
JEFFERSON COUNTY MEDIATION SERVICES

VOLUNTEER COLLOQUIUM MINUTES

January 18, 2011

Volunteers Present: Neila Achter, Judy Archuleta, Marty Atlas, Lucy Bambrey, Joel Bogen, Kate Boland, Patty Bortz, Peter Bowes, Christine Covie, Dick Gearke, Anita Gilbertson, Jim Gurley, Rita Hyland, Matt Jarvinen, Marietta Kerby, Georgine Kryda, Nancy Martch, Robyn McDonald, Caroline McKinnon, Madelynn Orr, Jerry Schopen, Dallas Shelton, Melinda Taylor, Karen Tracy, Mindy Taylor, Francisco Terrones

Staff Present: Mark Loye, Julie Carter, Helena Jo Goldstein

I. Welcome:

Mark Loye welcomed everyone to the meeting and asked those present to introduce themselves.

II. Program

- A. Case Status Report: This report shows all open cases. If you have an open case, please remember to keep the office informed about case activity.
- B. Cases Available: Emails are sent regularly to inform volunteers about available cases. Please remember to respond only if you are volunteering for a case. (Hint: change the subject line if you are using the email to correspond about something else!)
- C. Statistics: It appears we handled slightly fewer cases in 2010 than in 2009. However, the number of complex cases rose, requiring more staff and volunteer time to process the cases.

III. Presentation: When is an Oral Agreement a Verbal Contract?

Panelists Caroline McKinnon and Robyn McDonald made a presentation on the subject of oral agreements and a group discussion followed. They started by noting that all mediation cases can be seen as arising from a breach of contract- such as a marital, business, or social contract. A contract is an agreement to do or not do a legal act (as courts will not uphold a contract to do something illegal). Contracts can be express, such as in written rental agreements, or implied, for example in the marital context. The parties to the contract must have capacity - they cannot be drunk or high, and usually they cannot be minors. There has to be an initial meeting of the minds, an agreement on what is to be done or not done; and something of value has to be exchanged (called “consideration” in legal jargon).

Oral contracts are hard to prove in court. The judge has to make a finding, based on the facts presented, as to whether a contract existed. When looking at capacity to make an agreement, cases that involve one or more parties with developmental disabilities, or who have addictions, present special challenges. This issue can also arise in cases with

elderly participants, where a person may be lucid only at certain times. Deciding that a person did not have the capacity to make a contract is, in essence, taking away their right as a human being to make decisions for themselves. Some addicts may feel they can be rational only when they are under the influence, and not the other way around. In some cases a party may have very specialized knowledge that puts them at an unfair advantage when making contracts with members of the general public.

When determining whether a verbal contract exists, a judge will look to see if the parties acted like they had an agreement. They will consider whether any payments were made, whether a “for sale” sign was taken down, or similar steps.

The colloquium moved into a discussion of issues that arise in mediation. Sometimes a party is convinced that they will prevail in court, and the mediator is not of the same opinion. In small claims court, and in the large JCMS conference room, there is a book with the laws on issues that frequently arise (car repair, landlord tenant, etc.), so parties can be encouraged to read the statute. (This was not mentioned at the meeting, but it works particularly well when one party is claiming the right to treble damages. There are very specific steps to be taken to be eligible for treble damages, and most parties reading the law will quickly see their cases do not qualify.)

Mediators should remember traditional strategies. Use caucus time to allow venting. Acknowledge that life is not always fair. Ask many questions. Remind the parties that mediation is forward looking. It is about making the future look better than the present dispute. Particularly in domestic cases, you can ask, “Where do you see things in a year; how do you want things to look?”

Furthermore, mediation is the parties’ last chance to have control over the situation. Once they walk into the courtroom they have no control; the judge is going to declare someone right and someone wrong. You never know what the case will turn on for the judge. Maybe the judge will focus on an issue the parties have not even considered, for example if one party had the authority to lease the apartment in question, or enter into a contract to sell their brother’s car. The parties can end up with a result that makes both of them unhappy. Mediation is a chance for both sides to get at least some satisfaction.

Also, the evidence burden is higher in court than in mediation. In mediation, the parties can acknowledge they had some kind of agreement, and try to work out how to resolve the dispute fairly. They do not have to produce enough evidence to legally prove an oral contract existed; they can focus instead on resolving the conflict.

In contract cases the mediator can create doubt in the party’s certainty by asking if they think the other party meant to make a contract, what acts each side took that show there is a contract, whether they are certain they have exactly the evidence needed to convince the judge they are in the right, etc. The mediator should also review the BATNA with the party. Another tactic can be to ask about the trust the party must have felt to make an oral agreement. There must have been some sense of connection that caused the parties

not to reduce their agreement to writing. This may help remind the party that the other person is a human being, and not the enemy. Of course, sometimes the mediator has to accept that a party needs to get a decision from a judge and that settlement just is not for them.

If an agreement is reached, avoid language that is too vague to be helpful. “We will act civilly to one another” can mean different things to different people. In divorce cases, sometimes the parties want rules about alcohol or drug consumption prior to and during parenting time. However, they may be reluctant to put in a written agreement (particularly one that is going to be filed with the court) language such as: Party A will not do drugs for 24 hours prior to and during parenting time. Do not fall into the trap of writing something such as: the parties agree to be responsible adults when they have the children with them. For one person that may mean not drinking any alcohol, for another that may mean not drinking more than a six pack. When writing agreements remember you cannot allow people to give up their legal rights or obligations. For example, a Mom cannot agree that Dad will have no parenting time and in exchange will not have to pay child support. Both parents have a legal obligation to support their child and the courts will ignore any agreement to the contrary.

Mark Loye thanked everyone who attended for participating in the discussion.

IV. Next Colloquium: Tuesday, March 15, 2011, 6:00 – 8:00 p.m. in the Open Space Hearing Room (Ponderosa Room). The topic will be announced closer to the date. Suggestions for Colloquium topics are always welcome!

The meeting was adjourned.

Submitted by: *Helena Jo Goldstein*

Helena Jo Goldstein, Programs Manager

Approved by: *Mark Loye*

Mark Loye, Director