

**WHEN THE AGREEMENT ISN'T AGREEABLE –  
DEFENDING AND ATTACKING MEDIATED  
SETTLEMENT AND RULE 11 AGREEMENTS**

Jim Loveless  
and  
Kimberly M. Naylor

LOVELESS & ASSOCIATES  
2900 Airport Freeway  
Fort Worth, Texas 76111  
(817) 831-6800

**AUGUST 6, 2001**

## I. Introduction

Some would urge you to accept the proposition that agreements made under the following Rules or Statutes are of the same stature and each has the same requirements for enforceability or escape routes - But that is not true!

### A. Rule 11 TRCP:

“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 a part of the record, or unless it be made in open court and entered of record.”

### B. Tex. Civ. Prac. and Rem.Code §154.021:

“A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternate dispute resolution procedure, including:

1. An alternative dispute resolution system established under Chapter 26, ACTS of the 68<sup>th</sup> Legislature, Regular Session, 1983 (Article 2372aa, Vernon’s Texas Civil Statutes);
2. A dispute resolution organization; or
3. A non-judicial and informally conducted forum for the voluntarily settlement of citizens’ disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described in this sub-chapter:

(a) The courts shall confer with the parties in determination of the most appropriate alternate dispute resolution procedure.”

### C. Title 7 Tex. Civ. Prac. & Rem. Code §154.071 “Effect of Written Settlement Agreement”

1. “If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.”
2. “The Court in its discretion may incorporate the terms of the agreement in the court’s final decree disposing of the case.”
3. “A SA does not affect an outstanding court order, unless the terms of the agreement are incorporated into a subsequent decree.”

D. Texas Family Code §6.602 “Mediation Procedures”

1. “On the written agreement of the parties, the court may refer a suit for dissolution of marriage to mediation.”
2. “A MSA is binding on the parties if the agreement:
  - (a) Provides, in a prominently displayed statement that is in **boldfaced type** or CAPITAL LETTERS or underlined, 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.”
4. If a MSA meets the requirements of this Section, a party is entitled to judgment on the MSA, notwithstanding Rule 11 of the TRCP, or another rule of law.
5. Right of objection to face-to-face mediation, if history of family violence exists.

E. Texas Family Code §153.0071 “Alternate Dispute Resolution Procedures”

1. Subsection (a) addresses the Courts ability to refer case to arbitration.
2. Subsection (b) states that the Court may determine arbitration agreement not in the best interest of children and assignment of burden of proof to party objecting to arbitration award.
3. Subsection (c) states that on the written agreement of the parties, or on the court’s own motion, a court may refer a suit affecting the parent-child relationship to mediation:
4. Subsection (d) confirms that a MSA is binding on the parties if the Agreement:
  - (a) Provides in a prominently displayed statement that is in **boldfaced type** or CAPITAL LETTERS, or underlined, that the Agreement is not subject to revocation and, here you have no special emphasis or bold typing or capitalization, because that Statute does not show it that way;
  - (b) Is signed by each party to the agreement;
  - (c) Is signed by the party’s attorney, if any, who is present at the time the agreement is signed.
5. Subsection (e) describes that if the MSA meets the requirements of Subsection (d), the party is entitled to judgment on the MSA, not withstanding Rule 11 TRCP, or another rule of law.

6. Right of Party to Object to Face-to-Face Mediation if there is a History of Family Violence.

F. TFC §153.007 “Agreement Concerning Conservatorship Under the Cited Rules”

1. To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for conservatorship and possession of the child and for modification of the agreement, including variations from the standard possession order.

- (a) If the court finds that the agreement is in the child’s best interest, the court shall render an order in accordance with the agreement.
- (b) Terms of the agreement contained in the order or incorporate by reference regarding conservatorship or support of or access to a child in an order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract.
- (c) If the court finds the agreement is not in the child’s best interest, the court may request the parties to submit a revised agreement or the court may render any order for the conservatorship and possession of the child.

G. TFC §4.102 “Partition or Exchange of Community Property”

At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a Partition or Exchange Agreement becomes that spouses separate property.

H. TFC §4.103 “Agreement Between Spouses Concerning Income or Property from Separate Property”

“At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner.”

1. TFC §4.104 “Formalities”

“A Partition or Exchange Agreement must be in writing and signed by both parties.”

