"SLAM DUNK THE MEDIATION"

Winning Strategies for Preparing and Executing
Effective Mediations of Property and Custody Issues in Divorce

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CHAPTER 13

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PUBLICATIONS

DeLipsey, J. M. (1999). Child Sexual Abuse, Expert Witness Manual, State Bar of Texas, Family Law Section.

DeLipsey, J. M. , Bain, A. & Garcia, D. (1998). Handling a Divorce Case with a Child under the age of three years: Social Science Research, Code Provisions, Survey of Current Practices & Creative Ideas of Possession. 23rd Annual Advanced Family Law Course, San Antonio.

DeLipsey, J. M. (1997). Competency of the Young Child Witness Reporting Sexual Abuse. Voice, vol. 26, No. 8, 22-28

DeLipsey, J. M. & Nickelson, G. L. (1996). Sexual Abuse Allegations and Domestic Relation Proceedings: Practice Guidelines for Attorneys. 19th Annual Marriage Dissolution Institute State Bar of Texas.

DeLipsey, J. M. (1992) "Male Sexual Victimization: A review of current social science literature" Published proceedings of the 2nd Annual Midwestern Mental Health in Corrections Symposium.

DeLipsey, J. M. & Shuman, D. W. (1991). "The Child Witness" In Costello, R. (Ed). Forensic Psychology for the Journeyman Clinician. San Antonio, Texas: The Texas Psychological Foundation, Inc.

Morris, G. & DeLipsey, J. M. (1990). "Expert Testimony in Cases Involving Sexual Assaults on Children" Austin, Texas: Texas Criminal Defense Trial Lawyers Association.

DeLipsey, J. M. & Shuman D. S. (1989) "The Child Witness" Austin, Texas: Texas Criminal Defense Trial Lawyers Association.

DeLipsey, J. M. & James S. K. (1987). "Videotaping the Child Witness: The Texas Experience" In S. M. Sgroi, (Ed). Vulnerable Population. Lexington, Mass.: D.C. Heath & Co.

DeLipsey, J. M. & James, S. K. (1985). "Guidelines for Interviewing Suspected cases of Child Sexual Abuse." Dallas County Rape Crisis Center, Dallas, Texas.

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State Bar of Texas, *New Frontiers in Marital Property Law*, October 1996, "Attacking, Defending and Using Trusts, Estates, Family Partnerships and Other Estate Planning Devices"

Houston Bar Association, *Bench Bar Conference-1996*, October 1996, "Property--Wanted Dead or Alive"

State Bar of Texas, *Family Law Art & Advocacy Law Course*, December 1997, "Financial Valuation Expert Examination Demonstration"

South Texas College of Law of Texas A&M University, *Family Law Conference for the General Practitioner and Legal Assistant*, February 1998, "Understanding And Using Tax Provisions in Divorce Decrees With Forms And Checklist"

State Bar of Texas, *24th Annual Advanced Family Law Course*, August 1998, "Basic Reading and Understanding of a Tax Return: Personal, Corporate, etc."

State Bar of Texas, *24th Annual Advanced Family Law Course*, August 1998, and *25th Annual Advanced Family Law Course*, August 1999, "Tax Impact of Property Division: Seeing the Landmines Before You Step on Them"

American Bar Association, *National Institute of Trial Advocacy*, May 1999, Presenter

State Bar of Texas, *Expert Witness Telephone Seminar*, September 1999, "Business Valuation: Assets & Liabilities Approach Compared to Capitalization of Income, ..."

State Bar of Texas, *Marriage Dissolution Course*, May 2000, "Trial Demonstration: How to Try a Reimbursement Case" and "Focus on Experts: Close-Up Interviews on Procedure, Mental Health and Financial Experts"

State Bar of Texas, *Advanced Expert Witness Course*, February 2001, "Lost Profits in Business Litigation"

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Fellow, American Academy of Matrimonial Lawyers (1989)
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The David A. Gibson Award For Demonstrating Professionalism and Excellence in the Practice of Family Law, Presented by The Gulf Coast Family Law Specialists (2000)

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I. MEDIATION: CALCULATED RISK

The winning lawyer must adopt two personas to slam dunk mediation: the Warrior and the Peacemaker. The Warrior persona prepares you both for mediation day and trial. The Peacemaker persona empowers you to assist your client in resolution at mediation. We find that the problem with many lawyers who participate in mediation is that they lean too heavily one way or the other with these roles. We also find that lawyers who are successful in mediation have found a way to balance these roles well.

A. The Warrior

If mediation is the white flag sanctuary where conflicts and disagreement come into harmony and resolution, why plan for mediation as you would plan for combat? Simple. Mediation is the hill on which you, the commander stand, and display your vast armies and weapons of destruction to the other side. It is also the hill from which you can see the weaponry of the enemy and determine wisely whether a battle at trial is worth the risk.

Regardless of how anyone approaches mediation, it is the bottom line and the skill that is used to define the bottom line that determines whether the case will settle. This bottom line is ALWAYS determined by weighing risk versus gain. It is a singularly simple equation, "What do I gain or lose by agreement?" versus "What do I gain or lose from trial?".

The challenge is in determining the proper weight to give issues placed on the opposing sides of this decision equation. Prepared and informed lawyers will be able to accomplish this task successfully.

Litigation escalates conflict which is particularly problematic when children are involved and the parents must interact for that child's lifetime. Family law mediation came about in response to the restrictive nature of the law and our legal system where families were forced into adversarial roles. We do not recommend or support an adversarial approach to mediation – the ultimate goal of family law mediation is resolution of problems while minimizing casualties. Rather, we recommend that you, the lawyer, prepare for battle even though we don't intend for you to display this warrior persona in the mediation itself. Our message here is don't confuse the preparation strategy with your personal presentation and vice versa. Don't let a cooperative mind set on your part, lull you into not being absolutely prepared for trial and thus ready for mediation.

B. The Peacemaker

1. Mediation: Not a Linear Equation

Linear thinking traps us into cognitions of winners and losers. Slam dunking a mediation requires a more complex world view – cybernetic thinking, i.e. thinking which goes beyond these traditional boundaries and conceptualizes resolution where there are winners and winners – with winner being defined in a highly individualized way for that particular person and that particular case. This is how cases get resolved successfully – each party walks away being happy (or equally unhappy) with the deal struck.

Reaching an agreement in and of itself can be framed (cognitively fashioned) as a "win-win" for the parties. It takes creativity and a willingness to color outside the lines for a lawyer to frame up issues and bargains in a palatable (acceptable) manner for the client. Being able to do this will make the difference between selling an idea or not.

Approaching mediation with a positive and problem-solving attitude will take you and your client a long way down the road to settlement. That first step toward compromise or cooperation is all the momentum needed to get going. This is what the peacemaker does – set the stage, make a move, signal the other side that a positive outcome is possible.

2. Mediation: Cognitive Set

As we have been talking about "framing" and

"cognitive" matters we thought it would be helpful to expand on this idea of cognitive set. "Cognitive" set is the world view of each individual's approach to interpreting life and events. Cognitive set is likely influenced by genetics, life experience, and many others factors such as situational stress, illness, or just random events. We have all heard the saying that someone may approach life seeing "the glass half empty or half full". The individual's tendency to be optimistic or pessimistic will influence how they problem solve and ultimately, their happiness or state of content. "Cognitive Set" will also clue you into how to work with your client.

A common cognitive set technique which we have already mentioned and which actually helps people feel better is "reframing." As you already know, it is more helpful for people to see the glass as half full rather than half empty. This cognitive set reflects a optimism and has more positive associated outcomes than the more pessimistic approach. Yet, either description of half empty or half full would be accurate. People who take the half-full approach are happier and even healthier.

This is what you must do as the attorney working in mediation - identify cognitive sets of the parties which will be helpful in settlement or identify those which are standing in the way of resolution. Once you have identified the problem thinking, then you can set about finding other ways for your client to view the issue – change the mindset. Even if the issue remains the same – a different view or belief can many times be enough to get it resolved. This would be coloring outside the lines – if you can't change an issue, try to change the way one views the issue.

II. OVERVIEW OF PAPER AND APPENDICES

The purpose of this paper is to assist lawyers in preparing for mediation. First, we lead you through a simple and lean method to prepare your mediation case. Then, in separate appendices we have listed out special issue sections, "Family Law Mediation – An Overview," "Mediation Styles," "Ethics", "Children's Issues", "Sample Letter", and "Property." These appendices can be employed in concert or alone to assist you on just about any type of mediation case. These sections were written and peer reviewed by some of the most prominent attorneys and professionals in Texas, so we are confident they will be worth rt to review.

III. MAKING MEDIATION WORK

Many lawyers theorize that mediation works because it is a way to air grievances, fashion solutions which may not be available in a traditional courtroom, or set in motion a spirit of cooperative negotiation – who really knows? Probably a combination of these factors serve to reduce hostility and conflict. And, of course, some mediators are more successful than others – so the mediator style adds another dimension to this mysterious equation. Nevertheless, mediation seems to work and it is clear that the mediator style has a lot to do with mediation success.

Probably the most successful mediator style is one which defines the parties positions in an objective and neutral manner. The parties are usually then separated and then participate in a "caucus" style approach to problem solving. This mediation style seems particularly helpful for high conflict parties.

It shouldn't be surprising that similar techniques have been found useful in family therapy for high conflict, yet intact families. For example, in a program that successfully avoided hospitalization for high risk youths, each family member was represented by a therapist and each therapist "overzealously" advocated their client's position to a "neutral" family therapist. Surprisingly, as this happened, family members would plead with their representatives to soften or compromise their position. Over a very short period time, families would recognize the untenable positions they had taken and compromise with more realistic positions regarding conflicts. This program proved to be highly effective in keeping adolescents from psychiatric hospitalization. The same principle seems to be at work with caucus style mediation. Once clients start positively participating in their own problem solving, things often get resolved.

IV. THE LEGAL FRAMEWORK

Texas ADR law has developed over the years to a definable set of rules and procedures that all tend to favor the process. Texas has a public policy of encouraging the peaceful resolution of disputes, particularly those involving the parent-child

relationship, and the early settlement of pending litigation through voluntary settlement procedures. Tex. Civ. Prac. & Rem.Code Ann. § 154.002 (Vernon 2002). Trial and appellate courts are charged with the responsibility of carrying out this public policy. *Id.* § 152.003 (Vernon Supp. 2002); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 715 (Tex. App. – Houston [1st Dist.] 1988, writ denied) (op. on reh'g).

A. The Texas ADR Statute

Texas became one of the leaders in alternative dispute resolution (hereinafter ADR) with its passage in 1987 of the Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE § 154.001 *et. seq.*, hereinafter referred to as the "ADR Statute." The policy enunciated in the current ADR Statute is clear: "It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationships, including the mediation of issues involving conservatorship, possession and support of children, and the early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE 154.002. "It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under 154.002." TEX. CIV. PRAC. & REM. CODE § 154.003. In *Hansen v. Sullivan*, 886 S. W.2d 467 (Tex. App.-Houston [1st Dist] 1994, orig. proceeding), the court stated that the general policy of alternative dispute resolution procedures is that peaceable resolution of disputes is to be encouraged through voluntary settlement procedures. One court saw § 154.003 as an "admonishment" to carry out the policy. *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. App.--Houston [1st Dist.] 1992, no writ). The ADR Statute states that mediation is a forum in which the mediator "facilitates communication between parties to promote reconciliation, settlement, or understanding among them." TEX. CIV. PRAC. & REM. CODE § 154.023(a). Thus, settlement is but one of three purposes for the mediation, the others being reconciliation and understanding.

B. Family Code

1. Policy Statement

The majority of today's family law judges require mediation prior to setting the case for trial. Recent legislation supports this trend with the requirement that all parties proceeding with litigation under Title 1 or Title 5 of the Texas Family Code must include in the first pleading a statement that:

> "I AM AWARE THAT IT IS THE POLICY OF THE STATE OF TEXAS TO PROMOTE THE AMICABLE AND NONJUDICIAL SETTLEMENT OF DISPUTES INVOLVING CHILDREN AND FAMILIES. I AM AWARE OF ALTERNATIVE DISPUTE RESOLUTION METHODS INCLUDING MEDIATION. WHILE I RECOGNIZE THAT ALTERNATIVE DISPUTE RESOLUTION IS AN ALTERNATIVE TO AND NOT A SUBSTITUTE FOR A TRIAL AND THAT THIS CASE MAY BE TRIED IF IT IS NOT SETTLED, I REPRESENT TO THE COURT THAT I WILL ATTEMPT IN GOOD FAITH TO RESOLVE CONTESTED ISSUES IN THIS CASE BY ALTERNATIVE DISPUTE WITHOUT THE NECESSITY OF COURT INTERVENTION."

The foregoing statement must be printed in boldfaced type or capital letters and signed by the party. The only exceptions are pleadings which require citation by publication, pleadings requesting a protective order, pleadings that assert a special appearance, or pleadings which seek emergency relief on behalf of a child. See TEX. FAM. CODE ANN. § 3.522 and 102.0085 (Vernon 1999).

2. Divorce Mediation

On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.

A mediated settlement agreement is binding on parties in a divorce case. if the agreement:

a. provides in a separate paragraph that the agreement is not subject to revocation;

b. is signed by each party to the agreement; and

c. is signed by the party's attorney, if any, who is present at the time the agreement is signed.

TEX. FAM. CODE § 6.602(b).

3. Parent-Child Mediation

Alternative dispute resolution is specifically addressed in the context of child related issues in Section 153.0071 of the Texas Family Code as follows:

a. On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.

b If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.

c. On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.

d. A mediated settlement agreement is binding on the parties if the agreement:

(1) provides in a separate paragraph an underlined statement that the agreement is not subject to revocation;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

e. If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

f. The procedures and remedies provided by this section apply to an action brought under Title 1.

TEX. FAM. CODE ANN. § 153.0071 (Vernon 1999).

C. Family Maltreatment & Domestic Violence

Special attention has recently been given to maltreatment of children and domestic violence in mediated settlement agreements.

First, the FAMILY CODE states:

> A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of a marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.

TEX. FAM. CODE § 6.602.

Further,

§ 153.004. History of Domestic Violence

a. In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

b. The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child.

c. The court shall consider the commission of family violence in determining whether to deny,

restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.

d. The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit, unless the court:

> (1) finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child; and
>
> (2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that:
>
> > (i) the periods of access be continuously supervised by an entity or person chosen by the court;
> >
> > (ii) the exchange of possession of the child occur in a protective setting;
> >
> > (iii) the parent abstain from the consumption of alcohol or a controlled substance, as defined by Chapter 481, Health and Safety Code, within 12 hours prior to or during the period of access to the child; or
> >
> > (iv) the parent attend and complete a battering intervention and prevention program as provided by Article 42.141, Code of Criminal Procedure, or, if such a program is not available, complete a course of treatment under Section 153.010.

TEX. FAM. CODE § 153.004.

Some jurisdictions have also imposed local rules that affect whether the court will accept mediated settlement agreements. For example, as of September 1 , 2002, Dallas County local rules are as follows,

> " In all cases with children, the following language must be included in the final judgment: It has been represented to the Court that there has been no pattern of child neglect or family violence by any party to this case within two years preceding the filing of this case or during the pendency of this case. If a pattern is present, the court will have to make a determination of the appropriate visitation schedule."

Just as the local rule clearly indicates, any mediated settlement agreement which involves issues of maltreatment or violence is subject to being rejected by the court. These local rules in Dallas County have been the subject of a great deal of debate, but the local judges hold that they have a duty to ensure the safety of children regardless of agreements reached by parents. As of the writing of this paper, this local rule has not yet been challenged.

V. MEDIATION CASE LAW

A. Mediation Case Law In General

1. Referral To Mediation

Section 154.021(a) of the ADR statute states that a court on its own motion or motion of a party may refer a pending dispute to an ADR procedure. In Section 154.021(b) the law states that the court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure. Tex. Civ. Prac. & Rem. CODE § 154.021 (a) and (b). This section authorizes a referral of a pending dispute to alternative dispute resolution procedures at any point in the trial or appellate process. *Downey v. Gregory* (Tex. App. – Houston [1st Dist.] 1988). In *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App. – Houston [1st Dist.] 1992, no writ), the Court sustained the right of a Court to compel the parties to attend mediation, including the referral to a paid mediator. Some of the objections raised to mediation, and overruled in the case, were:

a. the lawsuit was a simple rear-end collision where the only issues were negligence, proximate

cause, and damages;

b. the trial was likely to last only two days;

c. the mediation would not resolve the lawsuit;

d. the parties had not agreed to pay fees to the mediator;

e. mediation would cause relators to compromise their potential cause of action under *Stowers*;

f. the law did not favor alternative dispute resolution where one of the litigants objects to it and when the litigants have been ordered to pay for it; and

g. court ordered mediation, over the objection of the parties and at their cost, violated their right to due process under the fifth and fourteenth amendments to the United States Constitution and Article I, section 13 of the Texas Constitution and their right to open courts under Article 1, section 13 of the Texas Constitution.

