

MEDIATION ETHICS AND CASES AFFECTING MEDIATION

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State Bar of Texas
39TH ANNUAL
ADVANCED FAMILY LAW COURSE
August 5-8, 2013
San Antonio

CHAPTER 42.3

TABLE OF CONTENTS

I. DUTY TO INFORM..... 1

II. FRAUD, MISREPRESENTATIONS, LYING, FAILURE TO DISCLOSE 1

 A. Illegal/Void MSA Provisions 2

 B. Limits on MSAs 2

III. ETHICS IN DEALING WITH AN UNREPRESENTED PARTY RE LAWYER ADVOCATE AND
MEDIATOR 3

 A. Lawyer Dealing with Pro Se 3

 B. Mediator Dealing with Pro Se 3

 C. Mediator Protective Language 3

IV. CASES STATING A MEDIATOR CAN TESTIFY 3

 A. “Settlement Process” 4

 B. Offensive Use Doctrine 4

V. CAN A JUDGE CHANGE THE TERMS OF A VALID MSA? 4

 A. Visitation Issues 4

 B. Best Interest of Children 5

 C. Arbitration Provisions in MSA 6

VI. BEWARE OF TFC 6.604 INFORMAL SETTLEMENT AGREEMENTS 6

VII. CAN JUDGE ORDER MEDIATION PRIOR TO FILING A MOTION TO MODIFY? 7

VIII. SUMMARY 7

APPENDIX 9

MEDIATION ETHICS AND CASES AFFECTING MEDIATION

This article applies to lawyers representing parties in a mediation or negotiation, as well as to mediators, especially lawyer mediators.

Note: The Texas Disciplinary Rules of Professional Conduct are mandatory. The Texas Supreme Court's Ethical Guidelines for Mediators, Adopted June 13, 2005, by Misc. Docket No. 05-9107, amended April 11, 2011, by Misc. Docket No. 11-9032, attached as Appendix A, are aspirational, like the Texas Lawyer's Creed.

I. DUTY TO INFORM

Under the Texas Disciplinary Rules of Professional Conduct, lawyers owe their clients certain duties. "In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients." DR 1.01 (b) (1) (2), TDRPC, Tex. Gov't Code Ann. tit.2, subtit. app. A. Disciplinary Rule 1.03 (b) states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Black's Law Dictionary describes the term "informed consent" as a principal of law which holds that in order to make a decision, a person must be aware and "informed" about the options and consequences of making the decision. "Informed Consent" is "a person's agreement to allow something to happen, made with the full knowledge of the risk involved and the alternatives." Black's Law Dictionary 346 (9th ed. 2009).

Lawyers have a duty to inform clients about the ADR processes, including mediation. There is a duty to inform a client of the risks and benefits of settlement. Lawyers get sued for malpractice for failing to explain the risks and benefits of settlement. *Alford v. Bryant*, 137 S.W.3d 916, 919 (Tex.App. Dallas 2004) rehearing overruled (July 19, 2004). In *Alford* a contract dispute settled in mediation. The original defendant then sued her attorney for failure to advise her of the risks and benefits of settlement. *Id* at 919. Attorneys owe a duty to clients to make a full and fair disclosure of every facet of a proposed settlement. *Boyed v. General Motors Corp.*, 881 S.W.2d 422 (Tex.App. ---Texarkana 1994, no writ).

In practical terms, what does all this mean in family law mediations? The lawyer for each side must explain the risks and benefits of the settlement offer as compared to the risks, costs, stress, time and benefits of going to court. How does the proposed settlement

compare to a client's BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement), PATNA (possible alternative to a negotiated agreement) & RATNA (realistic alternative to a negotiated agreement). Each lawyer should explain the uncertainty of letting a stranger in a black bathrobe decide the case. As I frequently say, "Going to court is like taking your dog to a partnership between a veterinarian and a taxidermist. All you know for certain is that you will get your dog back."

The following language should be boiler plate in each Mediated Settlement Agreement (MSA): "Each party to this MSA has been advised by each party's lawyer of the advantages and disadvantages of signing this Agreement."

