
JEFFERSON COUNTY MEDIATION SERVICES**VOLUNTEER COLLOQUIUM MINUTES**September 20, 2016

Volunteers Present: Nelia Achter, Rhett Adams, Tom Arnold, Jaydee Bachman, Marla Benavides, Theresa Brown, Marta Cary-Skovrinski, Nathan Cassell, Larry Cerrillo, Terry Ehrlich, Mary Ann Foster, Anita Gilbertson, Katie Groshong, Hazel Hanley, Tom Hoffman, Samuel Jenkins, Tad Kelly, Loretta Koehler, Joe Lasky, Wayne Leiser, Jo-Marie Lisa, Linda Lautigar, Nuria Lopez, Scott Methling, Debbie Plotkin, Bill Renno, Elizabeth Reppond, Virginia Robbins, Joel Scoville, Katheryn Thorburn

Staff Present: Helena Jo Goldstein, Rachel Johnson

I. Welcome and Introductions

Helena Jo Goldstein welcomed everyone and introduced herself and Rachel Johnson on behalf of the rest of the staff. Helena asked those present to introduce themselves. Helena introduced the agenda and the panel introduced themselves.

II. Discussion: Ethical Issues in Mediation**Panel: JCMS Mediators Joel Bogen, Robyn McDonald, and Matt Jarvinen**

Helena invited mediators to read each scenario on their own, and opened up the discussion between panel members and volunteers.

Scenario 1

In a parenting time mediation the non-custodial parent (NCP) presses for more overnights, citing the rental of a new apartment. Acknowledging that NCP has an important relationship with the children, the custodial parent (CP) agrees to work out an overnight schedule.

NCP has told you in confidence that he has a significant other living with him who will do all the parenting if NCP needs to work a shift, or wants to go out for a beer with friends. NCP also reveals that he doesn't have any beds for the children yet.

CP has no knowledge of either the significant other or the lack of beds, and is not asking any questions about NCP's living situation.

What are the mediator's ethical obligations in this matter?

Mediators discussed several obligations the mediator might have in the given scenario.

There was some debate about whether the mediator's obligation to confidentiality trumps honesty in the process. To what extent should the mediator make sure the information shared by the NCP is brought to light in mediation? Some mediators felt it important that CP be informed about the home environment their children would be in. Other mediators had a strong opinion that if a party shares information in confidence with a mediator, the mediator's first obligation is to keep that in confidence. One idea was to have a conversation with the NCP when he shares that information or at least before mediation and explain why it is important to share the information in mediation. The mediator can mention the possibility the CP might ask questions that will lead to NCP sharing the information.

Attendees discussed the possibility the NCP had no intent of sharing the information even if asked in mediation, and that the mediator could probe about whether the party is going to answer honestly or not. If the party is not going to answer honestly, the mediator can explain the importance of honesty in mediation (to create effective agreements that will work in practice). Another attendee suggested the mediator refuse to move forward in mediation if the party was not going to be honest because the basic ground rule of "open and honest" is being broken. The panel asked mediators how they would know whether the other party is being transparent about their living situation. Mediators considered having both parties to describe their living situations. A good way to do that may be to have each go through what a day at each home might look like. If the NCP is leaving out information the CP has provided, or vice versa, that might cue parties to ask the questions themselves, relieving the mediator of their dilemma.

Attendees debated whether it is the mediator's obligation to make sure information is not withheld. Panel members suggested it could depend what information is being withheld. Disclosure of financial information, for example, is a legal requirement, and without that information you cannot mediate regarding child support.

The matter of child safety was touched on briefly. Some mediators agreed that it is a valid concern if information about child safety is withheld by a party. Other mediators held the position that the availability of beds and involvement of significant others are not a safety concern and that they would not affect the NCP's ability to follow an agreement or have a safe home. One mediator shared that they and their siblings did not have their own bedrooms or beds growing up; it was simply the way things were and their safety was not compromised.

Scenario 2

There is a sign at the door to Jefferson County Mediation Services that reads, "Open Carrying of Firearms is Prohibited in this Building." Presumably, this allows concealed carrying of firearms in the building.

What are the ethics of mediators carrying a concealed weapon during a mediation?

Mediators noted that firearms are not addressed in the Mediator Standards of Conduct. The group considered the legality, morality, effectiveness and safety of a mediator carrying a concealed weapon.

Some mediators felt that since concealed carry is not prohibited, any party could legally conceal carry firearms, not just the mediator. Some mediators felt strongly that they would not mediate with any party who had a weapon present. Panel members pointed out that if someone is carrying a concealed

weapon, you as the mediator are not necessarily going to know. Panel members kept the conversation on track by reminding the group that the scenario highlights the *mediator* as the concealed carrier.

One mediator suggested that the matter is less a question of legality and more one of morality. Many mediators found the idea of a mediator carrying an open or concealed weapon to be unsettling. They suggested the act seems to go against what mediation stands for. The purpose of mediation is to talk, and weapons do not have a role in that setting. One mediator noted that since people are often already emotional, having a concealed weapon may potentially “add gasoline to a fire” and escalate emotions. She suggested it may not be unethical but it is not a good idea.

One panel member suggested that the debate thus far had been about legality and not effectiveness. At what point does effectiveness become the issue? How does carrying a firearm help the mediator? Some in the group felt that Colorado culture regarding firearms was swaying feelings about this scenario. In Texas, for example, the presence of a firearm in mediation may not be given second thought, because it is accepted that many people carry both open and concealed firearms.