2. TFC §4.105 “Enforcement”

“A Partition or Exchange Agreement is not enforceable if the party against whom enforcement is requested proves that:

- (a) The party did not sign the agreement voluntarily; or

- (b) The agreement was unconscionable when it was signed and, before execution of the agreement, that party –
  - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - (iii) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the party;
- (c) An issue of unconsciousability of a Partition or Exchange Agreement shall be decided by the court as a matter of law.
- (d) The remedies and defenses in this Section are exclusive remedies or defenses including common law remedies or defenses.”

#### I. TFC §7.006 “Agreement Incident to Divorce or Annulment”

1. To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and the maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment, unless the agreement is binding under another Rule of law.
2. If the Court finds that the terms of the written agreement in a divorce or annulment are just and right, those terms are binding on the Court. If the Court approves the agreement, the Court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
3. If the Court finds that the terms of the written agreement in a divorce or annulment are not just and right, the Court may request the spouses to submit a revised agreement, or may set the case for a contested hearing.

#### II. History of Settlement Agreements

##### A. Contracts

The Restatement of Contracts best provides the history and background of a binding contract, but in the simplest of terms it requires a meeting of the minds with an offer and acceptance with a valuable consideration. At common law in many instances there was no requirement of a written agreement to have an enforceable contract. Rather, enforceability was required only for transactions embracing such highly prized things such as real estate, or the performance of certain obligations. The right to sell or purchase a boatload of precious metals might have been enforceable upon no more than a handshake or word of mouth. But, early in our history it was determined that certain types of agreements were more prone to not be subject to a clear recollection of the

entirety of the agreement and, therefore, the agreement would have to be reduced to writing and the agreement placed in the hands of one other than the parties to the making of the agreement for safekeeping.

Most of today's practitioners can remember when we did not have mediation as an accepted part of our practice. The year 1987 brought us the plain vanilla Tex. Civ. Prac. & Rem. Code mediation legislation. It was nearly a decade later, in 1995 when the Texas Legislature embraced an even higher standard on enforceability for mediation in cases dealing with spouses or former spouses who still had minor children. Yes, 1995 was the year that Legislature decided that alternate dispute resolution should be a part of every family law case and this was the beginning of what we know today as the method by which the vast majority of our cases are brought to resolution.

§153.007 was originally derived from the Uniform Marriage and Divorce Act. The Law of Contracts applied to an agreement concerning conservatorship, while the Law of Judgments applied to a court decree. Remedial actions available to a dissatisfied party could vary, depending on whether a contract or a judgment was involved. The 1995 amendment to Subsection (c) places all remedies under the aegis of the Law of Judgments. At least that is what a number of scholars tell us. See *Sampson and Tindall TFC Comment to §154.124 and §153.007*. Contracts entered into before September 1, 1995 remain enforceable on that basis. See *U.S. Const. Art. 1, section 10, cl. 1*.

## B. Rule 11 Agreements

Many family law practitioners interchangeably refer to a Rule 11 Agreement and a MSA as one and the same.

To build a house, a building, or a law, we must first have a foundation. So what is the foundation of Rule 11?

Many things may not be said with absolute certainty. However it is with certainty that when Rule 11 first became a part of Texas Jurisprudence, no one living today was there to see Rule 11 in the beginning.

What we know today as Rule 11, began in the days when the State of Texas was no more than an embryo. Before Judge Roy Bean was the law West of the Pecos, we had what is today Rule 11. Today's Rule 11 is not of recent origin, but can be traced in substantially its present form to District Court Rule 28, adopted in 1840 under the Laws of the Republic of Texas, 1 Tex 840 (1848) and rectified in 1877 by authority of Article 5, §25 of the Texas Constitution.

Rule 47 was amended in 1872 by adding the phrase..... "or unless it be made in open court and entered of record". On September 1, 1941, Rule 11 of the Texas Rules of Civil Procedure became effective. By its wording, Rule 11 mandates that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing and filed with the Court."

The Supreme Court has time and time again ruled that Settlement Agreements are to be judged by Rule 11 standards. Williams v. Hollingsworth, 568 S.W.2d 130 (Tex. 1978); Kennedy v. Hyde, 682 S.W.2d 525 (Tex. 1984).