2. Good Faith Negotiation

In *Decker v Lindsay*, the Court stated: "A court cannot force the disputants to peaceably resolve their differences, but it can compel them to sit down with each other." 824 S.W.2d at 250. *See also Ames v. Ames*, 860 S.W.2d 590 (Tex. App. -- Amarillo 1993, *no writ*). In *Hansen v. Sullivan*, 886 S. W.2d 467 (Tex. App.-Houston [1st Dist] 1994, orig. proceeding) the appellate court overturned sanctions ordered by the trial court due to a failure of a party to negotiate in "good faith" at a mediation. The party being sanctioned had been present at the mediation for more than three hours until the mediator declared an impasse. The appellate court held that there could be no sanctions for lack of "good faith." *See also* TEX. CIV. PRAC. & REM. CODE § 154.053(a) (a person appointed to facilitate an alternative dispute resolution procedure shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement).

3. Objecting To Mediation

Section 154.022 of the ADR Statute requires the court to notify the parties that it has determined that a pending dispute is appropriate for referral to ADR. Thereafter, any party may, within ten days after receiving the notice, file a written objection to the referral. If the court finds that there is a reasonable basis for an objection, the court may not refer the dispute to ADR. Tex. Civ. Prac. & Rem. CODE § 154.022. In *Keene Corp. v. Gardner*, 837 S. W.2d 224 (Tex. App.-Dallas 1992, writ denied), the trial court ordered the parties to mediation on twenty-four hours notice. Sanctions were imposed when one of the parties requested the right to file an objection within ten days, was denied the right, and then sent a representative without settlement authority to the mediation. The appellate court overturned the sanctions for failure to allow ten days for the filing of objections. *See also Decker v. Lindsay*, 824 S.W.2d at 250, wherein the Court stated that "if a party objects, and there is a reasonable basis for the objection, the court may not refer the dispute to an ADR procedure."

4. Procedures For Objecting To Mediation

In *Downey v. Gregory*, 757 S.W.2d 524 (Tex. App.-Houston [1st Dist] 1988, orig. proceeding, no writ), a party filed for a writ of mandamus to require a judge to vacate a final judgment and refer the case to an ADR procedure. The appellate court did not require the trial court to do so, finding that it was discretionary with the trial judge. The Court stated that "[a]lthough the statute contemplates that the court will confer with counsel before making its determination about the referral, it is not bound in every instance to grant an oral hearing before making its determination. In the exercise of its discretion, the trial court is in the best position to determine the status of the case and whether to hold a formal hearing before making a preliminary decision about the referral of the case. The court may consider, among other factors, the nature of the dispute, the complexity of the issues, the number of parties, the extent of past settlement discussions, the posture of the parties, and whether there has been sufficient discovery to permit an accurate case evaluation. The court may also consider the status of the case on its docket and whether a referral would be appropriate at that particular time." Id. at 525.

5. Payment Of Mediation Fees

Section 154.054 of the ADR Statute discusses compensation of impartial third parties. It allows the court to set a reasonable fee for the services of an impartial third party appointed by the court. Unless the parties agree to a different method of payment, the court shall tax the fee for services of the impartial third party as costs of suit. The parties can also agree to split the fees other than 50/50. If a court denies your objection that your client is unable to pay for mediation, you can always file a mandamus proceeding alleging that the court abused its discretion.

6. The Selection Of Mediator

Within the ten days a party has to object to the mediation referral and ask the court to substitute another qualified mediator. The Court, in its discretion, may or may not substitute another. TEX. CIV. PRAC. & REM. CODE § 154.022(b).

a. *Appointment Of Impartial Third Parties*

An "impartial third party" must be appointed to mediate. TEX. CIV. PRAC. & REM. CODE § 154.051(a). To qualify for an appointment as an impartial third party, a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment. TEX. CIV. PRAC. & REM. CODE § 154.052(a).

b. *Impartial Third Parties In A Parent-Child Suit*

To qualify for an appointment as an impartial third party in a dispute relating to the parent-child relationship, a person must complete the training required above, and an additional 24 hours of training in the fields of family dynamics, child development, and family law. TEX. CIV. PRAC. & REM. CODE § 154.052(b).

c. *Other Qualified Impartial Third Parties*

In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify as set forth above if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes. TEX. CIV. PRAC. & REM. CODE § 154.052(c).

7. Disclosure Of Discovery & Witnesses At Mediation

In *Cruz v Furniture Technicians of Houston, Inc.*, 949 S.W.2d 34 (Tex. App.-San Antonio 1997, no writ), the report of an expert was provided to the parties during a mediation. The report did not include information that the witness was expected to be called at trial. The expert report was not given in response to the appropriate inquiry contemplated by rule 166b (6) (b) of the rules of civil procedure. Appellants attempted to excuse their failure to formally designate the expert based on their belief that the cause would settle following mediation. The exclusion of the expert witness at trial was upheld by the appellate court.

8. Sanctions For Not Mediating.

In the case of *Luxenberg v. McClellan*, 835 S.W.2d 135 (Tex. App. – Dallas 1992, no writ), "death penalty" sanctions were imposed by the trial court and a mandamus proceeding followed. Among the many abuses cited were that after the court ordered the case to mediation, Luxenberg advised the mediator that he would not attend but would be available by telephone. He subsequently did not appear in person for the court-ordered mediation. The appellate court upheld the striking of Luxenberg's pleadings citing his callous disregard for the discovery process, the mediation process, and the trial court. Luxenberg did not advance any explanation for failing to appear at the depositions, show cause hearings, and the court ordered mediation. However, if the failure to attend the court ordered mediation is due entirely to the fault of the party's attorney, it will be held error under *Wetherholt v. Mercado Mexico Café*, 844 S.W.2d 806 (Tex. App. – Eastland 1992, no writ) to enforce sanctions against the party. *See also Island Entertainment v. Castaneda*, 882 S.W.2d 2 (Tex. App.-Houston [1st Dist.] 1994, writ denied), wherein the court reversed the trial court's sanctions against a party for failure to pay amounts owed pursuant to a mediated settlement agreement. Although the court noted that courts have inherent power to sanction for abuse of the judicial process, it saw this as a breach of contract situation, not as grounds for

sanctions. "Mediation is a creative method for dispute resolution and is not another forum to obtain sanctions." *Id*. at 5.

9. Enforcement (Generally)

Section 154.071(a) of the ADR Statute provides that a written settlement agreement "is enforceable in the same manner as any other written contract." Tex. Civ. Prac. & Rem. CODE § 154.071(a) . The court may incorporate terms of the agreement in its final decree. Tex. Civ. Prac. & Rem. CODE § 154.071(b).

a. *Integration With Rule 11*

Confusion has arisen in the area of enforcement of mediated agreements because of Rule 11 of the Texas Rules of Civil Procedure which states: "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." Tex. R. Civ. Proc. 11. In interpreting cases under Rule 11, the courts have held that an agreed judgment cannot be entered if at the time of the rendering of the judgment one of the parties has repudiated their consent to an agreement which complies with Rule 11. However, that does not mean that the agreement cannot be enforced. It means only that it cannot be the basis of an "agreed" judgment. The Supreme Court explained in *Padilla v LaFrance*, 907 S.W.2d 454 (Tex.1995) that a court cannot render a valid agreed judgment absent consent at the time of rendering, but "this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract." Id, at 461. Once consent to settlement agreement is withdrawn, agreement can only be enforced as a binding contract that complies with rule 11, as established by proper pleading and proof); *Alcantar v. Okl. Nat'l Bank*, 47 S.W.3d 815, 819 (Tex. App. – Fort Worth 2001, no pet.) Unilateral withdrawal of consent does not, however, negate the enforceability of a mediated settlement agreement in a divorce proceeding, and a separate suit for enforcement of a contract is not necessary. *Alvarez v. Reiser,* 958 S.W.2d 232, 234 (Tex. App. – Eastland 1997, writ denied).

b. *Judgment Or Suit For Breach?*

There has been a split of authority with regard to the enforcement of mediated settlement agreements under 154.071 of the ADR Statute. In interpreting the statute after its passage, the question arose as to whether courts would summarily enforce the mediated settlement agreement or handle it as a breach of contract action. Would the mediated settlement agreement be given a different enforcement mechanism than the breach of contract enforcement of repudiated Rule 11 settlement agreements? While several Texas courts have held that settlement agreements reached through court-ordered mediation may not be unilaterally repudiated and may be summarily enforced, others have held that the mediated settlement agreement is entitled to no special summary enforcement but must be enforced as a breach of contract.

(1) Breach Of Contract

The Texas Supreme Court has entered the dispute on the side of the breach of contract method of enforcement in the case of *Mantas v. The Fifth Circuit Court of Appeals*, 925 S.W.2d 656 (Tex. 1996). In *Mantas*, the appellant sought to enforce a settlement agreement entered into during the pendency of the dispute, following appellee's attempt to repudiate it. The Court of Appeals had ordered the parties to mediation where they reached and signed a settlement agreement after the appeal had been perfected. Later, one of the parties repudiated the agreement and the other party asked the Court of Appeals to enforce the settlement agreement or abate the appeal pending resolution of the enforcement suit. The Court of Appeals denied the motion to enforce and refused to abate the appeal while the appellant pursued the breach of contract action against appellee in a separate proceeding. Appellant petitioned for a writ of mandamus. The Supreme Court held that enforcement of a settlement agreement entered into while the case was on appeal must be through a separate breach of contract lawsuit (citing *Padilla v. LaFrance, supra*) and also held that the Court of Appeals should have abated the appeal while the

enforcement action was proceeding. In *Mantas* the court said that "[w]here the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number. However, where the dispute arises while the underlying action is on appeal, as in this case, the party seeking enforcement must file a separate breach of contract action. Id., at 658-9. As to why it was requiring abatement of the underlying suit until the breach of contract action was decided, the court stated that "[i]t makes no sense for the court of appeals to expend its resources and require the parties to expend theirs, on an appeal which may be moot. Certainly , a ruling on the merits of the appeal before judgment is rendered in the enforcement suit would inject needless uncertainty and confusion into the issues surrounding the settlement." *Id*. at 659.

(2) Terms Of The Agreement

See also Montanaro v. Montanaro, 946 S.W.2d 428 (Tex. App.-Corpus Christi, 1997, no writ). In this case, an action was brought to enforce a settlement agreement entered into as a result of court ordered mediation. At the mediation, specific monthly payments had been agreed to, to be secured by a promissory note. After the mediation, the parties could not agree to the terms of the promissory note. The trial court had concluded that the settlement agreement was not enforceable as it had left material terms to be later agreed upon. However, the appellate court analyzed the case under standard contract law and found the agreement enforceable. Also, in *Bauer v. Jasso*, 946 S.W.2d 552 (Tex. App.-Corpus Christi, 1997, no writ), the Court of Appeals had ordered the parties to mediation where they arrived at a settlement agreement. After failure to deliver a certain payment, Jasso considered the agreement breached and asked the court to dismiss Bauer's appeal for want of prosecution due to the breach of the mediated settlement agreement. The Court of Appeals refused to do so, stating that enforcement of a disputed settlement agreement was through a breach of contract action.

c. *Procedure For Enforcement*

The party seeking enforcement of a settlement agreement must support it by pleadings and proof. *Stevens v. Snyder*, 874 S.W.2d 241 (Tex. App. – Dallas, 1994, writ denied); *Davis v. Wickham*, 917 S.W.2d 414 (Tex. App. – Houston [14th Dist.] 1996, no writ). The procedure for enforcing a mediated settlement agreement is the same for enforcing contracts generally. *Martin v. Black*, 909 S.W.2d 102 (Tex. App. – Houston [14th Dist.] 1995, writ denied).

10. Repudiation

A party who withdraws his or her consent to entry of a judgment based on a non-family law settlement agreement does not make the settlement agreement unenforceable. The other party can still enforce the agreement by providing proper pleading and proof to support enforcement under contract law. *Stevens v. Snyder*, 874 S.W.2d 241 (Tex. App. – Dallas, 1994, writ denied). Contract defenses are available in repudiating mediated settlement agreements. For example, in *Randle v. Mid Gulf, Inc.*, 1996 W.L. 447954 (Tex.App.-Houston [14th Dist.] 1996 [ordered not published pursuant to Tex. R. App. P. 90]), the Court of Appeals overturned a summary judgment which had been granted by the trial court on an action for specific enforcement of the mediated settlement agreement. The appellate court found sufficient fact issues of duress based on the appellant's statements that he was having chest pains because he did not take his heart medicine and he was told he could not leave the mediation until an agreement was reached. While this unpublished case cannot be cited as precedent, it does show what kind of facts might be needed to overturn an agreement based on duress. However, in *King v. Bishop*, 879 S.W.2d 222 (Tex.App. [4th Dist.], 1994). the appellate court held that alleged duress from one's own attorney to sign a mediated settlement agreement was not sufficient to invalidate the agreement. There was no evidence that the opposing party had participated in the alleged coercive conduct.

11. Mediation Confidentiality

Section154.053 (b) and (c) and Section 154.073 of the ADR Statute confer confidentiality requirements on both the mediator and the parties. It may even be that the mediator's confidentiality is the mediator's own privilege which cannot be waived

even when both parties agree. Section 154.073(c) states that information is admissible or discoverable if it is admissible or discoverable independent of mediation. Section 154.073(d) provides for *in camera* presentations to the court where there is a dispute regarding disclosure of communication or materials. TEX. CIV. PRAC. & REM. CODE § 154.053 and 154.073. There are few Texas cases that directly address confidentiality. However, in reading many of the cases dealing with mediation, the trend appears to be to allow divulging of mediation information that allows the court to enforce its orders, to enforce settlements reached during mediation, and to allow a party to obtain discoverable evidence. It is clear that a mediation memorandum or document prepared specifically for the mediation such as settlement memos, diagrams, summaries, *etc.* would be
protected and could not be used for evidentiary purposes. However, information subject to production under the discovery rules would not be protected even if divulged during mediation as long as it was obtained outside of the mediation process.

a. *Mediator's Confidentiality*

Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. TEX. CIV. PRAC. & REM. CODE § 154.053(b). And, unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court. TEX. CIV. PRAC. & REM. CODE § 154.053(c).

b. *Subject Matter & Disclosure Confidentiality*

Except as set forth immediately below, a communication relating to the subject matter of any civil or criminal dispute made by a participant in an ADR procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. TEX. CIV. PRAC. & REM. CODE § 154.073(a). Furthermore, any record made at an alterative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute. TEX. CIV. PRAC. & REM. CODE § 154.073(b).

c. *Exceptions To Confidentiality*

An oral communication or written material used in or made a part of any ADR procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure. TEX. CIV. PRAC. & REM. CODE § 154.073(c). Furthermore, Federal law, which does not recognize the mediator privilege, supersedes any contrary Texas state law arising in the context of claims for federal securities fraud and federal civil racketeering violations. *Smith v. Smith*, 154 F.R.D. 661 (N. D. Tex. 1994).

d. *Procedures To Determine Confidentiality*

If the question of whether a communication is confidential is in dispute, the issue may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure. TEX. CIV. PRAC. & REM. CODE § 154.053(d). *See also Smith v. Smith, supra*.

e. *Case Law On Mediation Confidentiality*

(1) Testimony Of Mediator

Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994) involved a case in which a mediator in an underlying state court suit was subpoenaed to testify in the federal suit concerning alleged fraud in connection with the mediated settlement of the state court action. The mediator was not required to testify because of confidentiality of the mediation process. The federal court referred to the confidentiality provisions of the Texas ADR Statute.

(2) The Effect Of Agreement Repudiation On Confidentiality

If a spouse decides to rescind and seek to overturn the mediated settlement agreement on the basis of something that happened during the mediation, he or she will probably be required to disclose the facts and circumstances pertaining to the activity giving rise to the claim. *In Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985), a plaintiff sought to set aside a conveyance of real property, claiming "trickery" and a failure to remember signing a deed. Medical records of the plaintiff revealed, however, that she had told her psychiatrist that "the building [in question] was sold while we were in Padre Island." The defendant then sought to depose her psychiatrist. "The primary issue [was] whether a plaintiff [had] the right to use the psychotherapist-patient privilege offensively to shield information which would be material and relevant to the defendant's defense of claims made against him by the plaintiff." Id. at 106. The Court ruled that a plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action. Id. at 108.

In an original mandamus proceeding, the court, in *DeWitt & Rearick, Inc., v. Ferguson*, 699 S.W.2d 692 (Tex. App. -- El Paso 1985 no writ), adopted the reasoning of *Ginsberg, supra*, to hold that the plaintiffs in that case had waived their attorney-client privilege. In this case, three sisters, upon advice of counsel, paid a sum of money to a third party in settlement of a previous case and sought recovery of the settlement amount from subsequent defendants. The sisters testified that their attorney's confidential advice was the basis for the sisters' decision to settle the previous case and to subsequently seek reimbursement of the settlement amount from the current defendants. Id. at 693. In their attempt to avoid liability for the settlement paid by the sisters, the defendants requested that the sisters state the advice of counsel that prompted the sisters' original settlement payment. The sisters resisted the discovery request by asserting the attorney-client privilege. Noting that the sisters went into court voluntarily in search of affirmative relief, the court concluded that the sisters' attempted exercise of the attorney-client privilege amounted to an improper offensive use of the privilege. Id. at 694. The court concluded:

> As the court noted in the *Ginsberg* opinion, these plaintiffs may be forced to elect to claim this privilege or abandon their claim. We conclude that if they pursue this claim they will have abandoned their [attorney-client] privilege.

