock and trade!

Or perhaps you picked up the Atlantic magazine for June/July 2010 and learned that "The End of Men" has arrived. Citing phenomenal statistical proof that worldwide female leadership and influence has now passed the tipping point, the authors declare "the end of men" is here. I don't know that I can go that far. I believe the Shakers tried that

(Bridgesmith Continued on page 9)

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Inside this issue:

President's Message 1

Larry Bridgesmith, J.D.

Meet the Mediator David Noblit 2

The Invisible Gorilla by Stephen Shields 4

Community Reconciliation Inc., Chattanooga by Jennifer Paden 8

Save the Date Feb 24 2011 TAPM Annual Mtg featuring Erica Foxx 10

MEET THE MEDIATOR
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David Noblit has been lead counsel in over one hundred trials in Federal and State Courts in Tennessee and Georgia and has participated as an advocate in mediation and arbitration of over five hundred cases since 1990; and has been engaged by counsel in Tennessee and Georgia in over three hundred and sixty-five.

In a recent Medical Malpractice case an attorney wrote: "It was obvious that you invested a lot of time and preparation for the mediation and I appreciate the same. I believe your efforts contributed significantly to the resolution of this matter."

Since 1979, Mr. Noblit has been involved professionally as a litigation attorney. He is listed as a Rule 31 Mediator by the Supreme Court of Tennessee since 2000. His clients have included individuals, Fortune 500 companies, small businesses and insurance companies. He was first involved in a case referred to mediation in 1985, and due to the then unique experience he has embraced mediation as a problem solving tool that limits risk of an adverse result and the tremendous expense for parties forced into the court system to resolve disputes. His other professional and honorary associations include the Chattanooga and Tennessee Bar Associations, the State Bar of Georgia, the Tennessee Defense Lawyers Association, International Association of Defense Counsel, and the Trial Attorneys of America.

Education & Training: 2000 Private Dispute Resolution Services, LLC - General Civil Mediation Training; 2004 Private Dispute Resolution Services, LLC - Domestic Violence Training; Served as Adjunct Professor Dispute Resolutions, University of Tennessee at Chattanooga; 2007 Advanced Mediation Practice, Institute for Dispute Resolution, Pepperdine University School of Law; 2009 Mediation for High Conflict Personalities.

Born in Chattanooga, Mr. Noblit graduated with a B.S. from the University of Tennessee and received his J.D. from Memphis State University in 1979. While a student he served as Vice-President (1975) and then President (1976) of Blue Key National Honor Fraternity and was inducted into Omicron Delta Kappa, Phi Delta Phi, and served on the Law Review as a student in law school. He also served as a Graduate Assistant to Legal Counsel at the University of Memphis in 1978-79.

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

A variety of personal and professional experiences, humor and empathy, splashes of humor.

What is your pet peeve?

Attorneys who do not come to mediation prepared to discuss settlement.

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

Married to Jenny with five adult children as the result of two blended families – 2 dogs and 1 cat.

What are your hobbies?

Tennis, walking with wife, gardening, and bird-watching

(Noblit Continued on page 3)

(Noblit Continued from page 2)

Why did you become a mediator?

Saw the need for people with litigation experience to assist other people, and professionals understand the risks inherent in the uncertain results possible in the litigation process.

What is your favorite mediation read?

Challenging Conflict Mediation Through Understanding – (Friedman & Himmelstein)

What is your phobia?

Getting smashed by a truck on a two-lane highway.

What is your favorite vacation spot?

Hilton Head, S.C. and Keystone, Colorado.

Personal or professional accomplishments you are particularly proud of:

President of University of Tennessee National Alumni Association
Being a single parent for 4 years without completely blowing it.

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

Chattanooga native – returned home after law school because Chattanooga is one of the greatest places to live, work, and have a family.

Please complete these sentences:

“I have a burning desire to continue to grow my mediation practice.”

“People tell me I look like David Noblit.”

“If I could have a 30-minute conversation with anyone (alive or otherwise, famous or not), I would want to speak with my deceased mother.”

What is your favorite TV show?

Dr. Phil!

What is your favorite food/restaurant?”

Mussels in white sauce at Mercantinos on Frazier Avenue in North Chattanooga

What is your favorite flavor of ice cream?

Ben and Jerry’s American Dream.

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

Without question, I would do it all over again. I really got lucky when I decided to pursue a career in the legal profession without knowing all of what would be in my future. I had an aptitude for dissecting problems of a social nature and learned how to develop solutions for cases in litigation, first as an advocate and then as a mediator.