Additional language that should be in each MSA to insure you do not have a client issue with informed consent is the following: "Each party to this mediation affirms by signing this Agreement each party is mentally and physically able and capable of participating in this mediation and has willingly made informed decisions about this agreement without being influenced by medications, drugs, alcohol, stress, force, duress, or threats. "

II. FRAUD, MISREPRESENTATIONS, LYING, FAILURE TO DISCLOSE

Is it violation under the Texas Disciplinary Rules of Professional Conduct (TDRPC) or the Ethical Guidelines for Mediators, for a lawyer advocate or mediator to misrepresent the value of an asset or omit a material fact or asset? Yes.

"A lawyer shall not assist or counsel a client to engage in conduct that lawyer knows is criminal or fraudulent." DR 1.02 (c) TDRPC, Tex. Gov't Code Ann. tit.e, subtit. App. A. DR 4.01 of the TDRPC, Truthfulness in Statements to Others states "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."

Comment 1 under TDRPC regarding false statements of fact states, "Whether a particular statement should be regarded as one of *material* fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted

conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representation of material fact." However, knowingly using a stalking horse to bid on real estate to under or over value the real estate would violate DR 4.01 as would failing to disclose a material fact such as a retirement plan, stock option or bonus.

A material misrepresentation by one party to a mediated settlement agreement can support rescission or repudiation by the other party. *Boyd v. Boyd*, 67 S.W.3d 398, 404-405, (Tex. App.—Fort Worth 2002, no pet.). In *Boyd*, the husband failed to disclose retirement accounts, stock options, and an earned, unpaid bonus in a mediated settlement agreement. The failure of husband to disclose material information can lead to rescission of an otherwise enforceable MSA under what is essentially fraudulent inducement. *Id.* at 404-405. Wife repudiated the MSA, contending that husband failed to make proper disclosures. The trial court denied enforcement of the agreement because of husband's material misrepresentations and omissions and the agreement's failure to include substantial assets of the parties. The appellate court agreed, stating that a duty to speak exists when "the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them." *Id.* at 405. "[W]hen one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression." *Id.* at 405 (quoting *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 670 (Tex. App.—Fort Worth 1998, pet. denied). In addition, the MSA included a full disclosure provision which stated: "Each party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them." *Id.* at 404. The appellate court further held that "inserting a catchall provision" like "Any undisclosed property is specifically awarded in equal shares to the parties" into a mediated settlement agreement "while at the same time intentionally withholding information about substantial marital assets will not save the mediated settlement agreement from being held unenforceable." *Id.* at 405.

Note: DR 8.04 MISCONDUCT, sec. (a) (3), states, "A lawyer shall not (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"

A. Illegal/Void MSA Provisions

It is possible that a MSA can be found unenforceable, even though it meets the requirements of Texas Family Code sections 6.602(c) or 153.0071(d). Contracts, including MSAs, can be found void if the agreement results in fraud, or if its

provisions are illegal. However, contracts are generally voided for illegality only when performance requires fraud or a violation of criminal. *Beyers v. Roberts*, 199 S.W.3d 354, 358 (Tex. App.—Houston [2d Dist.] 2006) (citing *in re Kasschau*, 11 S.W.3d 305, 314 (Tex. App.—Houston [14th Dist.] 1999, org. proceeding).

In *Kasschau*, a mandamus action was brought by husband in because the trial court refused to enter judgment based on a MSA that complied with the Family Code's requirements for an MSA. The appellate court denied the mandamus because the MSA had certain contingencies that the trial court had the discretion to review before entering the judgment. The appellate court found that certain provisions of the MSA were illegal and violated public policy and thus the entire agreement was found to be void. In the MSA husband agreed to turn over certain telephone recordings he made between wife and third parties without her consent, which were illegal recordings. The MSA also provided that these recordings would be destroyed. The trial court found, and was upheld by the appellate court, that these actions were illegal since it contemplated the destruction of evidence related to a possible criminal proceeding. **Note that the lawyers participating in this MSA and maybe the lawyer mediator, violated DR 1.02 (c), TDRPC, which says "A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent." The lawyers also violated DR 8.04(a)(2) and (4) which state, "(a) A lawyer shall not: (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a law in other respects;...(4) engage in conduct constituting the obstruction of justice;"**