Id. at 694.

In *Parten v. Brigham*, 785 S.W.2d 165 (Tex. App. – Fort Worth, 1989 no writ), the court applied the *Ginsberg/DeWitt* doctrine to a wife's claim of attorney-client privilege despite her attempts in court to overturn an agreed settlement of her divorce. In this case, the wife alleged that her husband concealed community property in a divorce settlement. She brought a bill of review to set it aside. The husband sought discovery as to her knowledge of the existence of property at the time of the divorce as may be revealed in discussions with her attorney. The wife asserted the attorney-client privilege as a defense to that discovery. The husband countered that when she filed the bill of review denying that she had knowledge of the properties and claiming that he had concealed them from her, she waived any attorney-client privilege as far as it related to communications between the attorney and client relating to the extent of the community estate. The court concluded that the wife's "knowledge and the knowledge of her agent and lawyer . . . are crucial to the proceedings, . . . [and that] . . . the [wife] may be forced to elect to claim the attorney-client privilege or abandon her bill of review." *Id*. at 168.

In *Hur v. City of Mesquite*, 893 S.W.2d 227, 234 (Tex. App. – Amarillo 1995, writ denied), the Court held that the confidentiality provisions of the ADR statute that state that all matters in mediation are confidential would not prevent a party from bringing suit for breach of a mediation agreement. In *Randle v. Mid Gulf, Inc.*, 1996 WL 447954 (Tex. App.-Houston [14th Dist.], 1996 [ordered not published under TEX.R.APP.P. 90]), the Court, citing *Hur v. City of Mesquite, supra*, allowed a party to divulge information concerning a mediation in order to allow him to present evidence that he signed the agreement under duress, especially since the other

party was suing to enforce the agreement. The *Randle* case cannot be used as precedent under Rule 90 of the Texas Rules of Appellate Procedure. In *Smith v. Smith*, *supra*, the court quashed a subpoena served on a mediator and noted that the Texas ADR Statute "has been described as the most complete in conferring the cloak of confidentiality on communications made during alternative dispute resolution procedures." *Smith*, 154 F.R.D. at 667. The Court in *Smith* looked not only at the Texas ADR Statute but also at the Dallas court's mediation order and rules which also provided for confidentiality. In *Parmer v. Pre-Fab v Construction, Inc.*, 1997 WL7020 (Tex. App.-Houston [14th Dist] 1997, [ordered not published pursuant to Tex. R. App. Proc. 90]), the appellate court indicated that a party complaining of the disclosure to the trial court of confidential information obtained during a mediation must, in order to obtain relief on appeal, specify what was revealed, the manner in which the results were reported, and how this affected the trial court.

B. Family Law Mediation Case Law

Recent case law has also strengthened the policy of enforcing the parties' settlement agreement. The well known case of *Ames v. Ames*, 860 S.W.2d 590 (Tex. App. – Amarillo 1993, *no writ*) was the first in Texas to hold that a party could not unilaterally revoke their consent to a Rule 11 agreement resulting from a mediated settlement agreement, pursuant to the terms of Chapter 154 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE.

Subsequently, the Houston Court of Appeals distinguished Ames in the case of *Cary v. Cary*, 894 S.W.2d 111 (Tex. App. – Houston [1st Dist.] 1995, *no writ*). In *Cary*, the court held that one party could repudiate a settlement agreement prior to the entry of the agreed decree, thereby precluding the court from entering a consent judgment. The court further recognized the option of pursuing other remedies, such as breach of contract, or specific enforcement which may be tried contemporaneously with the divorce suit.

Finally, the confusion was resolved with the Supreme Court case of *Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995). In *Padilla*, the court basically agreed with the dicta of *Cary* and held that the court cannot enter a consent decree once a party has repudiated a settlement agreement; however, all other remedies at law are available to the party seeking to enforce such agreements under RULE 11 of the TEXAS RULES OF CIVIL PROCEDURE.

1. Enforcement Of Family Law Mediation Agreement

a. *Divorce Cases Without Children*

A mediated settlement agreement is binding on parties in a divorce case. if the agreement:

> (1) provides in a separate paragraph that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.. TEX. FAM. CODE § 6.602(b).

If these requirements are met, a party is entitled to judgment on the mediated settlement agreement, notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. TEX. FAM. CODE § 6.602(c). *See also Alvarez v. Reiser*, 958 S.W.2d 232 (Tex. App. – Eastland 1997, writ denied)(attempted revocation of mediated settlement agreement ineffective, statement prohibiting revocation enforced). Rather, section 6.602 creates a procedural short cut for the enforcement of mediated settlement agreements in divorce cases. *Cayan v. Cayan*, 38 S.W.3d 161, 166 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). The phrase "notwithstanding rule 11 or another rule of law" does not require a trial court to enforce a mediated settlement agreement simply because it complies with section 6.602(b), irrespective of what the agreement provides for or how it was procured. *See In re Kasschau*, 11 S.W.3d 305, 311 (Tex. App. – Houston [14th Dist.] 1999, orig. proceeding) (op. on reh'g) (holding that trial court did not err by refusing to enforce mediated settlement agreement that contained an illegal provision); *see also Cayan*, 38 S.W.3d at 166 n. 8.

In *Boyd v Boyd*, 67s.w.3d 398 (TA-FW 2002, os pet)., not yet published (CA, Ft. Worth), the husband and wife were divorcing, so they went to

mediation were they settled with an irrevocable mediation agreement per Texas Family Code §6.602 and §153.0071. The agreement divided their property and also had a residual clause which said that any property not disclosed would be owned 50/50 by the parties. The agreement also said that each party had made a fair and reasonable disclosure of the assets and debts know to them. Later the wife discovered that her husband had intentionally concealed a $230,000.00 bonus. The total value of the estate was 10 to 15 million dollars. The husband moved to enter judgment on the agreement which the trial court denied and set the case for trial. The trial court found that the husband had not committed a fraud; however, since the agreement did not include substantial community assets or provide for visitation with the parties' child, the trial court set the agreement aside. After trial, the husband appealed claiming the trial court erred by not entering judgment on the mediated settlement agreement. The Court of Appeals affirmed holding:

– Texas Family Code §6.602 does not require a T/C to enter judgment on a settlement agreement that was obtained by fraud, duress, coercion, dishonest means or illegally.

– Although there was no fiduciary duty between the husband and the wife, since they both had attorneys, when a party states that he has made a fair disclosure of assets/debts, a duty does exist to make a full disclosure; thus an intentional non-disclosure of a material fact subjects that agreement to be set aside (rescission).

– Intentional failure to disclosure substantial marital assets is grounds to set aside an irrevocable mediated settlement agreement.

In *Cayan v. Cayan*,38 SW 3b 161 (Tex APP Houston [14th Dist.] 2001, pet. denied),, not yet published, (CA, Houston - 14th), the husband and wife were divorcing. They went to mediation and settled per a §6.602 irrevocable mediated settlement agreement, which they and their attorneys signed. The husband then revoked the agreement and the wife filed a motion to enter judgment, which the Trial court granted and signed the wife's proposed judgment. The husband appealed on the basis that §6.602 conflicts with §7.002 and 7.006 whereby the trial court must divide the property in a "just and right" manner. The Court of Appeals affirmed and held that §6.602 agreements are binding, can not be unilaterally revoked, and the trial court must enter judgment per the §6.602 terms. The trial court no longer has the duty to divide the parties' property in a "just and right" manner when the parties sign a §6.602 agreement. The husband also argued that the agreement gave his wife a part of his separate property, thus the trial court's judgment violates the Texas Constitution's prohibition against divesting separate property. The Court of Appeals, however, held that the Constitutional prohibitions only apply to judicial, unagreed divestment – this was an agreement. The husband also argued the §6.602 agreement and the trial court's signing of the judgment violated the open court provisions by depriving him of the common law defense of fraud. The Court of Appeals, however, held that judgment must be entered per the agreement; but if the husband was wrongfully induced, he has the same recourse as a person who discovered such fraud after a judgment was signed upon a non-§6.602 agreement (i.e., a bill of review).

b. *Cases With Children*

(1) The Statutes

Section 153.0071(d) Alternative Dispute Resolution Procedures of the Family Code states that a mediated settlement agreement involving the parent/child relationship is binding on the parties if it contains, in a separate paragraph, an underlined statement that the agreement is not subject to revocation, and if the agreement is signed by each party to the agreement and by any attorney present at the signing. Section 153.0071(d) TEXAS FAMILY CODE. If the requirements of this section are met, the party is entitled to a judgment on the mediated settlement agreement "notwithstanding Rule 11, TEXAS RULES OF CIVIL PROCEDURE, or another rule of law." TEXAS FAMILY CODE § 153.0071(e).

(2) The Cases

In *Spinks v Spinks*, 939 S.W.2d 229 (Tex. App.-Houston [1st Dist] 1997, no writ), at a court ordered mediation the parties to a divorce signed a settlement agreement involving the parent-child

relationship. At trial, the wife repudiated the agreement. The trial court, nevertheless, rendered a decree of divorce based on the mediated settlement agreement with a few modifications. The Court of Appeals reversed and remanded. It stated that not only was this not a traditional consent judgment because appellant withdrew her consent before rendition, but that the requirements for non-revocation provided by Section 153.0071(d) of the Texas Family Code were not met because the stipulation that the agreement was not revocable was not underlined.

In *Alvarez v. Reiser*, 1997 W.L. 620793 (Tex. App.-Eastland, 1997, no writ), the Court rendered an opinion enforcing a mediated settlement agreement. The trial court had entered judgment based on the mediated settlement agreement which did comply with Section 153.0071(d) of the TEXAS FAMILY CODE in that the parties stated in a separate, underlined paragraph that the agreement was not subject to revocation. The wife contended that she had withdrawn her consent so that Rule 11 of the TEXAS RULES OF CIVIL PROCEDURE prevented entry of judgment. The Court of Appeals stated that Rule 11 of the RULES OF CIVIL PROCEDURE was not applicable since 153.0071(e) of the TEXAS FAMILY CODE specifically provides for enforcement notwithstanding Rule 11, TEXAS RULES OF CIVIL PROCEDURE.

(3) Which Is Superior: Mediated Settlement Agreements or The Best Interests of the Child?

An argument can be fashioned that all agreements that are designed to be turned into Court orders must be in the best interests of the child in order for the Court to enter such an order. *See* TEX. FAM. CODE § 153.002 (Vernon 1999)(stating that the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child). A vivid imagination can think of an order that is so preposterous that a trial court will not enter it under any circumstances. Literally worded, however, TEXAS FAMILY CODE § 153.0071(e) clearly states that, if the rules are followed, the Court must enter it "notwithstanding ... another rule of law." "Another" rule of law, of course, would be the requirements of TEX. FAM. CODE § 153.002. So, if these two rules of law conflict, the wording of the statutes seem to indicate that the properly drawn mediated settlement trumps even the best interests of the child. This may prove to be wrong, though, as § 153.002 clearly uses the word "always," and clearly states that best interests shall "always" control.

VI. FINE TUNING THE CASE FOR MEDIATION

Be thoroughly prepared well in advance of the scheduled day. By now, you have complete discovery and have refreshed your memory regarding the mediation process itself.

Be sure to advise your client up front about the cost of mediation, including the mediator's fee and the attorney's time. Considering the fact that mediation usually encompasses at least eight hours, the client should be reminded of the costs so that the process is taken seriously.

Remember that your client most likely has never participated in a process such as mediation. Therefore, in preparation for mediation, the lawyer and client should discuss what will actually happen throughout the day. Advise the client that mediation can be a very laborious process - you "don't get sumthin for nothin". The client needs to understand that mediation is a legal process -define by rules and statutes and fleshed out by caselaw. Most lay persons think it is just a time to talk about compromise. They need to be educated.

Explain that the mediation might begin with a general session where each party and their attorneys will have an opportunity to speak openly about their perspective on the case prior to the beginning of the mediation process. Since this may be the only opportunity for your client to "vent", the lawyer may want to educate the client about using this therapeutic process as a powerful tool for winning at mediation. Sometimes, showing the other party the reality of your client's devastation over the divorce, can serve as a means to soften the case for mediation.

Moreover, since the mediation process is confidential, this would be the most opportune time to evaluate how well your client can evidence self-control and poise in an open forum. If the client wishes to speak during the opening session, encourage he or she to do so, but counsel them beforehand about the most effective way to relay

their thoughts in a productive manner.

The opening statement is seldom used by either the parties or the attorneys. However, a concise and effective capsulized presentation of what the other side may expect if the case is tried is your most powerful tool in settlement. The "How-To's on this presentation are coming in the next section.

If the animosity between the parties is so overwhelming that an extensive opening session would be a waste of time, and possibly destroy any attempt of settling, the lawyer should request that the opening statement session be either abbreviated, avoided altogether, or done with clients viewing the lawyer's presentation via closed circuit T.V. from another room (remember the study about effectiveness of family therapy techniques in avoiding hospitalization for youths).

Ensure that all of the necessary arrangements have been made prior to the day of mediation so that neither the parties nor the attorneys cause a delay, or have to stop the mediation altogether, due to scheduling conflicts. Instruct the client to make arrangements for child care, airline reservations and any other scheduling conflicts well in advance of the mediation. We find that these small issues can stop the mediation because clients simply were not educated about the nature and scope of mediation.

Likewise, if there are any key persons necessary to a final settlement on all issues, ensure that those persons are available by telephone if necessary. Necessary third parties can include parents, spouses, social workers, experts, psychologists and financial advisors. If the client absolutely cannot settle without the approval of some third party, the case should only be mediated when that person is available.

Like we said in the beginning, if you prepare for mediation as you would for trial - there will be no problems. Acting out the warrior persona will pay off for your client.

And, like we said in the beginning, if you approach mediation with the idea that the case will settle you will be erring too much on the peacemaker role. Just showing up on the designated day sounds like malpractice to us. This attitude does a great disservice to the client, the case, and the settlement process.

Mediation as opposed to trial is certainly more cost effective; however, a failed settlement effort can greatly increase the client's fees. Therefore, attorneys should approach mediation with the idea that the case *will* settle, the only question is the terms of the agreement. Practice Optimism. In some instances, it may be appropriate to engage in written settlement negotiations prior to the mediation process to ensure that there are no "deal breakers".

Of course the majority of cases which are settled have apparent deal breakers at the beginning of the mediation process but at least everyone knows going in where the problem areas are. If settlement offers are not exchanged, call or write the opposing lawyer prior to the settlement conference and affirm your commitment to settle the case. Let him or her know that both you and your client have worked hard to consider all the possibilities of viable settlement options. Offering words of encouragement will let the opposing attorney know you are "prepared" for mediation and it also allows the process to begin on a positive note.

Don't for one minute think that this advice might be interpreted as a sign of weakness by the other side. For the record, its called "good faith".

A. Discovery Must Be Completed

Make no mistakes, if discovery is not complete, you cannot make an informed settlement for your client. There are no exceptions. If you rationalize cutting corners here to save your client money or to save your client time, think twice. Your license is on the line, not your client's. Likewise, if you accept as fact some issues which are not supported by appropriate documentation, have your client sign off that he or she has been fully informed of risks associated with such actions. Better yet, videotape the informed consent conference and put if back for a rainy day, you will probably need it.

The lawyer should engage in the discovery process as if the case were going to trial and continue in that mode until the client is comfortable with making an offer of settlement or scheduling the case for mediation. Many attorneys have a bad habit of waiting to see if the case will settle before engaging in exhaustive discovery. This is not the way to begin. At a minimum, the lawyer should request that inventories be exchanged prior to discussing settlement. If at all possible, interrogatories and requests for production also should be answered prior to engaging in settlement

discussions. This minimal discovery is just as important to the attorney as it is to the client because of the potential for buyer's remorse once the settlement document is completed. Moreover, if custody is at issue, the lawyer should ensure that the psychological reports, social studies or any other important test results or evaluations are completed prior to discussing settlement options.

B. Know Your Discovery/ Know Your Case

In the context of preparing for a mediation session, "know your case" means knowing and preparing the following elements. Make sure you can answer these question without stumbling.

1. What are the key facts?
2. Which key facts are disputed?
3. Which key facts are in agreement?
4. What are your case strengths?
5. What are your case weaknesses?
6. Exactly what relief is sought?
7. Know comparable verdicts (if any)

C. Know the Risks / Gains

1. Know your risk. Ask: What is your range of results if you do not settle?

2. How long and how expensive it will be to go to trial and what outcome is possible at trial. Ask: What will it cost you to go to trial?