The rationale for the Rule was:

*“Agreements of counsel, respecting the disposition of causes, which are merely verbal are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversy; and hence, there is great propriety in the Rule which requires that all agreements of counsel respecting the causes shall be in writing and, if not, the Court will not enforce them. They will then speak for themselves and the Court can be the Judge of their import, and proceed to act upon them with safety. The Rule is a statutory one, and ought to be adhered to whenever counsel disagrees to what has transpired.”* Birdwell v. Cox, 18 Tex 535 (1857). The 20<sup>th</sup> Century case that best traces the history of a modern day Rule 11 is Kennedy v. Hyde, *supra*. Kennedy begins with the 1840 Rule and follows the trail to Birdwell and on through the next full Century.

Kennedy distinguishes between an action to enforce an Agreement as a Rule 11 and an action to enforce an “Agreement” as a contract. The Supreme Court in Kennedy goes on to state that the importance of a Rule 11 agreement is that it authorizes the trial court to enter an agreed judgment on the merits of the underlying suit.

In Kennedy, the Court stated that Rule 11 means precisely what it says, but that it should not be interpreted as requiring a “Slavish adherence” to the literal language of the rule in all cases. To the contrary, there are well-recognized exceptions to the rule in this State, and in other similar jurisdictions [see generally 7 ALR 3<sup>rd</sup> 1394 (1966)]. For example, an undisputed stipulation may be given effect, despite literal compliance with the Rule. Likewise, an agreement in compliance with the Rule is subject to attack on the grounds of fraud or mistake and a non-conforming agreement may be enforced for similar equitable reasons.

In determining whether a particular situation warrants an exception to Rule 11, an examination of the policy behind the Rules is always paramount. The reason for Rule 11 is clear. It is already observed that oral agreements concerning suits “are very liable to be misconstrued or forgotten and to beget misunderstandings and controversy”. See Birdwell, *supra*. The purpose of the Rule is evident, and its wisdom will be readily conceded. Agreements of counsel in the course of a judicial proceeding which may affect the interest of their client should not be left to the fallibility of human recollection. This is especially true with reference to agreed judgments which finally dispose of the rights of the litigants. The rationale underlying Rule 11 is sensible and contributes to efficient court administration. Agreements and stipulations are welcomed by courts because they limit the matters in controversy and expedite trial proceedings. Rule 11 ensures that such Agreements do not themselves become sources of controversy, impeding resolution of suits. The requirements of Rule 11 are not onerous; the benefits are substantial.

Extending the concept of *Kennedy* on Rule 11's, was that although there may have been a valid contract under the Rules of Oral Contracts, the oral agreement was disputed and unenforceable the moment its existence was denied in the pleadings and as a result further inquiry was prohibited. Specifically, Rule 11 prohibits further inquiry. If there is non-compliance with the specifics of the Statute, then there is no enforceable agreement following the concept of *Kennedy*. However, following the concept of *Padilla v. La France*, 901 S.W.2d 545 (Tex. 1995), if there is strict compliance with the Statute or the Rule and there is subsequent repudiation, so long as the Agreement itself falls within the embrace of the Rule, then it may still be enforced.

One can analogize the 20<sup>th</sup> Century Rule 11 to have had as its beginning in the Statute of Frauds.

“To satisfy the Statutes of Frauds there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony.” *Cohen v. McCutchin*, 565 S.W.2d 230 (Tex. 1978) and Tex. Bus. Com. Code §2601.

Under *Kennedy* an oral SA, although otherwise enforceable at common law, becomes unenforceable unless made in open court and, thus made a part of the court record.

### III. Understanding Rule 11 and §154.071 of the Tex. Civ. Prac. & Rem. Code, Requires a Mind Set Different from that of a Mediated Settlement Agreement

#### A. *Padilla v. La France* (907 S.W.2d 545 (Tex. 1995)).

This is a car wreck case that really boils down to what appears to have been some gamesmanship between Plaintiff's lawyer, Jeffrey Stidley and a State Farm Adjuster, Phil Bradshaw. The case which went up on appeal, originally stemmed out of a car wreck case in which Stidley's client, La France was injured. The liable party had coverage through State Farm with policy limits at \$40k, Stidley made a demand on Padilla's insurance defense lawyer, Chandler, and that demand required that the full \$40k be paid in two checks by 5:00 p.m. on April 23, 1991. A day or so after the demand was made, but still several days before the deadline for compliance, the issue of a \$1,600.00 hospital lien which was outstanding needed resolution. Both Chandler and the insurance adjuster, Bradshaw, attempted to telephone Stidley with no avail. On the 21<sup>st</sup> adjuster Bradshaw sent a fax to Plaintiff's lawyer, Stidley, inquiring as to how he proposed to satisfy the hospital lien. State Farm had suggested to reduce the settlement total amount, pay the lien and then disburse the net amount of \$38,400.00 to Stidley and his client. At the 11<sup>th</sup> hour (according to the record at about 4:45 on the deadline day) Stidley responded with a fax indicating the lien would be paid out of the \$40k settlement through his trust account and considered the case to be settled and was awaiting disbursement. There was no longer a mention of the actual deadline for payment.