Allowing their clients to enter into an agreement conditioned husband giving wife illegally obtained telephone recordings and providing that the recordings be destroyed certainly constitutes violations of the DRs cited above. If there were threats by wife that she would not agree to the MSA, unless husband turned over the recordings and threats that he would not sign the MSA unless they were destroyed, **the lawyers also violated DR 4.04(a)(1) which says, "A lawyer shall not present, participate in presenting, or threaten to present: criminal or disciplinary charges solely to gain an advantage in a civil matter;"**

B. Limits on MSAs

Parties cannot contract around the mandatory venue requirements in the Family Code in a MSA. *In re Calderon*, 96 S.W.3d 711 (Tex. App.—Tyler 2003, orig. proceeding)

III. ETHICS IN DEALING WITH AN UNREPRESENTED PARTY RE LAWYER ADVOCATE AND MEDIATOR

A. Lawyer Dealing with Pro Se

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” DR-4.03, TDRPC. The lawyer advocate should not give advice to the pro se party other than the advice to obtain counsel. Comment under DR-4.03.

B. Mediator Dealing with Pro Se

Although the first sentence under item 4 of the Rules for Family Law Mediation says, “The mediator will serve only in cases in which the parties are represented by attorneys,” there is nothing in the Texas Family Code or Chapter 154 of the Texas Civil Practice and Remedies Code that requires both parties be represented by a lawyer or prohibits a mediator from mediating a case when one or both are pro se. The Rules for Family Law Mediation attached in Appendix B and are also found in the Texas Family Law Practice Manual, Form 18-14.

The language in 6.602(b) and 153.0071(d) of the Family Code reads exactly same and says, “A mediated settlement agreement is binding on the parties if the agreement: (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, 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.” Italics added for emphasis. This language implies that the parties to mediation need not have attorneys. (Having served on Texas Family Law Practice Manual Revision Committee for 22 years now, and having checked with other senior members of the committee, including Sue Mills(SBOT staff attorney), I have still not found the source of this language and believe it to be a committee decision. However most of the language in Form 18-14 has been taken from Chapter 154 of the TPRC and sections 6.602 and 153.0071 of the TFC.)

Note: There is no statutory requirement that the mediator sign the MSA.

C. Mediator Protective Language

Mediators should use language similar to the following when mediating with a pro se party:

1. I am not represented by an attorney.

2. I acknowledge that Mike Gregory is the mediator in this case. Mike Gregory is hereinafter referred to as mediator in this document.
3. Mediator has told me that he is not and cannot be my attorney and that he has not and will not give me any legal advice.
4. Texas law prohibits one attorney from representing both parties in a legal matter.
5. Mediator does not represent me or the opposing party in this mediation.
6. Mediator has told me that I should get a lawyer to represent only me in this mediation.
7. It is in my best interest to be represented by a lawyer.
8. Without my own lawyer, I am at a disadvantage in this mediation and this legal matter.
9. I understand all the above statements and agree to start this mediation without my own lawyer.
10. I sign this document voluntarily without receiving any pressure from anyone to sign it.
11. I am not under the influence of alcohol, medications, drugs, pressure, duress, stress, force or threats that make me unable to think clearly.
12. I know what I am doing.

Signed on the ___day of ____, 2013, at ___o’clock__m. before the start of the mediation.

(Printed name, party without an lawyer)

IV. CASES STATING A MEDIATOR CAN TESTIFY

The general rule mediation is confidential and a statement made by a participant may not be used as evidence against the participant in any judicial proceeding. Courts have ruled that an impartial third party, including a mediator, cannot testify in a judicial proceeding. The basis of this rule is found in the Texas Civil Practice and Remedies Code, sections 154.053 and 154.073.

Section 154.053 states, in part:

“Standards and Duties of Impartial Third Parties.

“(c) 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 Ann. 154.053(c) (2005) (Emphasis added).

“(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code and Subchapter C, Chapter 48, Human Resources Code.” (To report child abuse)

Section 153.073 states in part:

“Confidentiality of Certain Records and Communications.