3. Know what results are likely from a trial. Ask not only what the range is, but: What is likely to happen if you go to trial?

4. Be aware of your client's other options (such as walking away) and other tools (such as binding arbitration or binding summary trials).

5. Once you have reviewed your case and answered the questions about the alternatives you are ready to talk with your client and spend the appropriate amount of time preparing them for mediation.

VII. WHAT TO DO WITH THIS - HOW TO START?

Ditch the advice of Glenda the Good Witch of the North who told Dorothy to "start at the beginning" as they followed the yellow brick road. You should start at the end of your case and work backward. This process will be efficient and lean. It is as easy as "3", "2", "1".

A. The Chart: Texas Pattern Jury Charge

List out each separate question that the trier of fact will answer in your case. Use the Texas Pattern Jury Charges. Each question will serve as a stand alone section for your case. Start with the big ticket items and distinguish between jury questions and the questions submitted only to the Court. One of your goals will be to a complete a chart which incorporates each and every component of your discovery. Lay out your discovery and check off each and every piece as you plug them into the chart. A secondary goal will be for educating your client which we will get to later.

1. <u>Analyze Strengths & Weaknesses</u>

Your chart will enable you to easily see the strengths and weaknesses of the cases and what can be expected if the case goes to trial. Based on the anticipated outcome, the lawyer should be able to develop a best and worst case scenario with the client. This analysis should eventually take the form of a "best case" written settlement offer to be submitted to the mediator well in advance of the mediation. The lawyer and the client should both know which points are negotiable well in advance of the mediation. If possible, the lawyer should anticipate the counter-offers of the opposing party and have several offers on hand for each stage of the mediation. Explain to the client that the other side is formulating the same best/worst case scenarios and encourage the client well in advance to remain optimistic about settlement.

B. The Art: Themeing the Case

The game is afoot. You have completed your discovery. You have charted it in an organized and concise fashion and it has been driven by jury questions and questions which will be answered by the trier of fact. You know your strengths and weakness.

Now is the time to study it, talk about it out loud to your staff and client, and begin the process of finding that one thread that will pull the pieces of the

chart together in a compelling way, your theme.

This process takes the case from cold facts on paper to a story about real people which hooks the outsider, draws her or him in, and urges them to do something to help your client's plight.

Having only one theme is ideal and most complicated cases can be taken to one general theme, even those which involve both complicated property and custody issues. Again, stay simple just as you would for trial preparation.

The most persuasive themes come from cultural mythology - they hold universal appeal, they hook the mediator, the jury, or the trier of fact. David and Goliath, Samson and Delilah, Motherhood, The Deceiver, The Trickster, The Whore, The Madonna, or The Good Provider - these are just a few of the collective themes which have built- in, human, appeal. You will be surprised about how easy your case mantra comes out once your have charted the discovery using the jury charge as your guide. When working in trial teams we rarely have significant disagreements about the case theme once the chart is completed - it just becomes evident.

Why worry about a theme just for mediation? You want to hook your mediator just like you want to hook your jury or judge. You want that mediator to see the human side of your story, to see it in color, and to feel some passion about it. Your goal is for the mediator see how powerful your case position is, how powerfully you will be presenting it, and to "get it" in terms of the crucial issues at hand. Much like advertising, you brand (theme) your product (your case position) to sell it - to win. Walking into mediation without your theme is like trying to sell a product with no advertising.

A trial is compelling story with great footnotes. Your mediation presentation is like cliff notes. Once the case has been analyzed, the lawyer should prepare a "position statement" to be disseminated to the mediator. The position statement should provide the mediator with a concise overview of the facts of the case and should reflect your "spin", your theme.

1. <u>The Position Statement</u>

The position statement should show why your client is entitled to receive everything requested in the "best case" settlement offer. The position statement should be forceful and persuasive, and not simply a bland overview describing the "typical" divorce. You have to brand your product if you are going to sell it.

Hook the mediator: Try to instill the mediator with both sympathy and confidence in your position. If case law is available and supportive of your position, cite those cases and provide copies to the mediator. While the mediator is designed to act as a "facilitator," human nature will not allow him or her to be a Mr. Spock in the mediation process. Show the mediator why and how you will win at trial, and encourage them to support your effort.

C. Creativity Is Essential

One of the greatest benefits of any mediation process is the client's ability to structure a settlement that would not otherwise be an option if the case were tried to the court. The most obvious example is an alimony agreement. Considering the limitations on the maintenance statute, there are very few cases that are appropriate for a court ordered award of maintenance. However, in many cases, alimony is an excellent way to compensate a non-working spouse for his or her share of a community business and provide a great tax incentive for the working spouse. Creative alimony packages in cases with large community estates are one of the best reasons to encourage clients to seriously consider a mediated settlement.

In custody cases, unusual possession orders that fit the lifestyle of the parties are best achieved by way of mediation. Since most family law judges are tied to a standard possession order, the flexibility of a settlement agreement may be the best way to secure a possession schedule that varies from the Texas Family Code. Likewise, the parties may be able to secure creative agreements on child support and private school tuition through the use of mediation. Thus, in any case where the client is requesting orders that are either <u>not</u> standard or beyond the court's powers, mediation is definitely the best avenue for settlement.

D. Case Example

Lets say you are preparing for a complicated child custody case where your client wants joint managing conservatorship, the opposing side wants sole and it is set for a jury trial.

Go to the PJC 215.9A Best Interest of Child-

Joint Managing Conservatorship-One Parent Seeks Joint Managing Conservatorship with Other Parent. Here you will find the two prong requirements of a) best interests and b) seven factors to be considered in the appointment of both parents as joint managing conservators.

"Best Interests" has been and continues to be an amorphous concept - but you can follow this rabbit trail through the PJC and find that the definitions and instructions regarding best interests hold that 'The best interest of the child shall always be the primary consideration in the determining questions of managing conservatorship and questions of possession and access to the child" [PJC215.1 Best Interest of Child]. This instruction, of course, is based on the Texas Family Code 153.002 (Vernon 2002).

Bottom line? There is no statutory definition of "the best interests of a child" and Texas case law has not determined an operational definition of this concept. Therefore, you can be creative in how you choose to define this question in your outline.

In our example, you are representing the parent preferring JMC, this usually would indicate a position of *status quo* so you would define best interests as something along these lines: 'This child is well adjusted" having had the involvement of two parents in the same home, so continue with the same parenting arrangement. If you take this approach then "Good Adjustment" would be your operating definition of Best Interests and it would constitute your first prong.

1. Good Adjustment

Under this section, you would list out evidence that would support that the child is well adjusted such as grade reports, achievements, or information from collateral witnesses like teachers or neighbors. The more objective the evidence, the better.

Then you would move on to the second prong, the seven factors. We have listed these in summary form:

2. Seven Factors

a. Whether the physical, psychological, or emotional needs and development of the child will benefit from JMC

b. The ability of the parents to put the child's welfare first and to make shared decisions in the child's best interests

c. Whether EACH parent encourages and accepts a positive relationship; between the child and the other parent

d. Whether both parents participated in child-rearing prior to filing

e. Geographical proximity of parents

f. Child's preference if 12 or older

g. Any other relevant factor.

In preparing your case, you would go through each one of these seven factors and list out the evidence you would put forth to support your position. You would also note in your privileged files the factors that you think you might fail. For example, if the parents did not live in the same county, geographical proximity might be a problem. For your private file, it is noted as a factor which would be lost. For your mediation presentation, you spin it as positively as possible. Perhaps, your client works in the county where the child lives, or can take off work early on particular days, or you can propose a visitation schedule in larger blocks that would cut down on travel time for the child, or you can present expert testimony that holds that the downside of travel for the child is worth the upside of a continuing relationship with your client.

Lets say that your client participated in child rearing prior to the filing of the divorce. You could bring evidence from collateral witnesses which supports your client's case position: teachers, doctors, cub scout leaders, extended family members, or family photos.

By the time you finish this process you will have a chart which incorporates your discovery completely. It will be important to keep this chart manageable and simple, much like you would for good trial preparation. For example, limit points under witnesses to three or five key issues. This is not the place (and probably the trial isn't either) to put forth 30 points of light to which your expert will testify. Keep it simple, to the point, and on the bull's

eye. Your evidence will be more persuasive when it is lean.

E. The Style: Show and Tell

Family lawyers are in the ice age. For decades, plaintiff lawyers have made elaborate and impressive presentations at mediation. Family lawyers typically bring documents and nothing else.

It will be important to know from your mediator about what will be acceptable in terms of time for presentation and the method by which this will be done. Some mediators have both sides make an opening and case summary statement together in the same room. Some mediators accomplish this in separate rooms. Some mediators will review materials sent over early, some won't. Be creative - its not the amount of information that is persuasive, it is the quality and the presentation that will be persuasive. Some mediators want the clients themselves to make a statement. You need to know these things before you start your "Show and Tell".

"Show and Tell" means show and tell. As you tell the story, you also show it. Some people are auditory learners, some are visual, showing and telling together is the most effective way to get your point across. It also takes your evidence to a more credible level - its beyond just what you say.

What are the most persuasive ways of showing?

1. Affidavits & Letters

For lay witnesses and collateral witness, affidavits or letters are helpful. For experts, use a highlighted report, a portion of a deposition, or a power point of the key elements of their testimony. This is more powerful than the lawyer regurgitating what they believe that particular witness will say.

2. Photographs/Video Clips

Using photographs to identify businesses, buildings or residences, in property disputes are a quick way for your mediator to latch onto this new information. Use them to make a child more a of real person than just a name - use a short video (2-3 minutes) of a day in the life. Use a 3-5 minute deposition clip or a videoed interview of an expert to drive a point home.. If you use the interview clip, ask the expert, "What is your bottom line" ,"What will you recommend" "How strong is your opinion". These clips and videos send a message about the strength of your evidence. Be powerful here if you can.

3. The Use Of Spreadsheets

Spreadsheets are enormously useful tools in allowing someone to take a "one-page" view of the entire community estate and how it is proposed to be divided. An electronic spreadsheet (such as Microsoft Excel, Lotus 1-2-3 and Quattro Pro) can easily change, move and manipulate quantitative data, almost in the blink of an eye. Before a spreadsheet can be used, however, it is generally wise to make sure the parties are "on the same page" with respect to (1) what assets and liabilities are community and what are separate; and (2) what each asset and liability is worth from a value standpoint. Even when litigants disagree over these matters, however, spreadsheets can be used for each side to understand and evaluate their respective positions in light of all of the different possible scenarios, and to better understand the "bottom-line" aspects of the decisions and risks of settling versus going to trial. In some cases, a mediator will use one spreadsheet in one caucus and another one in the other caucus.

For complicated tracing - use LARGE spreadsheets, use summaries - stick with big ticket items, and highlight. POWERPOINT or spreadsheet software is very effective in these matters. Keep these things simple and manageable. Don't have 10 or 20 items on a spreadsheet - get lean and use highlighting. Otherwise, your mediator won't get the key point or will be too overwhelmed to give it attention.

4. Mediation Notebook

In addition to intial offers, the lawyer should compile a notebook for himself and the mediator(which should be sent to the mediator as much as a week prior to the mediation). The notebook should contain, at a minimum, the live pleadings, inventory and appraisements, and reports of experts and offers. In most cases, we think it should also include a modified version of your chart of the questions that will be addressed in a trial and the evidence that you will use to will those questions. A thoroughly prepared notebook should include the following:

a. Attorney's information sheet and position statement; this might include your evidentiary and trial plan chart.

b. Parties' factual data (monthly cost of living expenses, pay stubs, tax returns, etc.);

c. All live pleadings (including but not limited to original petition, answer, counter-petition, motion for sanctions, motion for enforcement, etc.);

d. Relevant discovery, including answers to interrogatories;

e. Social study, psychological reports, election of conservatorship, and any other finding regarding the children;

f. The inventory of both parties;

g. Spreadsheets comparing the values on the respective inventories;

h. Tracing data;

i. Statutory and case law;

j. All written settlement offers from both parties;

k. An exhibit estimating the attorneys' fees and expenses which will be incurred to prepare the case for trial in the event that it does not settle;

l. Prepared settlement offer for mediation;

m. A mediation checklist;

n. A proposed Decree of Divorce.

F. Summary

Okay - If you followed these guidelines you will now have at your disposal a short presentation which hooks the mediator, which interests the mediator, which simple and powerfully presents the bottom line (the theme) of your case position incorporating different modalities of learning.

Your mediation notebook for the mediator should be completed. You should also have a simple chart which lists the ultimate issues of the case. Under each issue will be the evidence or witness (3-5 key points) that will cause you to win that ultimate issue. This chart will incorporate all the elements of your discovery. You may or may not choose to include this chart with the mediation notebook. You certainly though will be prepared to present elements of the chart - visually if possible and through documents in the mediation process.

By now you may be saying, this is too much money or time or preparation just for mediation – wrong. Mediation is a part of litigation - so get with the program.

Remember that prior to scheduling the mediation, the lawyer should ensure that anything necessary to a successful settlement has been completed. This can include inventory and appraisements, social studies, psychological evaluations and full discovery. If the client does not feel comfortable about the entire estate of the parties and the expert's opinion regarding the children, then the case is not ripe for mediation. Pushing the client to mediate a case before he or she is comfortable with moving forward may result in a settlement that is later withdrawn. Moreover, the client may pursue the attorney through a malpractice action or formal grievance if the case is "forced" into a mediated settlement.

VIII. MISCELLANEOUS ISSUES

A. Mediating The Property Case

Mediating the property case is more like a business break-up than mediating a custody case. In most divorce cases, there are usually numerous options available to each spouse in the division of their property to reach some sort of division of the property.

B. Novel Legal Issues

Generally speaking, the time and place to bring up novel legal issues is at trial in the courtroom. There are, however, some instances where one side in a mediation can present a very persuasive and forceful case in the presentation of an extension or change in current law to the point where it can have some impact in the mediation. Examples in Texas are (1) stock options; and (2) characterization of certain defined contribution retirement plans. With stock options, as of the time of the writing of this

article, there is no definitive case law instructing litigants and their attorneys of exactly how to handle issues pertaining to vesting. If an attorney can bring a persuasive presentation based on the particular facts and logic of the precise situation, this might go a long way to "persuade" the other side of the correctness of the position. The same can be said with respect to the characterization of certain defined contribution retirement plans. Recent case law has given hope to the theory of "intra-account" tracing of separate property assets; and, though the law is not especially developed as of yet, different creative theories can be advanced that might serve to "move" the mediation down a path of settlement deemed desirable by the side advancing the new theories.

IX. PULLING IT ALL TOGETHER

A. Educate Your Client

Want your client to be successful in mediation? If so, you better approach this thing with your mind right, i.e. an optimistic attitude. You must inspire your client to approach mediation with an optimistic attitude. There is not one among us who hasn't silently said, "This case will never settle" yet lo and behold it does. So, having a positive approach to this is the only acceptable manner of approach.

Another pre-mediation task is to ensure your client had "their say" – fully, shortly before mediation day. In this way, your client knows that he or she has been heard. Research indicates that verbalizing and writing about stressful issues reduce stress and reduces the impact of stressors. Get your client to this place before you walk in the mediation room. You will be more likely to be successful. This is your responsibility, not the mediator's.

1. <u>The Client Education Checklist</u>

- Explain the mechanics of the system (especially how a mediation session goes). The goal is to have the client understand the procedures and keep them from being surprised by the process. It also helps them take this seriously - especially when you talk about cost and all the preparation you have or will be doing to get ready for the big day.

- Explain the case - start to finish. Start with sharing the case theme and the fundamental questions that will be answered by litigation (this is this jury charge stuff or questions to be answered by the trier of fact)

- Explain the facts as the law sees them. The goal is to help the client to understand that only admissible evidence are seen as "facts". This is where you share the key points of witness testimony or presented evidence. This is where the client can learn about the strenghts and weaknesses of the case if it was to go to trial.

- Explain the law as the State has created it. The goal is to help the client understand that the result they will get will not necessarily be what they think is fair but what the law allows. This section goes hand-in-hand with the previous two points.

- Explain the status of negotiations (if any). The goal is to make certain that the client approves of at least where the negotiations will start.

- Determine and set the goals that the client is seeking from the dispute and the resolution process. The goal is to make certain that you are headed in the right direction in what you are seeking from the mediation session.

- Define your client's objectives given that they now understand the case fully. The goal is to get concrete goals.

- Examine the alternatives to the client's objectives. The goal is to help the client think in terms other than win/loss.

- Explain to your client the alternatives to settlement, including risks, delays and enforceability/collectability of judgments, if any. The goal is to keep help the client realize that having a trial and receiving a verdict is not necessarily the end of the process.

B. Validate Your Opponent's File

Review and make certain that the other side has all of the materials necessary to fully negotiate.

