CJAM Basic Mediation Training
February-March, 2008

Contracts 101 for VORP and Community Mediators

In general, there are no special rules of law governing agreements or promises made in mediation as distinct from other negotiation contexts. The contexts in which negotiations occur can affect how legal rules apply to them. There are statutes that affect negotiations in particular contexts (e.g., labor relations) or relating to particular subject matters (e.g., commercial law, contracts to convey title to real estate, and agreements to arbitrate). A few states, but not Indiana, have statutes specifically bearing on mediated agreements in some contexts. The following discussion outlines general, "common law" principles relating to contract formation. Obviously a discussion of this kind can only be a superficial overview.

Legally competent individuals have the power to enter contracts on their own behalf. Absent parties will be bound only if a participant in the negotiation has the power to act for them. This can be the case if the participant is a trustee, guardian, or other legal representative. It can also happen if the participant is a representative of the absent party acting within authority given by the party or if the absent party has created a situation in which the other party can reasonably assume the participant has the power to enter the contract. A corporation or other organization can enter a contract only through a representative.

The existence of contracts and their contents depend on parties' manifestations of intent. That is, the question is not what a party thinks s/he is communicating, but on what another party would reasonably understand to have been intended. If parties cannot agree on whether they have a contract or on its content, or if they cannot agree on what to do about their disagreement, they can go to court to obtain a judgment regarding their rights, and it will be the court's opinion regarding their manifestations of intent that will count. Thus, it is possible to enter into a contract without subjectively intending to do so and for parties to have "agreed" to terms even though they have different understandings regarding what has been communicated.

Intent to be binding: Parties' promises are not legally binding (enforceable) unless they manifest their intent that they be so. In some contexts, that intent is usually inferred (e.g., in commercial negotiations), while in other contexts it is not (e.g., the day to day agreements made in family life). Mediators can help parties be explicit and avoid misunderstanding regarding this and other matters of intent.

Promises to make a gift are not enforced (e.g., I promise to pay you $100 on your birthday), but must be made in exchange for a return promise or a change in position. Promises may be binding:

- When parties make reciprocal promises (e.g., one party promise to convey title to a property to another party who promises to pay a specified amount of money).

- When a party promises to do something when the other party acts in a specified way (e.g., pay promised for services), or
- When a party makes a promise on which another party relies in a foreseeable, material way (e.g., I promise to pay you an amount of money knowing you intend to use the money to make the down payment on a purchase, and relying on the expectation of receiving those funds you commit yourself to that purchase).

A contract comes into existence when the parties manifest their intents to agree to terms. This can happen by one party making an offer that the other party accepts, or the parties may both agree to a proposition "on the table," which may been developed collaboratively between them, proposed by a third party, or in some other way.

- The agreement will be enforceable if it is sufficiently complete in its terms. For example, a promise to make a loan will not be enforced if the parties have not manifested agreement to the rate of interest. Sometimes gaps in the parties' explicit agreement will be filled in with customary terms if the parties' consent to that can be reasonably inferred. For example, if the parties have not specified the time for performance, a court may infer they intended that performance must be "within a reasonable time." (One mediator function may be to help the parties avoid these problems.)

- The agreement will not be enforced if it contains illegal terms (e.g., a usurious interest rate). If an agreement is determined to contain an illegal term, the court will decide whether it is implicit in the parties' agreement that the illegal term should be "severed" and the remainder of the contract enforced without it or whether the agreement as a whole should be unenforceable.

To be binding, an agreement must be enforceable by court order. This is not a problem for breaches of contract that can be enforced by awarding monetary damages or the conveyance of title. (A judgment for money damages is "enforceable" even if it is not "collectible.") But courts will take a variety of factors into account if enforcement will involve the court's regulating the parties' conduct and relationships.

Some agreements are not binding until a court has approved them. Divorce and parenting agreements are important examples.

Agreements do not have to be in writing except where this is required by statutes regulating particular kinds of agreements. The traditional example of this is the "Statute of Frauds," adopted with variations in most states on an early English model, requiring contracts to convey title to real estate, contracts for employment with terms longer than one year, and some others to be in writing. Where there are requirements of writing, the requirement may be a statement of the terms of the contract or of a signature evidencing intent to be bound or both. Even where written agreements are not required for enforceability, complete memoranda of agreement signed by the parties play significant roles since such documents make explicit what the parties are manifesting their intent to.

Agreements meeting the above requirements may not be enforced if they are induced by fraud (material misrepresentations or failure to disclose material required to be disclosed), the product of mistake (the SHARED misapprehension of circumstances by the parties), or if there has been a change in circumstances making enforcement impractical.

Mediation practice implications:

Matters that should be explicit: Parties' expectations and desires regarding the nature of the agreement that will be the goal of the mediation need to be clarified in intake, in joint sessions, and in the mediated agreement. In some contexts, such as mediation of claims already pending in small claims court, the intent to have a binding agreement will be clear. In others, intent and desirability of enforceability may be very unclear, because of the nature of the relationships, because the result is experimental and intended to be modified with experience, or because enforcement is impracticable. Bear in mind that there may be social consequences for parties who do not abide by their agreements even where an agreement is not legally enforceable. And there may be outcomes of mediation that are not embodied in an agreement.

Written memoranda of agreement are important both to help the parties be clear regarding what they are doing and to protect the mediators and CJAM. Having the parties' agreement recorded in writing helps protect CJAM from being drawn, as witnesses, into later disputes regarding the agreement.

This discussion makes evident that there are legal issues regarding the formation and enforceability of contracts as well as to their substance. CJAM mediators, not being lawyers, are not expert in these matters and could not give the parties legal advice even if we were. If the parties intend a legally binding settlement, having legal advice will often be important. (Of course, even where the parties intend not to enter contracts, legal advice may still be important.)

Excerpts from CRS Policies and Procedures

2.1.2. Goals of CJAM mediation

The parties to the conflict determine the specific goals of CJAM mediations. CJAM mediators' goals are to assist the parties to increase their abilities to negotiate productively, to increase mutual understanding, and to facilitate agreements that resolve their dispute.

2.9.5. Agreements resulting from mediation.

Parties' agreements state whether they are intended to be legally binding. Agreements are usually (always when they are intended to be binding) reduced to writing and signed by the parties. Parties may seek legal advice before finalizing an agreement. CJAM will furnish copies of the parties' written agreement to the parties and will furnish copies to others if all parties agree.

Excerpts from Agreements to Participate:

Community mediation:

. . .

e. The exception to these rules of confidentiality is that this agreement to mediate and any written agreement made and signed by the mediation clients as a result of mediation may be used in any relevant proceeding, unless the parties make a written agreement not to do so.

VORP mediations:

. . .

As a result of these meetings I may agree to provide restitution in some form to the victim and I understand that failure to satisfactorily complete agreements may be taken into consideration in further court proceedings. If an agreement is reached during one of these meetings, details will be written, dated, and signed by everyone present. Copies will be distributed only with permission from those signing the agreement.