“(a)...a communication **relating to the subject matter** of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. (Emphasis added)

“(b)...the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

“(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.”

A. “Settlement Process”

In re Daley, 29 S.W.3d 915, 918 (Tex.App.—Beaumont 2000, org. proceeding) interpreted Sections 154.053 and 154.073 of the Texas Civil Practice and Remedies Code narrowly and allowed the mediator’s testimony into evidence. Daley wanted to have the testimony of his actions during a mediation protected by 154.053 & 154.073. The Court of Appeals held 154.053 restricts only the disclosure of matters that occur during the “settlement process” and testimony that Daley left the mediation without the mediator’s permission was allowed as it was unrelated to the settlement process. The Court further held at page 918 that “154.073 is not so broad as to bar all evidence regarding everything that occurs at mediation from

being presented to the trial court. Rather than a blanket confidentiality rule for participants, the statute renders confidential ‘a communication relating to the subject matter of the dispute of any...dispute’ made by a participant in an ADR procedure.” The appellate court then found that testimony was admissible as to the actions of a participant during mediation that did not involve the subject matter of the dispute.

B. Offensive Use Doctrine

Under the offensive use doctrine a person waives confidentiality of privileged information if: (1) the party asserting the privilege is seeking affirmative relief; (2) the privileged information sought is such that, if believed by the fact finder, in all probability it would be outcome determinative; and (3) disclosure of the confidential information is the only means by which the aggrieved party may obtain the evidence. *Republic Ins. Co. v Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding).

The appellate court in *Alford v. Bryant*, 137 S.W.3d 916, 921 (Tex.App. Dallas 2004) rehearing overruled (July 19, 2004), specifically held that “the offensive use doctrine should apply....to the mediation confidentiality statutes.” When a party asserts a privilege in an offensive manner they have exceeded the scope of the privilege. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985).

In *Alford* a contract dispute settled in mediation. *Id* at 919. The original defendant then sued her attorney for failure to advise her of the risks and benefits of settlement. *Id*. In defense the mediator was called to testify about the substance of the disclosure made by the attorney to the client. *Id*. The trial court did not allow the mediator to testify on the basis of Sec. 154.053 Tex. Civ. Prac. & Rem. Code. *Id*. at 921. The Court of Appeals reversed under the offensive use doctrine. *Id* at 922. First, the original defendant had sought affirmative relief from the court. *Id*. Second, the mediator’s testimony would have likely been outcome determinative as the only other evidence would have been “a veritable swearing match” between the two litigants. *Id*. Third, the mediator was the only other person present when disclosure of the risks and benefits of settlement was made and could present this critical evidence to the court. *Id*.

V. CAN A JUDGE CHANGE THE TERMS OF A VALID MSA?

A. Visitation Issues

1. A judge cannot change the terms or decline to enter judgment on a valid MSA, unless the court finds that: (1) a party to the agreement was a victim of family violence, and that

circumstances of the family violence impaired the party's ability to make decisions; and (2) the agreement is not in the child's best interest. Texas Family Code Sec. 153.0071(e) (e-1); *Williams v. Williams*, ___ S.W.3d ___, 08-11-00212-CV, 2012 WL 5942878 (Tex. App. ---El Paso Nov. 28, 2012) (Chief Justice Ann Crawford McClure wrote the opinion).