Many mediations fail because one party did not prepare properly -- often simply because a necessary medical report, bill, or similar item was not provided to them (or not had by the party who should provide it). Your goal is to make certain the other side has been sent everything they should have. *You should also read everything again at this point – before you send it.*

C. Selecting The Mediator

Just like attorneys, mediators have their own styles and requirements for mediation. As part of the case analysis, the lawyer should consider whether a passive or aggressive mediator is best for the job. If possible, a Board Certified Family Law practitioner should be selected. Depending on whether the issues are primarily related to custody or property, a mediator who focuses on either of the two areas should be selected. In this way, the mediator should have sufficient past experience to be able to advise the litigants about what can be expected at trial. The mediator's opinion can be very powerful to litigants, as they are deemed to be the "neutral" component of the process. Therefore, special care should be taken in selecting a mediator that can educate both parties about their potential for success if the case is tried.

Additionally, the lawyer should consider the personality of the client to determine what type of mediator would be most persuasive. If the client would be offended by an aggressive mediator, select someone that will be more supportive, albeit persuasive, to the client. Sometimes, a mediator who will take the time to allow the client to "vent" during the private caucus, and empathize with their predicament, is the best option. Although we hope that most of this type of help has taken place long before coming in the mediation room.

1. Mediator Selection Checklist

Here is a checklist for selecting the right mediator:

- Does the mediator have appropriate experience?
- Does the mediator have appropriate training?
- Does the mediator use appropriate methods?
- Is the mediator's fee schedule appropriate for this case?
- Is the site for the mediation appropriate for the parties?
- Does the mediator have a conflict of interest?

2. Creative Property Solutions

In essence, when dealing with a mediation involving the division of property, the parties are trying to come up with a settlement that they had not been able to reach on their own. This often involved "thinking outside the box." Creativity often just "happens" during a mediation, caused by the synergistic effects of several motivated people attacking a common problem. In fact, it is the author's experience that most mediations settle in a way that neither party fully envisioned at the beginning of the mediation process. This is the "brainstorming" effect. It cannot be planned for, and it is not predictable; but it is often the "magic" that will help parties come together in a situation where a "win-win" solution (or sometimes just a "face-saving" solution) can be reached.

3. "Winning" At Mediation

Many lawyers believe that it is impossible to "win" the case in ADR. Inevitably, both parties must meet somewhere in the middle, and seldom does one party leave one hundred percent victorious. For the record, this happens in trial too. From a certain perspective, this is true, because one might as well "roll the dice" rather than give up everything by way of settlement. Family law is unique, however, because emotions and secrets are involved. There are many cases that are winnable in mediation solely because one spouse or the other cannot bear the thought of having their dirty laundry aired in an open forum. For this reason, you should become educated about the personal vulnerabilities of your own client and their spouse. Sometimes a juicy investigative report, a padded expense account, or an x-rated video is enough to get your client everything they want, and more. Unfortunately, not all cases have such gems, and in fact, half of the time, such goodies are in possession of the other lawyer. Even if you do not have the goods for a home run, careful planning and preparation can still

result in a successful settlement. With thorough planning, the lawyer can win at mediation.

D. Developing Momentum Towards Your Settlement Objectives

Mediators are human beings. Mediators cannot help but have judgments about the issues involved in a dispute. Though the mediator is a "neutral," it might make a difference in the ultimate settlement how the mediator feels or thinks about each position. Like a bench trial is a trial to a "jury of one," a mediation is a presentation to a single individual who will have a great deal of impact on the ultimate settlement, if one is to be obtained. Do not be bashful about forcibly presenting your case before the mediator. It just may help the mediator "work" on the other side, and by so doing, get the other side to make concessions that he or she would otherwise not make.

E. The Opening Statement

1. Introduce yourself -- humanize yourself.

2. Introduce your clients -- humanize your clients.

3. Acknowledge a belief in the process and your client's good faith.

4. Express sympathy.

5. Outline your position, the basis for your position, and areas of good faith disagreement.

F. The Initial Caucus

1. Identify the strengths of your case -- discuss.

2. Evaluate the expected outcome of your case.

3. Discuss "the first credible offer" and when to make it.

4. Discuss unanticipated elements or overlooked issues.

5. Discuss initial expectations.

G. Slam Dunk it: Winning" Mediation

1. Use "good mediation advocacy" as opposed to "litigation advocacy". Good mediation advocacy involves planning, preparation, presentation, participation, perception, perseverance and patience.

2. Mediation works best when the mediator is a lawyer or judge qualified in family law mediation, and preferably a family law specialist. Nothing is more persuasive than expertise and experience.

3. Choose a mediator that is proactive, rather than one that is purely a "message carrier".

4. Be open minded about the mediation process, negotiate in good faith and be prepared.

5. Approach mediation with the seriousness of trial. The best case/worst case scenario should be compared with the expense and delay if the case is tried.

6. Supply the mediator with all of his required forms, documentation, and more, well before the mediation begins.

7. Attorneys who can remain optimistic, calm and creative in their proposed solutions usually get the best results for their clients. The lawyer's failure to focus on likely outcomes at the courthouse and lack of preparedness are the biggest problems.

8. Come up with creative solutions which meet the needs and concerns of the parties, but that may not be available at the courthouse (i.e., the payment of alimony or private school tuition).

9. Don't come to mediation with an offer that has already been rejected. Add something new and creative to the last offer before mediation in order to spice up the deal.

10. Learn to disagree without being disagreeable.

11. Maintain client control and step out of the litigation mode if necessary. Do not oversell the client on either the case or the attorneys' abilities. Assist the mediator in facilitating settlement and do

not treat him or her as an adversary.

12. The lawyer should direct their presentation to the adverse party, as opposed to the mediator or the adverse attorney. The non-combative "reality check" for the adverse party seems most effective and certainly gives the mediator something to start with or expand upon during private caucus discussions.

13. Educate the mediator about the personality and demeanor of your client outside the presence of your client.

14. Above all, the lawyer should be congenial, and express genuine concern for the other party's position, forgiveness and optimism about the prospects for settlement and resolution of all issues.

X. CONCLUSION

We all too frequently summon the sword and sacrifice the prospects of peace, or even the best interests of the children, in the name of legal justice. The adversary process, historically effective in resolving disputes between litigants where evidentiary facts have probative significance, is not always suited to the resolution of family law disputes. Especially where there are children and the parties cannot or will not recognize the impact of the disintegration of the marriage upon the children, where they fail to perceive their primary responsibilities as parents – that is, custody and visitation – we make it possible for parents to carry out that struggle by the old, adversary, fault-finding, condemnation approach. This kind of battle is destructive to the welfare, best interests, and emotional health of their children – and even to parents, in the long run. We want you to carry the sword and show the ability to wield it - we just don't want you to draw in the demilitarized zone. Mediation is a clear and present alternative to allow divorcing couples to take charge of their lives, look to the long term, and ultimately, often save money, time and get a "win-win" solution to their and their children's difficulties. You, as a peacemaker, can help make this happen.

APPENDIX 1

Family Law Mediation – An Overview

By Randall B. Wilhite

I. INTRODUCTION.

Family law and divorce mediation first developed in response to the restrictive nature of the law and our legal system that had forced divorcing couples to be adversaries. Inherent flaws in the adversarial process of marriage dissolution continue to increase the popularity of mediating divorces. Any discussion of divorce mediation invariably mentions that it is being used more and more frequently. Mediation has existed in one form or another since Biblical times. In its most elementary form, it is simply a third person helping two disputants resolve their disagreements. Mediation can be traced far back in the histories of China, Japan, parts of Africa, and Western civilization. See Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 5 (Sept 1983). In the United States, the most recognizable model for mediation developed from the informal dispute resolution of labor-management relations. *Id*. And, in fact, labor disputes and family disputes are quite similar in many core aspects. At their essence, both involve long-term relationships and "polycentric" problems. Labor and marital disputes are also characterized by the need for future cooperation between the parties after the dispute has been settled.

A. Why Has Mediation Been So Successful?

The family has traditionally been viewed as the most important institution in America, but statistics show that approximately fifty percent of all marriages now end in divorce. BUREAU OF CENSUS, U S DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 79 (1986). The drastic increase in the divorce rate has placed a tremendous burden on the courts. Today in Harris County, nearly one-half of the pending civil cases are divorce cases. The most common reason given for the rise of mediation in divorce is that a trial is often the worst possible environment in which to dissolve a marriage. Litigation escalates conflict and trauma without addressing the counseling and negotiating needs of most divorcing couples. Husband and wife are pitted against each other as opposing forces, each fighting for the most advantageous resolution or hopelessly conceding so much that the settlement is lopsided. It results in orders that are frequently resented and all too often violated. See Jessica Pearson, editor, INTRODUCTION TO DIRECTORY OF MEDIATION SERVICES (Divorce Mediation Research Project, 1983), reprinted in Doris J. Freed and Henry H. Foster, *Family Law in the Fifty States: An Overview*, 16 FAM L. Q. 289, 295 (1983).

1. Divorce – There's Nothing Like It!

People going through a divorce are often bitter and revengeful, reduced to a basic level, filled with greed, vengeance and pettiness. A divorce will find adults fighting over the most trivial things and people hurting the ones to whom they have pledged life-long support even when they can gain nothing by doing so. Also, a divorce finds people ready to sacrifice their children as tools against the other spouse. In short, in divorce cases, everything goes. There is no limit to the hurt people will inflict on one another. There are few conditions of stress so protracted, so personal, and so capable of being misunderstood by anyone who has not themselves gone through the process. It seems to get worse and worse as the litigation drags on. Families are ripped apart, the whole fabric of life is torn, and it is certainly unlike any other stress situation. Adding fuel to this fire is the specter of litigation under the Rules of Evidence and Procedure. Over the last several years, the "experiment" of mediation has proven to be quite successful. The reason is that mediation often seeks to minimize, rather than maximize, the stress situations through which the divorce litigant must move in order to have his or her case successfully resolved.

2. With Mediation, There Are No "Winners" Or "Losers" Under Traditional Definitions.

The emphasis on winning often detracts from

the more important objective of actually resolving the dispute on workable terms. By its very nature, adversarial resolution of marital disputes is highly competitive. The system sets parties up as potential winners and losers, and the results tend to reflect the underlying theme. With mediation, however, the emphasis can be shifted from "winning" and "losing" to a cooperative effort to devise a mutually workable solution to the issues at hand.

3. More "Win-Win" & Creative Solutions Are Available In Mediation.

The adversary system restricts the range of potential solutions. The emphasis is placed on strategies and tactics and causes a shift in focus away from the actual needs and best interests of both parties and their children. Decisions reached by the court through the adversary system tend to focus too much on legal issues, ignoring the emotional and "non-legal" issues of the family. The result is a lack of flexibility in resolving the disputes, often leading to unsatisfactory results to both sides and, ultimately, relitigation. Mediation, on the other hand, reduces future litigation modifying divorce decrees by instilling in the parties a feeling of cooperation and self-determination. In the adversary system, a judge makes the final decisions. In mediation, the husband and wife make the final decisions. Compliance with child support orders has been shown to be fifty percent higher when achieved through voluntary agreement rather than when court-ordered. *See* William A. Waddell, *Improving Child Support Payments*, 8 MEDIATION Q. 57, 63 (Sept 1985).

4. Mediation Is Confidential.

When compared to the adversarial system, mediation is believed to be more expeditious, inexpensive, private, procedurally simple and amenable to truth- finding and the complete airing of grievances. Mediation is able to deal with the causes of problems, reduce the alienation of the litigants, and lead to the development of satisfying agreements that are perceived as fair and acceptable over time. Further, unlike adjudication, mediation presumably aids disputing parties in resuming workable relationships with one another. The statutory and case law pertaining to mediation confidentiality is discussed later in this article.

5. Mediation Reduces Hostility.

A goal of divorce mediation is to reduce the anger and hostility the couple feels towards each other. Reducing the level of conflict enables the mediator to encourage negotiation. Reducing the tension and hostility also serves to mitigate the traumatic effect of the divorce. Ultimately, the primary goal of the mediation process is to reach a mutually acceptable agreement.

6. Mediation Defuses Conflicts Created By Different Negotiating Styles.

One reason mediation works very well in improving the negotiation process is because it helps defuse the natural conflicts created by differences in negotiation styles. Mediation is generally set up in a structure that isolates parties from style conflicts. The parties take fixed positions prior to the mediation meeting. The parties present their sides of the conflict with minimal interruption. The parties then retire to caucuses (separate areas) and the mediator shuttles back and forth with offers, positions, questions and information reworded in more neutral terms by the mediator. The most common contemporary mediation process tends to take the style out of the process and reduces the matter to positional shifts and objective statements. It should be remembered that mediation made substantial improvements in its success rates when this basic format became the standard or common format for mediating disputes. One of the reasons for the improved success rate of mediation when using the modern format is that negotiations that were floundering because of style conflicts in the old format had the element of style conflicts taken out or reduced by the new format.

II. DIVORCE MEDIATION DEFINED.

Divorce mediation is an attempt at mutual problem solving in which couples try to reach agreement on all of the issues in the primary areas of dispute in a divorce: property settlement, child custody and support, and spousal maintenance. The mediation process is conducted by a neutral mediator with appropriate training. Divorce mediation has been defined in many different ways, but these definitions state common themes and share many characteristics. For example, the preamble to the ABA's Divorce and Family Mediation Standards of

Practice defines mediation as a process in which a lawyer helps family members resolve their disputes in an informative and consensual manner. This process requires that the mediator be qualified by training, experience, and temperament; that the mediator be impartial; that the participants reach decisions voluntarily; that their decisions be based on sufficient factual data; and, that each participant understands the information upon which decisions are reached.

APPENDIX 2

Mediation Styles

By Randall B. Wilhite

I. MEDIATION STYLES.

A. Mediation.

There are two distinct forms of mediation: caucus & pure form. Though there is some overlap between the two methods, they are diverse in their fundamental approaches.

1. Caucus Method.

Typically a family law action is filed by a party represented by an attorney, the other side files a response represented by an attorney, discovery and perhaps hearings ensue, and just short of trial, a mediation is scheduled. At the mediation session, the mediator generally gives an opening introduction of the mediator's expertise, how the process works, what the mediator understands about the issues in dispute and asks for the commitment of both parties that they are at the mediation in good faith to try to resolve the issues in the case, and asks each side generally for a non-confrontational opening statement. The mediator generally separates the parties into "two caucuses" and practices "shuttle diplomacy" between the parties to help them narrow their issues and come to an agreement. The agreement that is made is reduced to writing and signed by the parties.

a. *Advantages of Caucus Mediation*.

Caucus mediation allows each party to tell their story in an atmosphere that is productive. The mediator can be sympathetic and be a good listener, but can also reinforce to each party the realities of the situation in helping lead both parties to resolution. Discovery is generally at least somewhat complete so that the parties are operating at close to a parity of understanding of the issues. Caucus mediation has shown a very good success rate. Caucus mediation allows progress and sometimes settlement in situations where the extreme conflict between the parties is exacerbated by the parties being together.

b. *Disadvantages of Caucus Mediation*.

Caucus mediation is rooted in the adversarial system. It is often under a "settle or else" mind set that leads to second guessing of decisions made in the mediation shortly thereafter. Case law and statutes now recognize the problem of "buyers remorse" and have made signed agreements enforceable. Having each side and his or her attorney present during the entire process, as well as paying the mediator, can be an expensive proposition. Most caucus meditations are usually done in one, marathon session until complete and the session can run (in some cases) until late at night. Also, while the mediator is with the other party caucus, one side is left for extended periods of time with little to do, but must be standing at "the ready" in case the mediator comes back to caucus with them. The "meter" is running the entire time.

2. Pure Form Method.

Pure form mediation, which is the mediation model predominantly in use around the United States as a whole, is the model where the mediator meets directly with the two parties and helps them to resolve their problem. The mediator generally meets with the parties in an appropriate number of short sessions with goals "or homework" to be done between sessions. The mediator, when an agreement is reached, often prepares a complete agreement.

a. *Advantages of Pure Form Mediation*.

The parties are directly involved to present their position and to respond to the other spouse's concerns. The mediator is truly in the middle as a professional neutral helping the parties to solve their problem. It is generally less expensive, as instead of three lawyers being present at mediation, only one is present (the mediator). Since pure form mediation is generally held in one-hour or two-hour sessions every other week for a period of time, the concepts of solution proposed for the parties' problem has a chance to "stand the test of time" before the parties sign and irrevocably bind themselves. In most cases,

genuine issues arise regarding which of the parties feels a need for verification or further inquiry. As a mediator is a facilitator of agreement, and a purveyor of legal information only (and not legal advice), the parties usually always have a consulting attorney with whom to work.

b. *Disadvantages of Pure Form Mediation*.

Even though the first tenant of pure form mediation is the full disclosure of all relevant facts, there is the potential for the parties to reach an agreement based on insufficient disclosure, or unequal bargaining power. Also, since it occurs over a period of time, priorities, agreements and temperaments can shift, sometimes making progress difficult. In most cases, it is imperative for both sides to have their own consulting attorney. What if a party refuses to have a consulting attorney? The pure form mediator can also be faced with a situation where one party clearly is at a perceivable disadvantage. An example of this would be the "wife" who is in the guilt stage of the dissolution of the marriage or the "husband" who has been overbearing and domineering throughout the relationship says "trust me" about the values or the vague promises he is making. Typically this would mandate an immediate referral to the wife's consulting attorney for reality check. What if the "wife" won't go? Or refuses to even have a consulting attorney?