Adjuster Bradshaw did not see Stidley's letter until the next day and shortly thereafter the \$40k was tendered in two checks to Stidley's offices as previously demanded, but on April 24<sup>th</sup> instead of the 23<sup>rd</sup>.

One would wonder what would happen next. But, bad facts can make bad law. Bradshaw tried to deliver the \$40k along with a CSA the next day. At that time, Stidley refused to accept them as not having been timely paid under his demand for payment by 5:00 p.m. on April 23, 1991. Guess what, the next day Stidley sent the insurance defense attorney, Chandler, a demand for \$2,750,000.00 alleging bad faith against State Farm for their not having settled for the policy limits as demanded and Stidley repudiated and withdrew his offer to settle for \$40k. *[Think he really wanted the \$40k, or was there a bigger plan?]*

There was a counter-claim and a counter-counter claim with motions for summary judgment and more. By now, State Farm (Padilla) had filed the series of settlement letters starting with Stidley's demand letter of April 10<sup>th</sup> through the payment tender letter of April 24<sup>th</sup>, claiming them all to be a part of a Rule 11 Agreement.

One of Stidley's defenses or arguments against the Rule 11 was that the adjuster, Bradshaw, was not a party nor a lawyer, and, thus, a writing from him to Stidley was not in compliance with Rule 11.

Cutting through all of this was the issue that consent was withdrawn before (the "Rule 11") the various demands and response letters were filed with the Court.

On the S/J hearing the T/C orally ruled that no Rule 11 Agreement existed due to the repudiation and withdrawal of the settlement offer. There was a motion for re-hearing, a cross-hearing on yet another motion for S/J, a hearing on a severance and more. Ultimately, the T/C signed an order that there was no Rule 11 Agreement and severed out the bad faith case.

Padilla was a 1991 case. In 1991 TRCP 11 stated the law as it does today:

"Unless otherwise provided in these Rules, no agreement between parties or attorneys touching any suit pending will be enforced, unless it be in writing, signed and filed with the papers as a part of the record, or unless it be made in open court and entered of record."

The majority in Padilla closely inspected the history of Rule 11 back to 1840, the Statute of Frauds, Birdwell, Kennedy and, ultimately, came up with a ruling that indicated that the agreement itself did not have to be filed with the Court prior to the timing of the repudiation. Further, that the various settlement demand and response letters that transpired over a series of days between April the 10<sup>th</sup> 1991 and April 24, 1991 did, in fact, collectively constitute a Rule 11 SA and that such agreement was filed with the Court before a hearing was had on a motion to enforce it.

The Padilla Court clearly points out that Rule 11 does not state when the writing must be filed. Padilla goes on to state, “the purpose of the Rule – to avoid disputes over the terms of oral SA’s – is not furthered by requiring the writing to be filed before consent is withdrawn. In fact, to require the parties to immediately rush to the courthouse with a signed document in order to quickly comply with the requirements of Rule 11, before the other party reneges on his agreement, goes against the grain of the policy in Texas Jurisprudence which favors the settlements of lawsuits.” Padilla v. La France, 875 S.W.2d 730 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 1994, reversed). The purpose of the filing requirement in the language of Birdwell is to “put the agreement before the Court so that the Court can judge of its import, and proceed to act upon it with safety.” See Birdwell at 537.

### B. Consent Judgments

Padilla discusses, in part, Burnaman v. Heaton, 240 S.W.2d 288 (Tex. 1951) which deals with the necessity to avoid confusion between an agreed judgment and one which is simply enforceable based upon a settlement agreement. A Court can not render what will be called a valid “agreed judgment” absent consent, at the time it is rendered, by all parties. However, this does not preclude the Court, after proper notice and hearing from enforcing a SA complying with Rule 11, even though one side no longer consents to the judgment. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract. We should keep this mindful even in mediated agreements under the FC and prevent issues on appeal where a judgment may be entitled “Agreed Judgment” when in fact, one party has repudiated the mediation agreement prior to entry, but which is still enforceable.