2. Facts of *Williams*: Parties entered into a MSA which was incorporated into the decree. Dad and Mother were JMCs, Mother primary, with Dad having parenting time as per the SPO. The SPO in the Decree said, "Summer Weekend Possession by JO-ANN WILLIAMS—IF JO-ANN WILLIAMS gives ALAN L. WILLIAMS written notice by April 15 of a year, JO-ANN WILLIAMS shall have possession of the child on any one weekend beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on the following Sunday during any one period of the extended summer possession by ALAN L. WILLIAMS in that year, **provided that JO-ANN WILLIAMS picks up the child from ALAN L. WILLIAMS and returns the child to that same place** and that the weekend so designated does not interfere with Father's Day Weekend." [Emphasis added]. This language conforms with SPO language in TFC sec. 153.312(b) (3).
3. Alan planned a trip to Yellowstone with the child during his summer possession. Jo-Ann felt the pickup and exchange for her weekend during Alan's summer possession should be at her residence rather than in Yellowstone. She filed a motion to clarify. The trial court changed the language in the decree for the pickup and return of the child to take place at a specific location in Denton County, TX rather than at dad's vacation location. Dad appealed to the Fort Worth Court of Appeals, but the case was transferred to the El Paso Court of Appeals.
4. Law and Holding: The MSA complied with the requirements of TFC sec. 153.0071(d). There were no allegations or evidence of family violence, thus the court could not decline to enter judgment under TFC sec. 153.0071(e) (e-1). Without evidence of family violence and that the violence impaired a party's ability to make decisions and that the MSA was not in the child's best interest due to family violence, a court cannot clarify a specific and non-ambiguous order. TFC sec. 157.421. A court may not change the substantive provisions of an order to be

clarified. TFC sec. 157.423(a). Any substantive changes by a court are unenforceable. TFC sec. 157.423(b). If Jo-Ann wants weekend access during Alan's summer possession, that is her right. But she is bound by the MSA, judgment, and statute to travel to the site of the vacation. Reversed and Rendered. *Id. Williams v. Williams*

B. Best Interest of Children

A best interest hearing is not required before entering an order pursuant to a mediated settlement agreement. *Beyers v. Roberts*, 199 S.W. 3d 354 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In *Beyers*, the appellant contended that the Family Code and common law created a duty on the trial court to conduct an evidentiary hearing to determine whether the parents' custody agreements were in the child's best interest in every case. *Id.* at 359. The court noted that "nothing in the statute requires that a trial court conduct a best interest hearing before entering an order pursuant to a mediated settlement agreement. Subsection (e) of section 153.0071 states that a party is entitled to judgment on a mediated settlement agreement so long as it satisfies the requirements of subsection (d)." *Id.* (citing TFC sec. 153.0071 (e)). The court also held that nothing in the common law creates such a duty. *Id.* at 360.

In re Stephanie Lee, No. 14-11-00714-CV, WL 4036610 (Tex. App.-Houston [14th Dist.] 2011, org. proceeding) (mem. op.) (9/13/11) (Mandamus currently pending before Texas Supreme Court) (Oral arguments heard 02/28/12) (A ruling has been expected for a long time now). Mother and Father entered MSA regarding custody of the child. The MSA met all the requirements of a valid MSA. Mother moved to enter judgment on MSA. Father objected saying the agreement was not in the best interest of the child because Mother's husband was a registered sex offender. Trial court found agreement not in best interest of child. Mother filed writ of mandamus to COA, which the COA denied. Mother filed writ of mandamus to Texas Supreme Court. The Family Law Council of the SBOT filed an *Amicus Curiae* brief asking the Supreme Court to grant Stephanie Lee's petition for writ mandamus and order the trial court to enter judgment that conforms to the parties' MSA.

The *Amicus Curiae* brief states in part that the MSA met all the requirements of TFC sec. 153.0071 (d), thus under TFC sec. 153.0071 (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." A court can only refuse to enter judgment on a MSA when the trial court finds that these three tests are met: (1) "a party to the agreement was a victim of

family violence,” (2) “and that circumstance impaired the party’s ability to make decisions;” (3) “and the agreement is not in the child’s best interest.” TFC sec. 153.0071 (e-1). The *Amicus* brief notes that the evidence clearly establishes that Husband was not a victim of family violence or that family violence affected his ability to make decisions.

C. Arbitration Provisions in MSA

In the Texas Supreme Court case, *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012), Husband and Wife signed a MSA, in which, Husband agreed “to transfer to [Wife] all of his beneficial interest and record title in and to” two companies. Husband was a partner of one of the companies and a member of the other. The latter company had a 1% interest in the former and served as a general partner of the former. Wife objected to H’s draft of Agreed Decree of Divorce arguing it did not comply with the MSA because she had not assumed Husband’s status as a limited partner. Husband argued that the MSA only required him to transfer his interests in the companies, not his partnership status. Trial court stated it would send the parties back to mediation, but also decided to take the matter under advisement. Wife withdrew her consent to the MSA and trial court signed Husband’s draft of the Decree.