The Invisible Gorilla - Mediating in the Shadow of Psychology

By: [Stephen L. Shields**](#)

I have represented clients as an advocate in mediations for a long time. I also teach ADR as an adjunct professor of law at the University of Memphis School of Law. But it was not until 2008 that I became serious about becoming a mediator and achieving my Rule 31 Civil Mediation listing. With over thirty years' experience, I thought I was perfectly prepared to discuss the uncertainties of the law and the risks of unpredictable outcomes. That part should be easy for me. But also, at a basic level, I thought about the psychology of mediation, and, the analogy between mediators and psychoanalysts.

Patients and disputants alike want answers; whereas mediators, like psychoanalysts, ask questions. Patients and disputants want advice; but mediators, like psychoanalysts, are trained *not* to give advice. Disputants, like patients, want support, but mediators and psychoanalysts are there to offer interpretations and insight. Thus, I had some notion that psychology (and related disciplines) would come into play in mediation, as it often does in law practice. So in 2008, I went to Lipscomb University to receive professional training in mediation. During this training, my eyes were opened even wider to the need to understand the interplay between mediation, psychology, and other disciplines.

The Invisible Gorilla

It was during one important session that our instructor showed a video, which I later discovered was a famous psychological demonstration. The video, as I recall, showed two teams passing basketballs back and forth. One team wore white shirts, the other black. We were asked to silently count only the passes from the players in white, ignoring the rest. It was a short video, probably less than a minute. When the video ended, our instructor asked how many passes we had counted. I had counted 33; or was it 34? Apparently it didn't matter, for the instructor had yet to ask her *real* question.

So what did the instructor really want to know? "By a show of hands, who saw the gorilla?" Gorilla?!? Turns out that keeping count was not at all the point of the demonstration. We were being tested to see if we noticed a person in a full-body gorilla suit walk on screen, face the camera, thump his chest, and walk off. Just as in the original study, many never noticed.

Of course, the question is, "What was the purpose of this psychological demonstration?" For me, personally, it was my "aha!" moment. I realized then how important it was for me to understand the "psychology of mediation." After my training at Lipscomb, I delved into scores of related articles, many from outside the field of law. There was much to discover — mindfulness, cognitive neuroscience, Freudian psychology, neuro-linguistic analysis, behavioral science, lin-

(Shields Continued on page 5)

(Shields Continued from page 4)

guistics, brain science, etc. In this article, I have attempted to share with you a glimpse of the insights I have gleaned— whether right or wrong — from my readings. My hope is that you will benefit, as I believe I have, from learning about people's tendencies and assumptions and how we, as mediators, can use our understanding of these tendencies and assumptions to effectively assist parties who are in conflict to resolve their dispute.

The Milgram Experiment

Stanley Milgram, in his well-known experiment, demonstrated that experimental subjects have a high level of deference to authority. Most people in his experiment were willing to administer a very painful level of electric shock to another person so long as the scientist in charge told them that what they were doing was alright — despite the fact that the other person was yelling in pain (fake, of course).

Why would individuals continue to pull the lever? And, what does this say about mediation?

Several aspects of the study are relevant. Milgram's "scientist" was in a position of authority. And, the scientist always reminded the participant of his "commitment" to participate fully. As a mediator, I try to get commitments from the disputants to keep an open mind, but now I emphasize the commitment, not only at the beginning of the mediation, but also in the written agreement *beforehand*. Using your perceived "authority" as a mediator to secure the following commitments can be strategically effective to obtaining a resolution:

- Commitment to try to settle the case;
- Commitment to approach settlement with an open mind;
- Commitment to allow enough time for the process to work; and
- Commitment to have all the necessary parties present.

At the very least, it sets a mindset and environment conducive to reaching a resolution. Perhaps it's just pop psychology, but I believe that Milgram's experiment teaches that such "commitments" play a role in the human psyche. And, at the very least, that makes them an important tool for mediators to understand and consider using.

The Invisible Gorilla — What Was That All About?

So, what was the point of the video shown by the instructor at Lipscomb? Obviously, it was a visual experiment. But it became apparent as I listened to other instructors that the point was this: As mediators we cannot lose sight of the big picture.

The point is that we can be blind, not only to visual cues — such as a gorilla beating his chest — but also to other matters that may be important to the disputants. If we focus solely on the immediate issues, we may miss what's right in front of our eyes. In other words, there may be "blind spots," both visually and mentally. So what can we learn from the gorilla in the room?

(Shields Continued on page 6)

(Shields Continued from page 5)

The lesson is to step back from the main issues and keep an eye out for other considerations that may influence the mediation. In practical terms, learn to make important notes about potential emotional issues or other matters that concern the parties that may help settle the case in addition to your notes about the legal issues and exchange of proposals. Also, I have a habit of reminding myself of the "invisible gorilla" before every mediation. This prompts me to step back and be on the lookout for matters that might be "below the line," as they referred to it at Lipscomb. The invisible gorilla is my sort of psychological defibrillator — constantly reminding me to be aware of matters above and below the line.