In Burnaman, the T/C’s judgment was reversed, in part, due to the fact that it stated on its face that it was an agreed judgment when, in fact, the record made it clear that the appellant repudiated the agreement and further indicated that her attorney did not have authority to have made the agreement in the first place. Similarly, in Quintero v. Jim Walter Homes, Inc., 654 S.W.2d 442 (Tex. 1983), the SC held that the T/C erred by rendering an agreed judgment of dismissal based on a release signed by the Plaintiff, because Plaintiff did not consent to the judgment at the time it was rendered. The SC noted that “Our reversal of the judgment of dismissal is without prejudice to the rights of Jim Walter Homes in its attempt to plead and prove enforcement SA under the release. Further, an action to enforce a SA, where consent is withdrawn, must be based on proper pleading and proof.

#### 1. Alvarez v. Reiser, 958 S.W.2d 232 (Tex. Civ. App. – Eastland 1997, writ denied)

In Alvarez, H and W attended a mediation and entered into an agreement that was signed by the parties and their attorneys. Prior to the entry of the judgment, W withdrew her consent. The issue for the Court of Appeals was whether the trial court erred by entering a judgment based on the mediated SA after one party withdrew consent to the agreement. The Court of Appeals affirmed the T/C’s ruling and found

that the agreement met the requirements of §153.0071 and, therefore, the Court was required to enter the agreement. The Court said:

*“Under the language of subsections d and e, mediated settlement agreements complying with §153.0071 are binding, and a party to such an agreement is entitled to a judgment. Unilateral withdrawal of consent does not negate the enforceability of the agreement, and a separate suit for enforcement of a contract is not necessary.”*

2. Cayan v. Cayan, 38 S.W.3d 161 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 2000, no writ).

In Cayan, H and W attended a mediation and entered into a Rule 11 Stipulation and MSA. Both parties and their attorneys signed the agreement and the court approved it. W filed a motion for the court to sign and enter a final decree based on the agreement. On the day the motion was set, H. filed a motion to revoke the agreement alleging mistake and misrepresentation because he relied on W’s CPA representation regarding the characterization of his retirement benefits. The T/C entered the decree and H appealed alleging that W could only enforce the agreement by contract.

The Court held that:

*“The plain meaning of §6.602 could hardly be more clear: a §6.602 agreement is binding, i.e. irrevocable, and a party to one is entitled to judgment based on the agreement.”*

They further stated that:

*“... we interpret §6.602 simply as an exception to §7.006(a) whereby parties to a divorce may elect to make their agreement binding as of the time of its execution rather than at the subsequent time the divorce is rendered.”*

The Court went on to say that:

*“... the purpose of alternative dispute measures is to keep parties out of the courtroom. Where a MSA is not summarily enforceable, the T/C is then faced with litigating the merits of not only the original action but also the enforceability of the settlement agreement, thereby generating more, not less, litigation. Enforcing mediated agreements as of the time they are entered rather than later also encourages parties to avail themselves of mediation by giving them greater assurance of a prompt and final resolution. Further, parties are more likely to mediate in good faith if they know their agreement will be enforced.”*

C. Comparison of Rule 11 to §154.071 Tex. Civ. Prac. & Rem. Code and the Family Code Mediation Formalities

Note that the Tex. Civ. Prac. & Rem. Code has no requirement of formality to the form of the agreement insofar as requiring a boldfaced, capitalized, underlined notice to the participants that the agreement is non-revocable. Further, the Tex. Civ. Prac. & Rem. Code does not include the requirement that lawyers have to sign the agreement, it simply states that if the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable. In the same manner as any other written contract.

Another issue arises under the Family Code in the sections referencing mediation for both actions between spouses and actions between those involved in a SAPCR which provides that it must be signed by the party's attorney, if any, who is present at the time the agreement is signed.

Does a lawyer have to sign if the agreement is not completely drawn up during the mediation session and it is not signed until sometime later by the party, and the lawyer is not present? We do not have an answer here, but it would be safe to assume that if someone was represented by counsel, counsel ought to sign the MSA if they agree with it and if they do not, put something in writing to say why they haven't signed it and, perhaps, their level of disagreement.

Likewise, there is no specific requirement that the mediator sign the MSA, but to have a valid MSA on its face, it must have come about as a result of a mediation that was either entered into by the written agreement of the parties or on the courts own motion for referral?