Wife appealed. The appellate court affirmed the divorce, but reversed the property division, holding that there had been no meeting of the minds regarding the transferred interest in the companies. H petitioned for review, which Supreme Court granted. The MSA included a mediation provision in the event of a question of fact about the meaning of the MSA; the issue would be arbitrated by the mediator. The ambiguous language was whether the husband would assign his partnership interest to Wife or would Wife assume Husband’s status as a limited partner. *Id.* at 617-618. The Supreme Court held that because the MSA was ambiguous as to whether the parties intended for Wife to be a partner and was a question of fact, the issue should have been arbitrated by the mediator. *Id.* at 622. It was improper for the trial court to resolve the dispute. It was also improper for the COA to substitute its interpretation for the trial court’s determination. The Supreme Court also said the MSA met the formal statutory requirements and should not have been set aside and the ambiguity should have been resolved by the mediator as the arbitrator.

VI. BEWARE OF TFC 6.604 INFORMAL SETTLEMENT AGREEMENTS

Unlike mediated settlement agreements under TFC Sections 6.602 and 153.0071, a court does not have to accept a TFC 6.604 written informal settlement agreement. Sec. 6.604(e) states “If the court finds that the terms of the written informal settlement agreement

are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing.” Sec. 6.604(d) states, “If the court finds that the terms of the written informal settlement agreement are just and right, those terms are binding on the court.”

In the Interest of M.A.H., A.B.H. AND C.T.H., Children, 365 S.W.3d 814 (Tex. App. ---Dallas 2012, no pet.), the parties negotiated a TFC 6.604 informal settlement agreement re property division and children issues. Husband’s attorney prepared a written Rule 11 agreement purporting to incorporate the terms of the agreement. Wife retained counsel and withdrew her consent to the Rule 11 agreement before the court rendered judgment. Trial court signed a decree of divorce that incorporated the Rule 11 agreement. Wife’s motion for new trial was denied. Wife appealed. Husband, appellee, argued estoppel, that appellant Wife accepted the benefits of the agreement. The COA held the an exception to the acceptance of benefits doctrine arises when the acceptance is not voluntary due to economic necessity and rejected appellee’s argument. *Id.* at 818.

The appellate court ruled that even if the agreement met the requirements of Sec. 6.604(b) and is thus binding on the parties, it is not binding on the trial court unless the court finds the agreement’s terms are “just and right.” Sec. 6.604(d). *Id.* pp. 819-820.

“If the parties, without mediation, reach an agreement on possession and conservatorship of the children or an agreement on child support, and if the court finds the agreement is in the best interest of the children, the court shall render an order in accordance with the agreement. *See* TEX. FAM. CODE ANN. sections 153.007(a), (b), 154.124(a), (b). Unlike agreements concerning dissolution of marriage, which by statute are not revocable, the statutes concerning unmediated agreements on child support, conservatorship, and possession of children lack similar language stating they are irrevocable. Sections 153.007 and 154.124 permit the trial court to render orders in accordance with an ‘agreed parenting plan’ or ‘agreement.’ *See id* Sections 153.007(b), 154.124(b). In this case, appellant revoked her consent to the agreement before the trial court rendered its orders on the agreement. Therefore, when the court rendered its orders, there was no longer an agreement in place. Accordingly, the trial court could not enter orders on child support, conservatorship, and possession in accordance the rule 11 agreement based solely on that agreement.” *Id.* p. 820.

The COA ruled the trial court erred in enforcing the rule 11 agreement concerning children issues. *Id.* p. 821. TFC sec. 7.001 requires the trial court to make a just and right division of the marital estate “having due regard for the rights of each party and any children of the marriage.” *Id.* p. 822. The COA affirmed the

trial court's judgment ordering the parties divorced and in all other respects reversed and remanded the case to the trial court for further proceedings without prejudice to the parties' rights to seek or avoid the enforcement of the rule 11 agreement as a contract. *Id.* p. 822.