Hotel Bathrooms and Towels

What in the world do hotel bathrooms and towels have to do with mediation? Recently, social psychologists performed an experiment regarding how hotels could help conserve resources. A hotel placed a cardboard sign in its rooms that said, "Help save the environment." Some guests helped; many did not.

Not to be dismayed, one of the psychologists suggested replacing the sign with a message that effectively advised the guests that *most* other guests participated in the program during their stay. As a result, a sign that read, "Almost all of our guests have been very helpful in conserving water by reusing their towels," was placed in the rooms. You already know the result, don't you? Guest participation in re-using towels went up drastically. People like to follow the crowd.

So, the question is how we apply the insight from this experiment in mediation? First, during the opening session, I talk about how most cases settle before litigation, and inform disputants about the high percentage of cases that settle during mediation. Another important lesson to share with disputants involves the reality of settlements. At times, disputants and their attorneys come in with a settlement figure that reflects their — perhaps unrealistic — value of the case. But in the end, both disputants realize that the settlement number will be either above or below their projected value — a potential dent in the ego. As a result, it's important to remind disputants that most others find themselves in the same position when faced with the uncertainties of continued litigation versus the guaranteed finality that settlement brings. Of course, the point is that people are more likely to do something when "most others have chosen to do the same thing."

The Fairness Factor

Social psychologists have also studied procedural fairness. One particular study concluded that individuals who are in conflict are more satisfied if they consider the process "fair." That's why it is so crucial for the mediator to treat everyone with dignity and respect. That includes demonstrating the necessary energy and time to devote to help the parties settle their case. And, before the mediation, I encourage the lawyers (and for the lawyers to

(Shields Continued on page 7)

(Shields Continued from page 6)

encourage their clients) to treat their “adversary” with respect and dignity throughout the process.

Conclusion

I’m certain that the Lipscomb psychology professor who was also in my class would find my analysis and understanding somewhat superficial. But the point is to help us expand our reading and understanding into other areas, and to combine the insights of other disciplines with traditional mediation for a more effective mediation strategy. If you have other psychological techniques you believe are appropriate for the mediation setting, please share them with me via email. I have a longer list of citations and if you would like a copy, feel free to send me a request as well as your thoughts or comments.

** Mr. Shields is a partner in the Memphis-based law firm of Jackson, Shields, Yeiser & Holt. He is also an adjunct professor at the University of Memphis School of Law and a Rule 31 listed Civil Mediator. His email address is sshields@jsyc.com.

1. I borrowed the phrase from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979). While “bargaining in the shadow of the law” is a phrase often used, bargaining (mediation) has increasingly become a requirement of the law.
2. Christopher Chabris & Daniel Simmons, *The Invisible Gorilla* (2010). To view the video yourself, navigate your browser to http://www.theinvisiblegorilla.com/gorilla_experiment.html.
3. See generally Elizabeth E. Bader, *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10 Pepp. Dispute Resolution L. J. 183 (2010); *Psychological Impediments to Mediation Success: Theory and Practice*, 21 Ohio St. J. on Disp. Resol. 281 (2006); Bill Eddy, *High Conflict People and Legal Disputes*, Janis Printing (2008); Mark Grulston, *Just Listen: Discover the Secret to Getting Through to Absolutely Anyone* (2010).
4. The experiment is described by Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (2007).
5. Noah J. Goldstein, Robert B. Cialdini & Vladas Griskevicius, *A Room With a Viewpoint: Using Social Norms to Motivate Environmental Conservation in Hotels*, J. Consumer Research (August 2008).
6. *Psychological Impediments to Mediation Success: Theory and Practice*, 21 Ohio St. J. on Disp. Resol. 281 (2006).
7. See generally, F. Allen Lynd & Tom R. Tyler, *The Social Psychology of Procedural Justice*, 66 Melvin J. Lerner Ed. (1988).

Community Reconciliation, Inc in Chattanooga, Tennessee

By Jennifer Paden

Mediation is mandated in cases of divorce in Hamilton County and the practice of Mediation tends to be dominated by Rule 31 listed lawyers. In the Chattanooga area most of these practitioners charge \$125 to \$250 and up per hour. Chattanooga is fortunate to have Private Dispute Resolution Service (PDRS) a legal practice and mediation service, which also provides the community with Rule 31 training in Civil and General Mediation, and Family Mediation.

Community Reconciliation, Inc. was founded at the request of Juvenile Court Justice Suzanne Bailey in 2002. Judge Bailey wanted the program to address the burgeoning rate of shoplifting among teenagers and the fact that shoplifting is the “gateway” crime for juveniles. Traditional methods were not as effective as she wished and juveniles would reappear in court for multiple offenses. She felt that the Restorative Justice methods, which had proved effective in other courts, would work in hers.