Issue: Must there be a written Order of Referral to Mediation? Must there be the equivalent to a Rule 11 Agreement between the parties to go to mediation for the resulting mediation to be binding?

#### **D. BOLDFACE-CAP'S-UNDERLINE**

What if every requirement of §6.602 and/or §153.0071 for boldfaced, all cap's, underlined notice of non-revocation disclaimer were met, but in fact there was no third-party mediator and there was no mediation, simply the parties and the lawyers got together and engaged in good old fashioned settlement negotiations? What do we have here? Do we have a Rule 11 Agreement? Do we have a CSA? We surely have a §7.006 TFC Agreement, but under this portion of the Code, such agreements can be repudiated or modified before rendition **AND** if the Court finds that the terms of the written agreement in the divorce or annulment were not just and right, the Court may request the spouses to submit a revised agreement, or may set the case for contested hearing. Likewise, similar provisions relate to the various methods of dispute resolution and settlement in parent-child relationship actions.

*Compania Financiară Libano, S.A v. Simmons*, 2001 WL 69058 (Tex. 2001). This opinion was published June 21, 2001.

This is not a divorce and is a matter dealing with a CSA-Rule 11 and §154.071, Tex. Civ. Prac. & Rem. Code enforcement matter.

§154.071 states:

- a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
- b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.

The underlying law suit claimed a fraudulent transfer of property interests. The parties entered in to a CSA for Simmons to transfer to Compania property interest, for an agreed judgment to be rendered for the recovery of \$25,000 from Simmons and for the execution of mutual releases.

This CSA was filed with the court as a Rule 11 and the court signed an agreed judgement. However, the judgement did not refer to the property transfers nor to the releases. Rather it contained a grant of the \$25,000 judgement and a Mother Hubbard Clause stating "all relief not expressly granted herein by way of claim or counter claim is denied". Compania filed a timely motion to modify the judgement but it was never ruled upon and was overruled by operation of law.

Some months later [less than a year] Compania sued Simmons to compel performance of the CSA and claimed a breach of contract, fraud, tortuous interference and specific performance.

T/C granted a S/J in favor of Compania and ordered specific performance and atty. fees. A divided CCA granted S/J in *Simmons v. Compania Financiera Libano, S.A.*, 14 S.W.3d 338 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 2000, reversed) reversed and said the action was an impermissible collateral attack on the agreed judgment and concluded that they were barred under the doctrine of res judicata, and that the CSA/R-11 had been merged into the agreed judgement in view of the Mother Hubbard Clause.

The Supremes reversed. They indicate there is nothing in the CSA that says all of the terms thereof were intended to be in the judgement. The statute says the CSA/R-11 may be enforced as a contract. They go on to state that often times parties simply dismiss with prejudice and rely entirely on their agreement for protection of their respective rights.

They conclude that settlement terms need not be incorporated into a judgement to be enforceable.

Does this answer the question or simply raise another one? That remains to be seen.

#### IV. Partition and Exchange Agreements

##### A. Drafting Concerns

We know that spouses can enter into a marital property agreement at any time. They can do this in good times or bad times. They can dispose of all of their property as defined by §4.001 of the TFC. In forms that will be available in this Course Book, but in the “Workshop Section” dealing with “Preparation of the Trial Notebook” and “Mediation Notebook”, the MSA has a boiler plate section that provides for a Partition and Exchange as a part of the MSA agreement. What if for some reason, the agreement, whatever it may be, and whatever kind or under whatever Rule it may be, is not enforceable under such Rule? Is it not possibly enforceable under some other Rule? We understand the Statute of Frauds, we understand Rule 11, we understand the Tex. Civ. Prac. & Rem. Code requirements as to an effective SA and then we understand the additional enhanced burdens placed on party’s who enter an agreement in the Family Law Mediation process. You have to have your lawyer sign, it has to be in **Bold, CAP, and underlined** or ALL CAPITAL LETTERS.

But, there is no such requirement in §4.02 TFC et seq. As recited in the introduction of the Article, you have the provisions as to both formalities and enforcement. If one were to include in this partition language in the settlement document, be it mediated or not, and notwithstanding any other Rule of law, should it not be enforceable as a partition contract under §4.102 of the TFC. Have you not possibly boot strapped yourself up above and beyond the limitations or restrictions as set forth for a MSA?