LESSON: Use mediation, not informal settlement agreements and Rule 11 agreements.

VII. CAN JUDGE ORDER MEDIATION PRIOR TO FILING A MOTION TO MODIFY?

Mother filed motion to modify prior court order. Dad filed a counterpetition to modify. The trial court modified the prior order. Mother appealed trial court's modification order, which ordered among other things that the parents mediate controversies before setting any hearing or initiating discovery in a suit for modification of the terms of the order. The family code provides that "On the written agreement of the parties or on the court's on motion, the court may refer a case to mediation." TFC sec. 153.0071(c). Additionally, TFC section 153.134 provides that if feasible, the court shall recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of joint conservatorship through litigation, except in an emergency. TFC sec 153.134(b) (5). After citing the above portions of the TFC, the appellate court held, "However, a trial judge has no authority to order mediation as a precondition to file in the future a motion to modify conservatorship issues pertaining to a minor child. Here, the trial court went beyond merely recommending mediation before litigating future modifications. The trial court abused its discretion by ordering the parties to mediate before setting any hearing or discovery in a suit for modification of the terms and conditions of conservatorship, possession, or support of K.L.D. *See Dennis v. Smith*, 962 S.W. 2d 67, 74 (Tex. App.—Houston [1st Dist.] 1997, pet. denied)." **In re K.L.D., 12-10-00383-CV, 2012 WL 2127464 (mem. op.) (Tex. App.-Tyler 2012, no pet. h.) (06/13/12).** Thus, the answer to question above is no.

VIII. SUMMARY

The take away from this article to know the Texas Disciplinary Rules of Professional Conduct and do not violate them by the following:

- * Failing to explain a matter to the extent needed to permit the client to make informed decisions. You have a duty to inform.
- * Don't lie, cheat, misrepresent material facts, or fail to disclose material facts.
- * Don't condone or allow illegal conduct or fraud.
- * Follow the rules when dealing with a pro se party, when you represent the other party.

- * A mediator must be very careful and protective when dealing with pro se parties.
- * Despite the rules of confidentiality, there are times when a mediator can testify.

Additional take aways:

- * A judge cannot change the terms of a MSA or fail to enter judgment on an MSA that meets the requirements of TFC sec. 6.602 or 153.0071 unless it contains material misrepresentations, fraud, illegal or void provisions or as to children issues, unless the court finds (1) a party to the MSA was a victim of family violence, and (2) that the circumstance of the family violence impaired the party's ability to make decisions and (3) the agreement is not in the child's best interest.
- * Arbitration provisions in a MSA can be enforced.
- * Beware of TFC 6.604 Informal Settlement Agreements because a judge can fail to render judgment on one, even it meets the requirements of 6.604, if the judge finds that the terms of the agreement are not just and right.
- * A judge cannot order parties to mediation prior to filing a future SAPCR action or prior to discovery in a future SAPCR action.

***Protect and preserve your credibility and integrity as it takes a long time to acquire and short time to lose.**

Special thanks to Jimmy Vaught, Tom Greenwald, Chris Wrampelmeier and Craig Fowler for providing me with information for this article.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11- 9062

**APPROVAL OF AMENDMENTS TO THE
ETHICAL GUIDELINES FOR MEDIATORS**

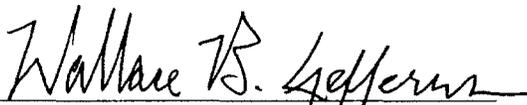
ORDERED that:

1. The Supreme Court of Texas adopted the Ethical Guidelines for Mediators by Order dated June 13, 2005, in Misc. Docket No. 05-9107. The State Bar of Texas Alternative Dispute Resolution Section Council has proposed three changes to the Ethical Guidelines. The proposals were published for public comment, approved by the ADR Section Council, and presented to the Court for approval.
2. The following amendments to the Ethical Guidelines for Mediators are hereby approved:
 - Section 2. Mediator Conduct.
Comment (f). A mediator should not simultaneously conduct more than one mediation session unless all parties agree to do so.
 - Section 4. Disclosure of Possible Conflicts.
Prior to commencing the mediation, the mediator should make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality.
 - Section 10. Disclosure and Exchange of Information.
Comment. A mediator should not knowingly misrepresent any material fact or circumstance in the course of mediation.
2. The Ethical Guidelines for Mediators are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon

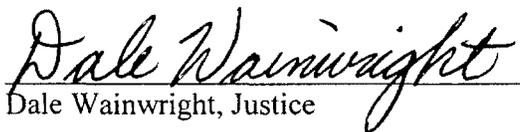
reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

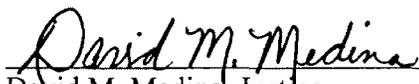
- 3. These changes take effect June 1, 2011.