B. The Mediator.

1. The Carrier Pigeon.

Some mediators are criticized for being nothing but a "carrier pigeon." These mediators often "err" on the side of being too passive, and are accused of merely taking one offer from one side to the other, with little comment or value-added suggestions or encouragement towards the value of the offer. These mediators take a more strict view of the role of a mediator, and do not come close to "practicing law" or "giving advice."

2. The Bruiser.

Some mediators are criticized for being a "bruiser." These so-called "brusiers" attempt to push the parties into a settlement by using his or her strong personality, and by so doing, dominate or even intimidate the litigant into a settlement. As a case in point, though certainly on the mild side, *see Matter of Marriage of Banks*, 887 S.W.2d 160 (Tex. App. – Texarkana 1994, no writ), wherein the court held that a settlement agreement arrived at following mediation of a matrimonial dispute was binding upon the former wife, even though she claimed that the mediator had given her estimates of legal fees that had frightened her into signing, and further holding that the actions of a mediator could not serve as a basis for setting aside her agreement.

3. The Negotiator.

Another form of a mediator is a "negotiator." The "negotiator" attempts to inject risk into each side's case, and by so doing, makes each litigant, independent of the other side, feel insecure about his or her case. This insecurity, it is hoped, will lessen the expectations about the litigant's case, and puts him or her in a situation whereby a settlement seems more desirable than incurring the risk of a trial. The caucus method is especially good for this style of mediation; because, if the doubt creation or risk injection methodology is used in the presence of the other side, the other side would, quite naturally, have their hopes and spirits of winning at trial buoyed. Hence, the negotiator makes both sides feel insecure at the same time by not letting the other side know that he or she is beating up on the other side while in the other room.

C. Negotiation Styles.

In mediating conflicts, it helps to understand the styles of dispute resolution most often used by negotiators. Often, the various styles need a mediator to buffer the interactions and turn a toxic negotiating atmosphere into a successful mediation.

1. Attack or Fight.

This type of negotiator is often called an aggressive negotiator. They seek to win. The goal is victory, defined as maximizing the client's outcome and outmaneuvering or beating opposing counsel. They make threats, insult, withhold information, "stretch" the facts, and demand one-sided gains.

2. Appease or Attempt to Convert.

This type of negotiator is often called a cooperative negotiator. They seek to act fairly. The

goal is agreement, defined as reaching a "fair" result for their client, with a high value placed on the relationship between the attorneys and the clients. They are courteous, realistic in positions, and openly share information. They also often make one-sided concessions with the expectation that the opponent is morally obligated to reciprocate.

3. Flee or Attempt to Evade the Problem.

This kind of negotiator is often called a distractor. They seek to win but are uncertain what that means. The goal is survival, defined as not losing or being beaten. They dither between three patterns: attack, appeasement and hiding/delaying/stalling. Many, many attorneys who are thought of as "attack" or "appeasement" negotiators are actually dithering attorneys whose strategy of dithering emphasizes either attacking or appeasement (but includes the other two patterns). They are often noncommittal, with the desire of avoiding loss or harm. In an attack orientation, the bottom line is "what can I conquer or take?" In appeasement, it is "what can we work out or create?" In dithering: "what can I avoid losing?"

4. Displace or Analyze the Problem.

When a man is told not to come in to the office today because it has burned down and responds by analyzing the changes in traffic patterns the fire trucks will have made, he is engaging in displacement. This kind of negotiator is often called an analyst. They seek to understand. The goal is solving the problem (often independent of the parties benefit) and increased understanding. They are thoughtful and act independent of trust. Where an appeaser can not work with you if he or she does not trust you, and a ditherer will not trust you (even as he or she works with you), an analytical attorney does not see trust as an important issue. They tend to rely on objective criteria and to seek multiple options -- even where there is only one solution.

5. Truth Seeking.

This kind of negotiator is often called an idealist. They seek abstract truth or justice often without regard to human factors or reality. They often have a single "truth" (e.g. global warming or global cooling) that dominates them in spite of rational considerations (pro or con). They may well be right in their "truth" but reason isn't why they hold to it. They are honest, sincere, dedicated. Often intense, inflexible and idealistic.

D. Lawyers.

1. The Client Is The King or Queen.

Some attorneys do not feel it is appropriate to encourage a client to settle against the wishes of the client. The attorney does not want to have the client "feel"that the client is being under any pressure to settle at all, and that the only job that the attorney has is to "represent" the client (as opposed to counsel and recommend). Rarely do attorneys take this approach in its purest form; but, it can be a dominant trait of certain attorneys. These attorneys treat their clients like he or she is a King or a Queen, and that it would be insulting to the "monarch" to suggest anything other than the wishes of the Throne. These attorneys usually turn the chances of settlement completely over to the mediator, and sometimes detach themselves during the mediation. Sometimes, these attorneys even discourage settlement, and argue with the mediator during the day – doing what they can to make sure the client believes that he or she is vigorously advocating the cause and interests of the client.

2. Winning Is Everthing.

The attorneys who fit this role are, unapologetically, in business to "win." Once they have been hired, their sole aim is to gain victory; and in doing so, they will do virtually anything and everything they think is necessary to serve the interest of his or her client, to achieve his or her purpose, to gain him or her a divorce in which he or she will come out financially, psychologically, and in every other way, on top. That is what these lawyers have been hired to do, and by necessity, in the mediation context, they often appear cold and calculating. These lawyers tend to draw equally tough opposition, and are often only at mediation because they are ordered by a court to attend mediation.

3. Settlement Pro-Active.

Some attorneys (probably most) approach mediation with a spirit that the case should settle. These are usually the attorneys who send a well-

reasoned and explanatory "mediation package" to the mediator several days in advance of the mediation. These are usually the attorneys who come to the mediation with an open mind, and are willing to intelligently analyze the strengths and weaknesses of his or her client's case.

E. Clients.

1. Emotional.

Some clients come to mediation emotionally charged, and ready to have their "day in court." It is often best to allow them to vent their feelings at the beginning of the mediation. This seems to give this client the sense that he or she has been "heard," and the euphoric feeling of having had his or her say. After the venting, the mediator must redirect the focus of the emotional client to the business of solving the dispute.

2. Clients Who Are Experienced Negotiators.

Sometimes, clients vastly differ in their own negotiating capabilities. Sometimes, one spouse has been involved in negotiating business transactions for a living. Like most everything, the more one does something, the better one gets at it. This disparity must be realized as soon as possible by the mediator; and some care must be taken to level the playing field. This is one benefit of the "caucus" style of mediation; as in that style, only the mediator must confront the seasoned negotiator.

3. The Impact of Good Old-Fashioned Leverage.

Numerous extrinsic factors give each spouse "leverage" in any negotiation. A mother may have been the primary caretaker, thereby giving her the perception of having a better case in court for having primary caretaking responsibilities. A husband may have more knowledge of the assets of the marriage, and has only begrudgingly shared this information with his wife. To some extent, there is nothing anyone can (or should) do about this kind of leverage. Everyone must play the poker hand he or she has been dealt. But, a recognition of these varying degrees of leverage can assist the mediator in assisting the parties to fashion a settlement. For example, it is often helpful for a mediator to suggest that the particular Judge to which this case has been assigned is "known for" certain predictable behavior with respect to certain fact situations, or leans towards (or against) a particular gender or issue. These suggestions can weaken the resolve of a litigant in a caucus session, create insecurity in what was theretofore thought to be an ironclad position, and facilitate a realistic settlement in the framework in which the case sits.

APPENDIX 3

Mediation Ethics

By Randall B. Wilhite

An attorney who decides to engage in divorce mediation must address certain ethical considerations. The mediation attorney occupies a difficult position. The attorney must consider each party's interests and each party's legal obligations. Potential ethical dilemmas include: conflicts of interest, loyalty, confidentiality, and the appearance of impropriety.

The ethical dilemmas faced by the mediation attorney are a result of the conflict between the Professional Code of Responsibility and the nature and conduct of divorce mediation. This conflict has been the subject of many state bar opinions. Folberg and Taylor have summarized the analysis of bar opinions as follows:

> The message that emerges from the ethics opinions in jurisdictions that allow attorneys to serve as mediators or advise participants before a mediated agreement is finalized is that the participants must be aware of the attorney's limited role and the risks of mediation. The mediation participants must explicitly understand that a mediating attorney cannot advance either party's interest over the interest of the other and can give only nonpartisan legal advice to each party in the presence of the other. It must be explained that the attorney's role is dependent upon full disclosure of all relevant facts by participants and that in a divorce case without full disclosure the settlement may be set aside by the court upon the insistence of either party. The participants must be urged to obtain independent review of the agreement and must be aware from the outset that the attorney may not represent any or all of them in any proceeding relating to the conflict in any subsequent capacity. Folberg and Taylor, *A Comprehensive Guide to Resolving Conflict Without Litigation* at 252-53 (1st Ed Jossey-Bass, 1984).

The primary ethical dilemma faced by a lawyer in mediation is the potential conflict of interest. "A lawyer who wishes to undertake divorce mediation as part of his legal practice faces the prohibition of representation of conflicting or potentially differing interests. Exceptions to this prohibition include matters not involving litigation where the lawyer explains to both clients the implications of dual representation and obtains the clients' consent. Mediation is actually different from dual representation though, because the mediating attorney is not representing either party, but is simply acting as a neutral third party.

APPENDIX 4

Mediation – Children's Issues

By Randall B. Wilhite

I. EFFECTIVE ADVOCACY IN THE MEDIATION OF CHILDREN'S ISSUES.

Effective representation of clients in mediations involving children requires the same level of preparation, diligence and assertiveness as is required in presenting a jury trial. The outcome of a mediation session depends, to a large degree, on the performance of counsel. What lawyers do can make a big difference in the outcome. Unlike property cases, where one can give in one area and get in another, a child is something with whom most litigants, quite naturally, choose not to bargain. Though a divorcing party may, for example, give up his or share of the family business in exchange for his or her interest in the family home, there is usually not the same "give-and-take" in a custody dispute. With the usual default position of a Standard Possession Order for the parent who does not obtain primary managing conservatorship, the "losing" parent in a custody fight will get what some lawyers calculate to be about 40% (or more) of the yearly overnight time with the child – and this time usually includes more opportunities for "quality" time on weekends, holidays and summers than the parent with primary possession. The effect of this is that fewer custody cases are actually being tried; and more of them are being settled.

It is a rare mediation that requires the same amount of preparation as a jury trial, but counsel should not underestimate the work necessary to do the job right. It may not be appropriate to look under every rock, but the lawyer in mediation should know what rocks are out there. A mediation is nothing other than an accelerated, facilitated negotiation. As in all negotiations, knowledge is power. The mediator will be spending much of his or her time exploring with counsel and client potential weaknesses in the case. While it is foolish not to listen carefully to what the mediator has to say, counsel should not hesitate to point out when the mediator may be wrong. More importantly, a key to achieving a good result in mediation is to help the mediator in conducting the same process with the opponent. There is no substitute for presenting to the mediator a view of the facts that can be supported by admissible evidence and a reasonable evaluation of trial outcomes, based on applicable legal authority, arising from those facts. Good mediators will "smoke out" bluffing and generalities.

A. Rights & Duties.

1. <u>"Automatic" Rights & Duties</u>.

The following rights and duties are assigned to most any parent:

a. *At All Times*.

(1) the right to receive information from the other parent concerning the health, education and welfare of the children;

(2) the duty to inform the other parent in a timely manner of significant information concerning the health, education, and welfare of the children;

(3) the right to confer with the other parent to the extent possible before making a decision concerning the health, education and welfare of the children;

(4) the right of access to medical, dental, psychological/psychiatric and education records of the children;

(5) the right to consult with any physician, dentist or psychologist/psychiatrist of the children;

(6) the right to consult with school officials concerning the children's welfare and educational status, including school activities;

(7) the right to attend school activities;

(8) the right to be designated on the children's records as a person to be notified in case of an emergency;

(9) the sole right to receive and give receipt for periodic payments for the support of the children and to hold or disburse these funds for the benefit of the children (*this right almost always is assigned to the person with the right of primary possession*);

(10) the right to consent to medical, dental and surgical treatment during an emergency involving an immediate danger to the health and safety of the children; and,

(11) the right to manage the estates of the children to the extent the estates have been created by the parent or the parent's family.

b. *During Periods of Possession*:

(1) the duty of care, control, protection and reasonable discipline of the children;

(2) the duty to support the children, including providing the children with clothing, food, shelter and medical and dental care not involving an invasive procedure; and

(3) the right to physical possession and to direct the moral and religious training of the child.

2. Rights & Duties That Are Not Usually Deemed Critical or Essential.

There are some rights and duties that often are easy "give-ups" in a mediation because they really do not impact the lives of most children. They are:

a. the [independent or joint] right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

b. the [independent or joint] right to consent to marriage and to enlistment in the armed forces of the United States;

c. the [independent or joint] right to the services and earnings of the children;

d. except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, the [independent or joint] right to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government; and

e. the [independent or joint] duty to manage the portions of the estates of the children with respect to accounts or funds established for the children's benefit by [name of parent] after the entry of this Decree of Divorce.

3. Rights & Duties That Are at the Heart of Most Custody Disputes.

a. Usually, the most elementary right on which parents disagree is the exclusive right to establish the primary physical residence of the children.

b. Domicile restrictions, and their limits, are other areas about which parents often disagree.

c. The exclusive right to consent to medical, dental, psychiatric, and surgical treatment, including non-emergency invasive procedures is an area of dispute; and

d. The right to make decisions regarding the children's education and school activities is sometimes a major issue in a mediation.

B. Periods of Possession.

1. Factors for Court to Consider

In ordering the terms of possession of a child under an order other than a standard possession order, the court shall be guided by the guidelines established by the standard possession order and may consider:

a. the age, developmental status, circumstances, needs, and best interest of the child;

b. the circumstances of the managing conservator and of the parent named as a possessory conservator; and

c. any other relevant factor.

(1) the desires of the child;

(2) parenting history of the parties;

(3) health or psychological needs or condition of the children or parents;

(4) the living environment of the children or parents;

(5) the level of conflict between the parents;

(6) the developmental needs of the children;

(7) the children's school or extracurricular activity schedule;

(8) the age of the children;

(9) the child's tolerance for change and flexibility;

(10) substance abuse problems;

(11) the distance between the parties' residences; and

(12) the financial condition of the parties.

2. Key Concepts.

The starting point for most mediations is the "minimum" periods set out in the Texas Family Code called a Standard Possession Order. Most non-custodial parents start out knowing that this is a minimum and start there with the negotiations. Key areas for discussion in mediations about periods of possession usually deal with the following ideas or concepts:

a. Overnight during the school week (Wednesdays or Thursdays);

b. Overnight Sundays during the non-custodial parent's weekend;

c. Moving Wednesday to Thursday during the school week (so as to lengthen the weekends and prevent "ping-ponging" with the child);

d. Summers (i.e., SPO 30-days or 'June to Mom; July to Dad,' or 'split the summer.'

e. Religious holidays;

f. The Monday following the primary conservator's weekend;

g. Pick up and delivery options, especially when parents live several miles apart;

h. "One-on-one" time in multi-children families;

i. Alternating weeks (with or without an intervening Wednesday for the other parent);

j. Alternating school grading periods;

k. Providing first rights of refusal if a parent has to go out of town during his or her period of possession;

l. Allowing third parties (grandparents, for example) to take possession of children during Spring Breaks, summers, etc.

m. Prohibiting overnight girlfriends and/or boyfriends during a parent's periods of possession;

n. Who can and cannot pick up and return children;

o. Neutral pickup and delivery sites, including school to the greatest extent possible;

p. Supervised visitation;

q. Child(ren) less than age 3 years (one is, one isn't).

r. Medication (children & parents);

s. The homosexual parent;

t. The teenager who has "a life of his/her own;"

u. The child who refuses to go;

v. Long distance travel by children and parents to exercise periods of possession (mechanics and payment of costs);

w. Injunctions about alcohol, drugs, seatbelts, car seats for infants, leaving the children with undesirable people; and

x. Summer camp and from whose period(s) of possession does it come.