Our program was started by a local pastor who had worked in the first VORP program in Tennessee in Anderson County and who had helped to spread restorative justice programs in our state. He recruited Kiwanis and together they incorporated and hired the first executive director Berti LeWinter, establishing the twelfth VORP program in the State modeled on the program in Anderson County.

Since 2002, VORP has received more than 750 case referrals from Juvenile Court mainly in the area of shoplifting, but also for vandalism, trespass and endangerment. The Informal Adjustment department refers most of the cases to our VORP office located in the court, but referrals have expanded to include the court as well.

Volunteer mediators receive training and then shadow cases until they are comfortable with the VORP process. Jennifer Paden, our second Executive Director has not only continued and updated our training methods and shadowing, but at her urging and recruiting eight of the sixteen currently active mediators have Rule 31 training and/or listing. All our mediations are done pro bono and participation in our program is purely voluntary for both victim and offender—the court may refer, but acceptance of the referral is voluntary by both parties.

After referral, the case is assigned to one of our trained mediators by our Program Coordinator Van Colucci. Once the initial meetings with the victim and the offender to explain the program and process are conducted, then a formal mediation between the parties is arranged and a contract is signed. This contract is then delivered to the court office of VORP and once the restitution is received the papers are filed with the Juvenile Court. So far 97% of Mediations have resulted in a contract for restitution and 97% of these contracts are fulfilled. Recidivism has been reduced.

Our program has been funded in the past by in-kind contributions from the local juvenile court, yearly AOC and IOLTA grants, grants from the Community Foundation and local Chattanooga foundations, Kiwanis, fundraisers sponsored by the Chattanooga Disc Golf Association, St Peter’s Episcopal Church and other faith communities, and individual donors and sponsors. Fund raising for this type of juvenile mediation is difficult because the constituency served, victims and offenders, seldom contributes. Community Reconciliation finished in the black this year despite the reduction in grants from the AOC and other groups.

(Bridgesmith Continued from page 1)

or something similar and it doesn't work as a nation building strategy. However, mediators should hear the case being built by growing global and national data as support for less competitive problem solving and more collaborative skill sets.

Maybe you read the Wall Street Journal article on August 21 declaring that "the end of management" has been pronounced. Instead, the power of "mass collaboration" is replacing the industrial era command and control model of leadership. Coercive power no longer controls outcomes in business and organizations. Mass collaboration requires a different skill set which pursues mutual self interest rather than win/lose strategies. The effective leaders are trading their spurs and six-shooters for "three cups of tea" and relationship building tools.

As I blogged about these developments and others (<http://lipscombicm.wordpress.com/>) I thought, "Mediators should be ruling the world!" These are our traits, our strengths and our turf. The next President must be a mediator. The next Nobel Peace Prize winner must be a mediator (oh wait, she was!).

Mediators, rise up. Our time has come. Let's rule over the world! (Oops, see how easy it is to slip back into triumphalism and competitive posturing.)

Seriously, the world clamors for the facilitative problem solver more than the warrior. The creative collaborator has an enormous cache in our conflict driven culture. "For such a time as this" we bring the skills of innovation and synthesis to parties in conflict better than any other occupation.

Let's shake off our scarcity mentality and claim the abundance of possibility available when "the whole mind" of analytic and relational thinking takes multiple impossible outcomes and forges a new reality far superior to the old.

Mediators, our day has come.

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TAPM MISSION STATEMENT:

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

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SAVE THE DATE TAPM'S ANNUAL MEETING FEBRUARY 24, 2011 Erica Ariel Fox—Guest Presenter



Erica Ariel Fox is an attorney and management consultant who specializes in conflict intervention, leadership development and organizational change. She is a Lecturer on Law at Harvard Law School where she teaches negotiation to law and other graduate students. Ms. Fox is perceived by many in the domain to be among the new generation of global leaders in the negotiation/mediation field.

For over a decade Ms. Fox has been working with the internationally acclaimed Program on Negotiation at Harvard Law School (PON), working with executives, diplomats and lawyers. During that time she focused much of her efforts on improving senior leaders' abilities to tackle challenging interactions, culminating in the publication of the business best-seller *Difficult Conversations* that was authored by her close colleagues.

Currently Erica's work focuses on leading the Global Negotiation Insight Institute (GNII). GNII explores modern applications of ancient wisdom to high-level negotiations and disputes and the writing of "Beyond Yes: Negotiation Mastery from the Inside Out".

In addition to ten years as a mediator, Ms. Fox has coached hundreds of executives on challenging management situations with a focus on how they can communicate more effectively. Ms. Fox consults to a wide range of clients, from organizational leaders at an international insurance firm to leaders at the World Bank.

Ms. Fox has a B.A. with honors from Princeton University and a J.D. with honors from Harvard Law School. She has trained extensively with world leaders in the fields of negotiation, mediation, and conflict systems intervention, and is a partner at Mobius Executive Leadership

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