SIGNED AND ENTERED, this 11th day of April, 2011.

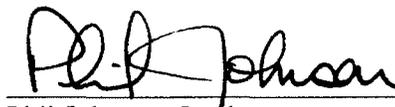

Wallace B. Jefferson, Chief Justice

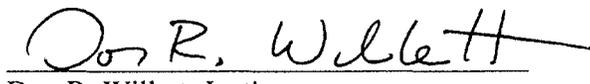

Nathan L. Hecht, Justice

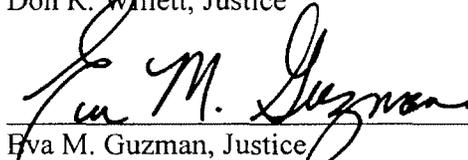

Dale Wainwright, Justice


David M. Medina, Justice


Paul W. Green, Justice


Phil Johnson, Justice


Don R. Willett, Justice


Eva M. Guzman, Justice


Debra H. Lehrmann, Justice

ETHICAL GUIDELINES FOR MEDIATORS

PREAMBLE

These Ethical Guidelines are intended to promote public confidence in the mediation process and to be a general guide for mediator conduct. They are not intended to be disciplinary rules or a code of conduct. Mediators should be responsible to the parties, the courts and the public, and should conduct themselves accordingly. These Ethical Guidelines are intended to apply to mediators conducting mediations in connection with all civil, criminal, administrative and appellate matters, whether the mediation is pre-suit or court-annexed and whether the mediation is court-ordered or voluntary.

GUIDELINES

1. Mediation Defined. Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

Comment. A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in anyway. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

2. Mediator Conduct. A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.

Comment (b). The interests of the parties should always be placed above the personal interests of the mediator.

Comment (c). A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.

Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.

Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

Comment (f). A mediator should not simultaneously conduct more than one mediation session unless all parties agree to do so.

3. Mediation Costs. As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services at a reduced fee or without compensation.

Comment (a). A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.

Comment (b). If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator should withdraw from a mediation if it is inappropriate to serve.

Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

5. Mediator Qualifications. A mediator should inform the participants of the mediator's qualifications and experience.

Comment. A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

6. The Mediation Process. A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

Comment (a). A mediator should inform the parties about the mediation process no later than the opening session.

Comment (b). At a minimum, the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law. (See, e.g., §§154.053 and 154.073, Tex. Civ. Prac. & Rem. Code.)

7. Convening the Mediation. Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

Comment. A mediator should not convene the mediation if the mediator has reason to believe that a *pro se* party fails to understand that the mediator is not providing legal representation for the *pro se* party. In connection with *pro se* parties, see also Guidelines # 9, 11 and 13 and associated comments below.

8. Confidentiality. A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required bylaw.

Comment (a). A mediator should not permit recordings or transcripts to be made of mediation proceedings.

Comment (b). A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.

Comment (c). Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.

Comment (d). In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.

9. Impartiality. A mediator should be impartial toward all parties.

Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

10. Disclosure and Exchange of Information. A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

Comment. A mediator should not knowingly misrepresent any material fact or circumstance in the course of mediation.

11. Professional Advice. A mediator should not give legal or other professional advice to the parties.

Comment (a). In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. Comment (b). A mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counselor other professional advisors.

12. No Judicial Action Taken. A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.

Comment. It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.

13. Termination of Mediation Session. A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

14. Agreements in Writing. A mediator should encourage the parties to reduce all settlement agreements to writing.

15. Mediator's Relationship with the Judiciary. A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.