C. Support.

Child support in most cases is governed by a set of mathematical calculations based on income, applied to a chart and multiplied by a fraction. In larger income cases, or cases where there are children who have proven special needs, other child support issues arise. Some are:

1. Extracurricular activities;

   a. School activities;

   b. Summer activities;

   c. Recreational leagues and activities;

   d. Club & traveling teams;

2. Over guideline support.

3. Summer Camp.

4. Private School. (Who picks, who pays)?

5. College (It is not required, but it is negotiable).

6. Medical Support.

   a. Health insurance. (Whose policy, how much does it cost, and what is the coverage and benefits?)

   b. Orthodontia.

   c. Dental insurance.

   d. Medical Expenses for providers outside of the plan;

   e. The percentage of who pays the uninsured medical expenses;

D. Tie-Breakers For Mediation.

1. Consultation before a major action is taken.

2. Mediation before litigation. (Except in emergencies and enforcement).

3. Arbitration. (Almost always informal in nature is better).

   a. School issues before a school expert.

   b. Medical issues before the pediatrician.

   c. Trusted family friend.

   d. The mediator.

   e. Psychologist, psychiatrist or therapist for the children.

E. Creative Solutions.

See generally *Constructing Creative Ideas Involving Periods of Possession, Relocation, and Other Parentchild Issues*, by Kevin R. Fuller, Koons, Fuller & Vanden Eykel, 2311 Cedar Springs, Suite 300, Dallas, Texas 75201, Marriage Dissolution Institute 1998, for an excellent set of forms for creative ideas for handling children's issues in divorce.

1. Non-standard Possession;

2. Possession conditioned on drug testing & monitoring;

3. Substance abuse evaluation;

4. Random drug testing;

5. Supervised possession;

6. Counseling as a condition of visitation;

7. Order to attend parenting workshop;

8. Bond as a condition of possession;

9. Airline employee possession schedule;

10. Possession for after a child turns age 15 years old;

11. Travel expense & mechanics language;

12. Year-round school possession;

13. Child care during the summer; and

14. Ongoing therapeutical treatment for the child.

II. THE ROLE OF THE PSYCHOTHERAPIST IN MEDIATION.

A. Court appointed.

B. Retained.

C. Children's Therapist.

III. DOMESTIC VIOLENCE.

The Texas Family Code provides that the court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child. Tex. Fam. Code § 153.004(b).

Some counties are establishing policies against accepting mediated settlement agreements when there has been domestic violence without an evidentiary hearing on best interests.

IV. ADVOCACY OF CHILDREN'S ISSUES AT MEDIATION.

A. Have a Plan and Be Specific.

If your client is proposing a possession schedule that varies from the guidelines, have the alternative schedule drafted prior to mediation so it can be presented. Creating momentum towards the client's objective is essential; and these schedules to just that. It creates a path down which the mediation can work during the day to accomplish the client's objectives. Use precise, order language.

B. Understand Alternatives.

Know your case. Know your client. Know your mediator. Know the Texas Family Code. Know the Judge. All of this knowledge greatly assists in examining risks and alternatives, especially when a Judge is inclined to rule in one way or the other or refuse a certain agreement (i.e., split custody, half-on half-off possession, domestic violence, etc.). Understand your case's weaknesses and let the mediator know that you know.

C. Keep Technology in Mind.

With telephones and cheap long distance, faxes and e-mail, there are unprecedented alternatives for a parent to keep in touch with his/her children. Work these into the mediation agreement whenever possible.

D. Making the Mistake of Failing to Communicate Willingness and Ability to Try the Case.

Of course, in the vast majority of instances, the parties on both sides are better off settling then taking their chances before a judge, jury or arbitrator. On the other hand, the key to achieving a reasonable settlement for a client is to make clear that counsel is ready, willing and able to try the case. Unfortunately, some lawyers have the reputation that they will settle any case, on the courthouse steps if necessary. Opponents know this, and act accordingly, even in mediation. I am not suggesting "table pounding" and premature threats to walk out of the mediation. Rather, lawyers should cultivate a reputation for being willing to go to trial when necessary. Such a reputation cannot be credibly created during the course of the mediation of a single case, but rather requires diligent preparation and effective presentation of adversary proceedings over the course of a career. Lawyers and parties should participate meaningfully in the mediator's effort to explore weaknesses as well as strengths of a case. On the other hand, after full exploration of a case and careful consideration of the settlement positions of the other side, there are indeed cases in which it is appropriate to walk out of mediation.

E. Making the Mistake of Mediating Too Early or Too Late in the Case.

Every case is different, and it is difficult to state hard and fast rules as to when mediation should be considered, especially in children-related or custody cases. It sometimes makes sense to attempt

immediate mediation of exigent problems, particularly where the parties have an ongoing relationship that they desire to protect. On the other hand, some level of preparation, investigation and discovery is often necessary to enable counsel to render a reasonable evaluation of a client's position. Sometimes mediation on the eve of trial is appropriate, but often lawyers do their clients a disservice, financially and emotionally, by waiting that long.

F. Set Aside Enough Time to Mediate.

For the mediation process to work, clients in custody cases need time to "vent" and possibly to change opinions and positions that have been held for a long time. Sometimes, there will appear to be little or no progress for several hours, but many such cases result in satisfactory settlement if all sides continue to work hard until the mediator concludes that the parties are truly at impasse. Experience also suggests that what is most effective is a give and take negotiation process, with offers and counter offers going back and forth, rather than announcing and adhering to a firm, initial position. This is not to say that parties should not make large movements (it is often very effective, and sometimes necessary, to do so), but only that the process can take some time to be successful. The mediation process is often arduous and emotional for the parties in custody cases, but most often results in viable and effective settlements. The process is difficult, but trial is usually immensely harder emotionally and financially for the client. Most (but not all) clients want prompt closure on reasonable terms, rather than full "victory" in court or arbitration. An experienced mediator will advise all sides when further efforts seem fruitless. Remember, the mediator may have information on a confidential basis from the other side suggesting more flexibility than the "official" position that the mediator is authorized to communicate.

G. Prepare Your Client.

Experienced litigators never take their clients to deposition or trial without thorough preparation. The same should go for mediation. The client should understand ahead of time the general nature of the process, including the rules of privilege and confidentiality in mediation, and in the non-binding nature of the process. Even more importantly, the client should have the benefit before the mediation of his or her lawyer's evaluation of the case, and potential pitfalls and weaknesses. With such prior preparation, there is no need for counsel to "grand-stand" in front of the client during a private caucus. There are few true custody cases that have gone as far as mediation with 90+ percent chances of success, and it is not productive to take up the time of the client and mediator in expert in expressing that level of confidence about the outcome. A client's level of trust in his or her lawyer can be irreparably damaged if the client learns for the first time, at mediation, that there is, for example, a risk that anticipated attorneys' fees and costs will be substantial. The mediator will be asking about these issues, and it is devastating to a client to hear about them for the first time at the mediation session. Clients appreciate aggressiveness and diligence on their behalf, but also respect honesty and candor from their lawyers.

H. Usually It Is Best Not to Reveal a 'Bottom Line' to a Mediator.

In just about any case, but especially so in child custody cases, it is generally best not to reveal a client's "bottom-line" to the mediator, even in confidence. For one thing, a settlement position should be flexible, based upon new insights and new information gained during the mediation process. Also, while the mediator will respect the confidential nature of such information, counsel can expect the mediator to argue it against the client in private caucus. It is generally better to let the mediator and opponent try to infer where ones client may be going, based upon the course of negotiations. Most mediators prefer not to be granted discretionary authority on behalf of a party because of concern that the mediator may lose neutrality by making bargaining decisions on behalf of one side or the other.

V. PREPARE.

The prepared advocate almost always gives his or her client the advantage at mediation. Momentum with the mediator is most important. Credibility can be established by the confidence that comes from being ready for trial and, at the same time, having thought out and discussed with the client, reasonable

and creative solutions to the problems.

APPENDIX 5

Sample Letter To Client

Taken From: Lasher, Patricia J., *Preparing Your Client To Go To Mediation*, 1998 SO. TEX. FAM. L. GEN. PRACTITIONER.

PERSONAL AND CONFIDENTIAL

Dear _____:

As we have discussed, mediation of your case is set for (day of the week), (date), at (time), with (name of mediator). The location is (address), and the telephone number there is (telephone number). A fax machine is available (fax number), but please remember to consult with me during the day before having any information faxed to you at the mediation. If you need directions to the mediation, my staff will assist you. I will meet you there at (time).

In preparation for the mediation on _____, I wanted to let you know that these sessions occasionally last into the early evening. Often no real movement is seen until late in the afternoon. While I have, in the past, been in mediation until midnight, I do not think that this is an effective way of resolving such important issues. Unless both parties, and the mediator, agree that the session will continue, I expect to conclude the matter by (time).

One way to see that the time is well spent is to be prepared. To that end, my staff and I will be preparing a confidential mediation statement for the mediator's eyes only. (If there are certain restrictions or conditions you want to request be placed upon _____'s periods of possession, please let me know as soon as possible). (If there are any terms and conditions which you hope to see incorporated into your divorce decree and which we have not previously discussed, please let me know immediately).

The mediation will begin with a meeting of both you and your spouse and the attorneys. You may be asked if you wish to make an opening statement. If that occurs, my suggestion is that you keep your comments brief and focused on your goal of reaching an agreement that is a fair division of the community estate considering your respective earning potentials, that you would like to see provisions for your child(ren) that are in his/her/their best interest and that you would like the agreement to provide for your needs for security for the next few years until your earning capacity is re-established. It is probably best to stay away from reflections over the causes in the breakup of the marriage, as that usually sets back settlement talk for several hours. You will have the opportunity to discuss sensitive matters in the presence of the mediator and in confidence. You may want to begin preparing an idea of issues you wish to address, and you and I will discuss this more fully at a meeting before the mediation.

When the mediator decides the time is right, we will be separated into two rooms and the mediator will spend time with you and me and then with _____ and _____, going back and forth with offers and counter-proposals throughout the duration of the day. Lunch will be brought in if we work past noon.

The mediator is there to facilitate agreement, not to force one. A mediator cannot make either you or _____ agree to something to which you have objection. Sometimes, the mediator will spend what appears to be an inordinate amount of time with the other party. Often it will appear that nothing is going to be resolved. However, because the mediator can see and hear both parties, we will rely on the mediator to

determine whether continued negotiation is worthwhile. If we discuss issues or facts in the presence of the mediator, but do not want them repeated to _____ and his/her attorney, we may say so. The mediation itself is confidential and the mediator may not discuss the mediation with the Judge or anyone else.

The mediator will assume that you are there in good faith and that you are prepared to make decisions. If you are going to need to discuss the settlement with anyone who will not be present, please make sure he or she will be available by telephone during the day. If you intend to bring anyone else with you to the mediation, please let me know immediately. Occasionally a financial advisor is helpful; family members who have not participated in the process of separation and prior negotiations are sometimes counter productive.

If you and _____ reach an agreement, the mediator will reduce it to writing and you and _____ will sign it in the presence of your attorneys. This will become a binding agreement that either of you could enforce against the other as a contract. Sometimes the parties agree to go directly to the courtroom from the mediation and a divorce is granted that day. In other cases, the parties agree at mediation to a date for entry of the decree and granting of the divorce. In that event, _____ or I will draft a divorce decree which incorporates the terms and conditions of the mediated settlement agreement. When you and _____ have read, approved and signed the decree, you and I will go to Court early one morning (no advance notice for a hearing is needed for agreed decrees) and the process of having the divorce "proved up" and granted takes about five minutes.

This is often an emotional and tiring process. Please try to take a walk or bike ride the day before and to get a good night's sleep the evening preceding mediation. Although you may not want it, eat a light breakfast the morning of the mediation.

I know that you will have many questions about mediation. Enclosed are the Rules and forms which the mediator requires. Please complete them as soon as possible and return them to me. As you are doing this, I suggest that you write down the questions which come to mind, so that we can discuss them when we meet in preparation for mediation.

We will work together to prepare for this process. I want you to feel as relaxed as possible under what I know are difficult circumstances.

Very truly yours,

APPENDIX 6

by Patrice L. Ferguson

FACT PATTERN

John and Mary Smith have been married 20 years. They have built a handsome estate however it is fairly illiquid and the largest asset is John's 100% ownership interest in Smith Development. John believes that the company is his separate property which, although formed during marriage, was the incorporation of a predecessor sole proprietorship owned prior to marriage. Mary's attorney has made a number of arguments that indicate some jeopardy in that position, and has evaluated the case in terms of "best" and "worse" case. John receives fair compensation of $250,000 per year plus perks. They have one child, a high school sophomore in public school who lives with Mary.

MEDIATION CHECKLIST: PROPERTY ISSUES

John and Mary Smith
Inventory and Appraisement Comparisons

FOR SETTLEMENT PURPOSES, ONLY

	VALUE PER JOHN			VALUE PER MARY		DIFFERENCE IN JOHN'S VALUE FROM MARY'S
	TOTAL ESTATE	COMMUNITY	SEPARATE	TOTAL ESTATE	COMMUNITY	COMMUNITY VALUE
ASSETS						
CASH IN BANKS						
Bank One #12345, JS, 02/01/02 stmt	40,000	40,000		40,000	40,000	
Bank One #67890, MS, 02/01/02	14,000	14,000		43,500	43,500	(29,500)
Washington Mutual #159758, MS, 02/01/02	25,000	25,000		25,000	25,000	
	79,000	79,000		108,500	108,500	(29,500)
BROKERAGE ACCOUNTS						
Smith Barney #F578215654ST, JS, 01/31/02 stmt	32,000	32,000		25,000	25,000	7,000
	32,000	32,000		25,000	25,000	7,000
RETIREMENT ACCOUNTS - IRA						
Morgan Stanley #JMS98754, JS, 01/31/02 value	125,000	125,000		130,000	130,000	(5,000)
	125,000	125,000		130,000	130,000	(5,000)
BUSINESS INTERESTS						
Happy Hills (10 acres)	1	1		36,000	36,000	(35,999)
Houston Realty Partners, 50%, amount invested	10,000	10,000		20,000	20,000	(10,000)
Smith. Ltd., 60%, owner's opinion	2,000,000	400,000	1,600,000	2,000,000	2,000,000	(1,600,000)
	2,010,001	410,001	1,600,000	2,056,000	2,056,000	(1,645,999)
LIFE INSURANCE POLICIES						
Northwestern Life #468, MS, $500,000 term life	0	0		0	0	
Transamerica #357, JS, $2,000,000 term life	0	0		0	0	
	0	0		0	0	
RESIDENCES						
9152 West Blvd, Houston, TX						
JS ($4.5MM FMV - 2.7MM lien)	1,800,000	1,800,000				
MS ($4.3MM FMV - 2.7MM lien)				1,600,000	1,600,000	(200,000)
6579 Fawn Run, Aspen, CO	2,500,000	2,500,000		2,000,000	2,000,000	500,000

John and Mary Smith
Inventory and Appraisement Comparisons

FOR SETTLEMENT PURPOSES, ONLY

	VALUE PER JOHN			VALUE PER MARY		DIFFERENCE IN JOHN'S VALUE FROM MARY'S
	TOTAL ESTATE	COMMUNITY	SEPARATE	TOTAL ESTATE	COMMUNITY	COMMUNITY VALUE
	4,300,000	4,300,000		3,600,000	3,600,000	700,000
VEHICLES						
Suburban 2000, ($26,000 Kelley BB -29,000, 02/01/02)	(3,000)	(3,000)				(3,000)
BMW 540 2002, ($48,000 Kelley BB)	48,000	48,000		48,000	48,000	
Jaguar 2000, (leased - $1,400 per month)						
Boxster 1999	11,000	11,000		29,000	29,000	(18,000)
	56,000	56,000		77,000	77,000	(21,000)
PERSONAL PROPERTY & FURNITURE						
Club Membership: River Oaks Country Club	15,000		15,000	50,000	50,000	(50,000)
Guns				220,000	220,000	(220,000)
Personal Property: in Possession of JS		100,000			100,000	
Personal Property: in Possession of MS		250,000			250,000	
	365,000	350,000	15,000	270,000	620,000	(270,000)
TOTAL ASSETS	6,967,001	5,352,001	1,615,000	6,266,500	6,616,500	(1,264,499)
LIABILITIES						
Federal Return, 2001	500,000	500,000				500,000
Federal Return, 2002 through 02/28/02	125,000	125,000				125,000
Community Savings and Loan				22,000	22,000	(22,000)
Wells Fargo Line of Credit	75,000	75,000				75,000
TOTAL LIABILITIES	700,000	700,000		22,000	22,000	678,000
NET ASSETS	6,267,001	4,652,001	1,615,000	6,244,500	6,594,500	(1,942,499)

Characterization Chart (in 000's) **FOR SETTLEMENT PURPOSES, ONLY**

Value	Separate Percentage*							
	0%	20%	40%	50%	60%	75%	90%	100%
1,000	0	200	400	500	600	750	900	1,000
2,000	0	400	800	1,000	1,200	1,500	1,800	2,000
3,000	0	600	1,200	1,500	1,800	2,250	2,700	3,000
4,000	0	800	1,600	2,000	2,400	3,000	3,600	4,000
5,000	0	1,000	2,000	2,500	3,000	3,750	4,500	5,000

*** Balance is community.**

Mary Smith **FOR SETTLEMENT PURPOSES, ONLY**
Comparison of "Best" and "Worst" Case
Regarding Smith Ltd. Interest Characterization