The group discussed a few other concerns. What if a party catches a glimpse of a concealed firearm? Mediators thought at the very least it would be distracting to the party and very possibly make them uneasy. The mediator in that situation risks losing the trust of the party and jeopardizes their position as a neutral facilitator of the process. Concerning safety, suppose the party who sees the concealed carry is particularly volatile? There is a chance that party may try to take the weapon and use it against others in the room. Some mediators thought it dangerous for parties to know they have access to a weapon, especially in cases that may involve domestic violence. It was suggested that if parties are volatile or have history of domestic violence the mediation should be moved to the courthouse where there is security screening.

Mediators also discussed what the mediator’s obligations are if they are carrying a concealed firearm. Does the mediator have to disclose to parties that they are carrying? Some people thought the mediator should be transparent. Other people asked why the mediator should disclose the information, and at that point what is the purpose of the firearm being concealed? Mediators had concerns that disclosing the information might automatically create an atmosphere of discomfort and the mediator may risk losing trust, rapport and neutrality with parties.

Scenario 3

The mediator discovered that one of the parties has been using his cell phone to record the mediation. This is the fifth time in a year the mediator has found someone recording in this fashion, and doing so despite explicit instructions in the Agreement to Mediate not to do so. The mediator is a technological idiot, and doesn’t trust himself to be able to tell if someone is recording with their phone even if they say that they aren’t. Consequently, the mediator bans all cell phones from his mediations, and takes away any that he finds.

What are the mediator’s ethical considerations in this matter?

Mediators discussed several ethical concerns in this scenario, including confidentiality and the mediator’s role and authority in the matter.

Most mediators felt that the main ethical concern is the risk of confidentiality being breached by parties using cell phones to record mediation. One panel member suggested that confidentiality is only breached once the information is public. He asked mediators to consider how they know it will or will not become public. Anyone can potentially record in mediation, and what is going to be the worst that happens if information gets out? Mediators suggested that no one can imagine that a judge would be happy to discover that a party is recording in mediation. Does it breach confidentiality to report the recording to the judge?

The next consideration was what the mediator should do ethically or what they have the authority to do if they catch a party violating the mediation agreement by recording. Should the mediator continue mediation? Mediators discussed concerns that neutrality may be lost if the party is caught and the mediator moves forward with mediation. Someone suggested checking with both parties before continuing; sometimes people are not surprised that the other party is recording and they do not care. One mediator suggested that a party caught recording in mediation is not mediating in good faith, which gives the mediator grounds to terminate mediation. Mediators for JCMS do have the power to terminate mediation at their discretion.

A mediator shared an experience in which a party's attorney told his client to record mediation. The group discussed the issue of attorney malpractice in regards to confidentiality of the process and authority of the mediator. If an attorney is recording, is it grounds to report them? Some mediators argued that the confidentiality clause would allow an attorney mediator to disclose that information of attorney malpractice. Can a mediator disclose conduct verses content? The consensus seemed to be that all information should be kept confidential.

The discussion turned to the ethics of the mediator taking phones. One mediator shared her experience as a teacher, and explained that she was not allowed to take students' phones because they are personal property; however, she could ask them to voluntarily give up their phones. Mediators discussed the possibility of practicing something similar in mediation to limit recording devices in the room, while also considering some obstacles to limiting phones. Parties often use their phones to check their calendars, or keep them close in case their kids call in an emergency. One option is that during office hours and when staff is available, mediators could put phones in a basket to be held in the front office. If a party received a call, a staff member would be able to alert them. Attorneys are unlikely to surrender their phones. If parties keep their phones in mediation, mediators need to verify that parties are taking their phones with them during caucus.

One mediator asked, how far do you go? At some point it seems that you have to trust. Others suggested that the mediator should assume that parties will record. Another consideration was that a recording device is not necessarily going to be a cell phone. One panel member shared her experience of being recorded with a non-cellular device. In her private practice mediation agreement she includes that she will report any findings of recording to the judge.

Scenario 4

Parties arrive at a mediation concerning a car sale that went awry. Upon entering the mediation room, the buyer discovers that the seller is Muslim, and obviously so because she is wearing a burka. The buyer becomes unhappy, and interacts in ways that show his discomfort. Eventually the buyer, speaking very calmly and politely, says that he would be able to mediate more effectively if the seller would remove her burka.

What are the mediator's ethical obligations in this situation?

Mediators discussed the ethical considerations in the situation, often referring to the Mediator Standards of Conduct.

The main concern seemed to be whether or not it is appropriate for the mediator to move forward with mediation. The mediator should consider whether any bias was aroused by the exchange and whether they are able to conduct mediation in an impartial manner. The mediator may have an obligation to step out of this particular case if their neutrality is compromised. There was also a discussion about standards that mediators should consider in this situation. One mediator shared a story about two men of a particular religious background who requested they have a male mediator due to cultural needs. She bowed out and they were provided with a male mediator.

The group discussed what the mediator is obliged to consider if moving forward. Mediators suggested talking to both parties in caucus to explore their positions. The buyer may not want to move forward in separate rooms or if the seller does not comply with the buyers request to remove her burka. The seller may be offended and not want to move forward. Mediation remains a voluntary process.

Helena Jo Goldstein thanked everyone who attended for participating in the discussion, and wished them a good evening.

III. Next Colloquium: Tuesday, November 14, 2016, 6:00 – 8:00 p.m. in the Open Space Hearing Room. Topic: Domestic Violence Offender Treatment

The meeting was adjourned.

Submitted by: *Rachel A. Johnson*

Rachel A. Johnson, Admin. Assistant

Approved by: *Helena Jo Goldstein*

Helena Jo Goldstein, Program Director