	JOHN'S BEST CASE (90% SP, 10% COMM)	COMPROMISE CASE (60% SP, 40% COMM)	MARY'S BEST CASE (0% SP, 100% COMM)
Fair Market Value of Smith Ltd. (100%)	2,000,000	2,000,000	2,000,000
Value of Separate Interest	(1,800,000)	(1,200,000)	-
Net Community	200,000	800,000	2,000,000
Assuming division is 50%	100,000	400,000	1,000,000
Assuming division is 55%	110,000	440,000	1,100,000
Assuming division is 60%	120,000	480,000	1,200,000

Alimony Chart: Net Present Value after Taxes

FOR SETTLEMENT PURPOSES, ONLY

Assumptions:	
Rate of return	8%
Tax rate	
monthly alimony between 3,000-5,000	27%
monthly alimony between 6,000-8,000	30%
Standard deduction	4,700
Single exemption	3,000

# of Mos. **Monthly Alimony**

	2,000	3,000	4,000	5,000	6,000	7,000	8,000	9,000
24	42,193	56,985	72,581	88,426	104,594	119,874	135,207	150,575
36	60,897	82,246	104,755	127,624	150,958	173,012	195,143	217,323
48	78,167	105,571	134,463	163,818	193,770	222,077	250,485	278,956
60	94,113	127,108	161,894	197,238	233,300	267,383	301,585	335,864
72	108,838	146,995	187,223	228,097	269,801	309,216	348,770	388,412
84	122,434	165,357	210,611	256,591	303,504	347,843	392,338	436,932
96	134,988	182,313	232,207	282,901	334,625	383,510	432,567	481,734
108	146,580	197,969	252,147	307,195	363,360	416,444	469,713	523,102
120	157,283	212,425	270,559	329,627	389,893	446,853	504,012	561,300
132	167,167	225,773	287,560	350,340	414,393	474,932	535,683	596,571
144	176,292	238,098	303,259	369,465	437,015	500,859	564,927	629,138
156	184,719	249,478	317,754	387,125	457,904	524,799	591,929	659,209
168	192,499	259,987	331,138	403,431	477,191	546,904	616,862	686,976

Proposed Settlement Schedule with Liability for Taxes Included

MARY'S BEST CASE

FOR SETTLEMENT PURPOSES, ONLY

	VALUES	ALLOCATION TO JOHN	ALLOCATION TO MARY
ASSETS			
CASH IN BANKS			
Bank One #12345, MS, 02/01/02 stmt	40,000		40,000
Bank One #67890, JS, 02/01/02	43,500	38,500	5,000
Washington Mutual #159758, MS, 02/01/02	25,000		25,000
	108,500	38,500	70,000
BROKERAGE ACCOUNTS			
Smith Barney #F578215654ST, JS, 01/31/02 stmt	25,000		25,000
RETIREMENT ACCOUNTS - IRA			
Morgan Stanley #JMS98754, JS, 01/31/02 value	130,000		130,000
BUSINESS INTERESTS			
Happy Hills (10 acres)	36,000	18,000	18,000
Houston Realty Partners, 50%, amount invested	20,000	10,000	10,000
Smith. Ltd., 40% separate/60% community--***MARY'S BEST CASE***	2,000,000	2,000,000	
	2,056,000	2,028,000	28,000
LIFE INSURANCE POLICIES			
Northwestern Life #468, MS, $500,000 term life			
Transamerica #357, JS, $2,000,000 term life			
	0	0	0
RESIDENCES			
9152 West Blvd, Houston, TX			
(4.3MM FMV - 2.7MM LIEN)	1,600,000		1,600,000
6579 Fawn Run, Aspen, CO	2,000,000	2,000,000	
	3,600,000	2,000,000	1,600,000
VEHICLES			
Suburban 2000, ($26,000 Kelley BB - 29,000, 02/01/02)	0		
BMW 540 2002, ($48,000 Kelley BB)	48,000		48,000
Jaguar 2000, (leased - $1,400 per month)	0		
Boxster 1999 (net of loan)	29,000	29,000	
	77,000	29,000	48,000
PERSONAL PROPERTY & FURNITURE			
Club Membership: River Oaks Country Club	50,000	50,000	
Guns	220,000	110,000	110,000
Personal property in possession of JS	100,000	100,000	
Personal property in possession of MS	250,000		250,000
	620,000	260,000	360,000
TOTAL ASSETS	**$6,616,500**	**$4,355,500**	**$2,261,000**

Proposed Settlement Schedule with Liability for Taxes Included

MARY'S BEST CASE

FOR SETTLEMENT PURPOSES, ONLY

	VALUES	ALLOCATION TO JOHN	ALLOCATION TO MARY
LIABILITIES			
Federal Return, 2001	500,000	500,000	
Federal Return, 2002 through 02/28/02	125,000	125,000	
Community Savings and Loan	22,000	22,000	
Wells Fargo Line of Credit	75,000	75,000	
TOTAL LIABILITIES	**$722,000**	**$722,000**	**$0**
NET ASSETS	5,894,500	3,633,500	2,261,000
% OF NET ASSETS		61.64%	38.36%
CASH AT SIGNING		(250,000)	250,000
ALIMONY (present value, approx. $7,000 for 120 months)		(436,250)	436,250
	$5,894,500	**$2,947,250**	**$2,947,250**
% OF NET ASSETS		**50.00%**	**50.00%**

Proposed Settlement Schedule with Liability for Taxes Included

MARY'S WORST CASE

FOR SETTLEMENT PURPOSES, ONLY

	VALUES	ALLOCATION TO JOHN	ALLOCATION TO MARY
ASSETS			
CASH IN BANKS			
Bank One #12345, MS, 02/01/02 stmt	40,000		40,000
Bank One #67890, JS, 02/01/02	43,500	43,500	
Washington Mutual #159758, MS, 02/01/02	25,000		25,000
	108,500	43,500	65,000
BROKERAGE ACCOUNTS			
Smith Barney #F578215654ST, JS, 01/31/02 stmt	25,000		25,000
RETIREMENT ACCOUNTS - IRA			
Morgan Stanley #JMS98754, JS, 01/31/02 value	130,000	65,000	65,000
BUSINESS INTERESTS			
Happy Hills (10 acres)	36,000	36,000	
Houston Realty Partners, 50%, amount invested	20,000	20,000	
Smith. Ltd., 90% separate/10% community--***MARY'S WORST CASE***	200,000	200,000	
	256,000	256,000	0
LIFE INSURANCE POLICIES			
Northwestern Life #468, MS, $500,000 term life			
Transamerica #357, JS, $2,000,000 term life			
	0	0	0
RESIDENCES			
9152 West Blvd, Houston, TX			
(4.3MM FMV - 2.7MM LIEN)	1,600,000		1,600,000
6579 Fawn Run, Aspen, CO	2,000,000	2,000,000	
	3,600,000	2,000,000	1,600,000
VEHICLES			
Suburban 2000, ($26,000 Kelley BB - 29,000, 02/01/02)	0		
BMW 540 2002, ($48,000 Kelley BB)	48,000		48,000
Jaguar 2000, (leased - $1,400 per month)	0		
Boxster 1999, (net of loan)	29,000	29,000	
	77,000	29,000	48,000
PERSONAL PROPERTY & FURNITURE			
Club Membership: River Oaks Country Club	50,000	50,000	
Guns	220,000	220,000	
Personal property in possession of JS	100,000	100,000	
Personal property in possession of MS	250,000		250,000
	620,000	370,000	250,000
TOTAL ASSETS	**$4,816,500**	**$2,763,500**	**$2,053,000**

Proposed Settlement Schedule with Liability for Taxes Included

MARY'S WORST CASE

FOR SETTLEMENT PURPOSES, ONLY

	VALUES	ALLOCATION TO JOHN	ALLOCATION TO MARY
LIABILITIES			
Federal Return, 2001	500,000	500,000	
Federal Return, 2002 through 02/28/02	125,000	125,000	
Community Savings and Loan	22,000	22,000	
Wells Fargo Line of Credit	75,000	75,000	
TOTAL LIABILITIES	**$722,000**	**$722,000**	**$0**
NET ASSETS	4,094,500	2,041,500	2,053,000
% OF NET ASSETS		49.86%	50.14%
CASH AT SIGNING		0	0
ALIMONY		0	0
	$4,094,500	**$2,041,500**	**$2,053,000**
% OF NET ASSETS		**49.86%**	**50.14%**

Alimony amount to achieve the following division:

Disproportionate		**45%**	**55%**
Net assets and cash at signing	4,094,500	2,041,500	2,053,000
Alimony (present value, approx. $4,000 per month for 84 months)		(198,975)	198,975
Necessary ending allocation to achieve 45/55 division	4,094,500	1,842,525	2,251,975
Alternative 2		**40%**	**60%**
Net assets and cash at signing	4,094,500	2,041,500	2,053,000
Alimony (present value, approx. $7,000 per month for 108 months)		(403,700)	403,700
Necessary ending allocation achieve 40/60 division	4,094,500	1,637,800	2,456,700

Proposed Settlement Schedule with Liability for Taxes Included

COMPROMISE CASE

FOR SETTLEMENT PURPOSES, ONLY

	VALUES	ALLOCATION TO JOHN	ALLOCATION TO MARY
ASSETS			
CASH IN BANKS			
Bank One #12345, JS, 02/01/02 stmt	40,000		40,000
Bank One #67890, MS, 02/01/02	43,500	43,500	
Washington Mutual #159758, MS, 02/01/02	25,000		25,000
	108,500	43,500	65,000
BROKERAGE ACCOUNTS			
Smith Barney #F578215654ST, JS, 01/31/02 stmt	25,000		25,000
RETIREMENT ACCOUNTS - IRA			
Morgan Stanley #JMS98754, JS, 01/31/02 value	130,000	65,000	65,000
BUSINESS INTERESTS			
Happy Hills (10 acres)	36,000	18,000	18,000
Houston Realty Partners, 50%, amount invested	20,000	10,000	10,000
Smith. Ltd., 60% separate/40% community--***COMPROMISE***	800,000	800,000	
	856,000	828,000	28,000
LIFE INSURANCE POLICIES			
Northwestern Life #468, MS, $500,000 term life			
Transamerica #357, JS, $2,000,000 term life			
	0	0	0
RESIDENCES			
9152 West Blvd, Houston, TX			
(4.3MM FMV - 2.7MM LIEN)	1,600,000		1,600,000
6579 Fawn Run, Aspen, CO	2,000,000	2,000,000	
	3,600,000	2,000,000	1,600,000
VEHICLES			
Suburban 2000, ($26,000 Kelley BB - 29,000, 02/01/02)	0		
BMW 540 2002, ($48,000 Kelley BB)	48,000		48,000
Jaguar 2000, (leased - $1,400 per month)	0		
Boxster 1999 (net of loan)	29,000	29,000	
	77,000	29,000	48,000
PERSONAL PROPERTY & FURNITURE			
Club Membership: River Oaks Country Club	50,000	50,000	
Guns	220,000	220,000	
Personal property in possession of JS	100,000	100,000	
Personal property in possession of MS	250,000		250,000
	620,000	370,000	250,000
TOTAL ASSETS	**$5,416,500**	**$3,335,500**	**$2,081,000**

Proposed Settlement Schedule with Liability for Taxes Included

COMPROMISE CASE

FOR SETTLEMENT PURPOSES, ONLY

	VALUES	ALLOCATION TO JOHN	ALLOCATION TO MARY
LIABILITIES			
Federal Return, 2001	500,000	500,000	
Federal Return, 2002 through 02/28/02	125,000	125,000	
Community Savings and Loan	22,000		22,000
Wells Fargo Line of Credit	75,000	75,000	
TOTAL LIABILITIES	**$722,000**	**$700,000**	**$22,000**
NET ASSETS	4,694,500	2,635,500	2,059,000
% OF NET ASSETS		56.14%	43.86%
CASH AT SIGNING		(40,000)	40,000
ALIMONY (present value, approx. $5,000 per month for 84 months)		(250,000)	250,000
	$4,694,500	**$2,345,500**	**$2,349,000**
% OF NET ASSETS		**49.96%**	**50.04%**
Alimony amount to achieve the following division:			
Disproportionate		**45%**	**55%**
Net assets and cash at signing	4,694,500	2,595,500	2,099,000
Additional cash		(100,000)	100,000
Alimony ($7,000 per month for 96 months)		(382,975)	382,975
Necessary ending allocation to achieve 45/55 division	4,694,500	2,112,525	2,581,975
Alternative 2		**40%**	**60%**
Net assets and cash at signing	4,694,500	2,595,500	2,099,000
Additional cash		(250,000)	250,000
Alimony ($8,000 per month for 108 months)		(467,700)	467,700
Necessary ending allocation to achieve 40/60 division	4,694,500	1,877,800	2,816,700

Mary Smith's Estimated Monthly Budget

FOR SETTLEMENT PURPOSES, ONLY

USES OF CASH:	**During Marriage**	**Post-divorce Reality**
Federal Income Tax estimate for her income	$ 2,700	$ 2,700
Cash and Credit Cards	1,500	*200*
Charities	50	*20*
Clothing, Cosmetics, Jewelry	700	*150*
Entertainment/Travel/Restaurants	500	*100*
Gifts	225	*40*
Groceries	300	*800*
Housing Costs:		
Brinks Security	80	*50*
Cable (Warner Cable)	50	*30*
House mortgage	2,500	2,500
Homeowners' association fees	100	100
Housekeeper	1,200	*250*
Household item purchases	200	*75*
Insurance - home	1,000	*200*
Insurance - American Homeshield	350	350
Lawncare	500	*75*
Pest control	50	*25*
Pool service	100	*50*
Taxes	1,500	1,500
Telephone - SWB	100	*50*
Telephone - Cellular	50	50
Utilities	1,800	*700*
Total Housing Costs	9,580	6,005
Life Insurance	100	100
Medical care	325	325
Vehicle Expenses:		
Car payment	400	400
Car insurance	75	75
Gasoline & maintenace	150	*100*
	625	575
TOTAL MONTHLY EXPENSES	**$ 16,605**	**$ 11,015**

Mary Smith's Estimated Sources of Funds

FOR SETTLEMENT PURPOSES, ONLY

	BEST CASE		WORST CASE 60%		COMPROMISE 55%	
Cash at signing	$250,000		$0		$40,000	
Various cash accounts	95,000		90,000		90,000	
Less cash reserve	(50,000)		(50,000)		(50,000)	
Total settlement funds (cash)	$295,000		$40,000		$80,000	
Assumed annual rate on all investments	3%		3%		3%	
Sources of funds:						
Alimony (number of months varies)	$7,000	(120)	$7,000	(108)	$7,000	(96)
Interest on settlement	813		229		288	
Child support	1,500		1,500		1,500	
Job opportunities/salary	1,500		1,500		1,500	
Total sources of funds	$10,813		$10,229		$10,288	

Bibliography

Beletic, Anne Turner, *Mediation And Defending Or Attacking Mediated Settlement Agreements*, 1998 ADVANCED FAMILY LAW COURSE.

Beletic, Anne Turner and McCurley, Mike, *Winning Your Case In ADR*, 1996 ADVANCED FAMILY LAW COURSE.

Conner, Coye, McShane, John V. and Royall, Donald R., *Settlement Agreement Enforcement And Your Ethical Problems*, 1997 MARRIAGE DISSOLUTION.

Coulson, Robert, Family Mediation – Managing Conflict, Resolving Disputes (2d. ed.) (1996 Josey-Bass Inc., Publishers, San Francisco, California).

Friedman, Gary J., *A Guide To Divorce Mediation* (Workman Publishing, New York, New York, 1993).

James, Paula, *The Divorce Mediation Handbook – Everything You Need To Know* (1997 Josey-Bass Inc., Publishers, San Francisco, California).

Guerra, John F., Royall, Donald R. and Runge, Barbara K., *Arbitration v. Mediation: A Contrast Of The Purposes, Procedures And Practicalities of These Forms of ADR*, 1998 ADVANCED FAMILY LAW COURSE.

Lasher, Patricia J., *Preparing Your Client To Go To Mediation*, 1998 SO. TEX. FAM. L. GEN. PRACTITIONER.

Royall, Donald R., *The Rest Of ADR In Family Law – Alternative Dispute Resolution Proceedings And Procedures...Besides Mediation*, 1998 MARRIAGE DISSOLUTION.

Runge, Barbara K. and Wong, Betty, *Matrimonial Arbitration v. Mediation: What Is It, Can I Do It, What Does It Look Like, Show Me The Forms*. 1995 ADV. FAM. L. DRAFTING.

Saposnek, Donald T., *Mediating Child Custody Disputes* (Rev. Ed.)(1998 Josey-Bass Inc., Publishers, San Francisco, California).

Trusch, Norma Levine, *The Art of Advocacy During Mediation*, 1997 SO. TEX. FAM. L. GEN. PRACTITIONER.

Wright, Deborah L., *Winning Tactics and Strategies in Mediation*, 1997 SO. TEX. FAM. L. GEN. PRACTITIONER.