##### B. Problems Not Addressed by the MSA and What to Do?

Generally, it has been my experience that most lawyers and mediators do not do Partition Agreements as a part of the mediation process. There are many reasons why that may not be best in your particular case. It is almost always a certainty that there is going to be some accumulation of assets from the day of mediation until the day of rendition, unless you walk across the street from the mediator’s office and get your divorce granted that day. There is salary that will come in, someone could win the lottery, someone could receive a bonus, someone could be in an automobile accident and be injured, additional contributions will accrue to retirement benefits, dividends may be paid on an asset, or other portions of the marital estate may have changes as a result of market dynamics. A Partition and Exchange Agreement, coupled with provisions dealing with income from community/separate property would solve that problem. Likewise, if someone goes out and buys a new car the day after the MSA, or otherwise acquires an asset on credit (does real well day trading or a margin account) that acquisition can be considered to have been the separate property of the spouse and/or partitioned to them should the situation blow up. This additionally gives you a further nail in the armor of enforceability.

In *Rogers v. Rogers*, 806 S.W.2d 886, Tex. Civ. App. – Corpus Christi 1991, no writ), a SA was dictated into the Court record. As part of the agreement, H was to pay W \$3,500.00 per month for twenty (20) years and that such amount would be reasonably

secured to the satisfaction of W's attorney in a future agreement. Both parties testified that they heard the agreement, understood it and agreed to it. The parties were unable to agree on the security and H filed a motion for signing of judgment with the Court. W filed a motion to set aside rendition of judgment. The T/C entered a judgment nunc pro tunc regarding the security issue. The Court of Appeals reversed the ruling of the T/C and said that the agreement dictated into the record did not resolve the issue of security, which was a material term of the agreement. Accordingly, the court held that there was no final and enforceable agreement because the parties did not agree to all material terms.

*Henry v. Henry*, 2001 WL 61952 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 2001), was an appeal from the 306<sup>th</sup> District Court in Galveston. There are a lot of facts that make a case interesting, but the fact that is important for the purposes of this presentation is that there was a mediation that occurred between the parties and that the MA purported to settle, waive, and release all claims between the parties except in regard to distribution of the retirement accounts and the vehicles. The parties in this case went on to litigate several claims for reimbursement that involved funds that had never been in retirement accounts. The T/C then ruled on these reimbursement claims despite having approved the SA. Several of these claims were decided in H's favor and several in W's favor. Neither party objected to the consideration of these issues in the T/C and neither party raised these as a subject of the appeal. Therefore, the CCA says that "they have no impact on our consideration of the reimbursement issues." Here again, the mediation settled most, but not all claims, and there is no reversible error found as to the T/C holding a "mini-trial". Justice Norman Lee was the author of the opinion.

This is a very good case to read for a number of points, including the elements of proof of:

- a. Cruel treatment;
- b. Legal sufficiency;
- c. Factual sufficiency;
- d. Characterization of certain retirement/severance packages;
- e. Reimbursement issues;
- f. Withdrawal of funds during the pendency of the suit;
- g. Attorney's fees/very good discussion that touches upon *Capellen v. Capellen*, 888 S.W.2d 539 (Tex. Civ. App. – El Paso 1994, writ denied); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 1989, writ denied); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *Masey v. Masey*, 807 S.W.2d 391 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1991, writ denied), as well as TRAP 33.1 dealing with the award of attorney's fees during the pendency of the appeal.

Time did not permit obtaining copies of the Appellant/Appellee Briefs and all of the underlying facts, but for a relatively small dollar case, *Henry* will be cited time and time again during the remainder of this decade and perhaps longer.

## V. Parent-Child Relationship Actions

### A. Davis – A Case Study

Examine Davis v. Wickham, 917 S.W.2d 414 (Tex. Civ. App - Houston [14<sup>th</sup> Dist.] 1996, no writ). The Court confirmed the remedy of a breach of contract suit for enforcement of an agreement revoked prior to judgment. But Davis was a modification case, and the Court never addressed the problems of enforcing a contract that provides for custody of children. Furthermore, the Court never addressed the best interest issue.

In Davis, the parties were ordered to mediation in a custody/modification suit and entered into a MSA as a result of that mediation. Thereafter, the parties and their attorneys also signed a Rule 11 Stipulation and SA based on the MSA reflecting that the parties and their attorneys agree to be bound by the terms to the MSA and to incorporate it into an Agreed Order of Modification for approval by the Court. Prior to rendition of judgment, dad repudiated the agreement and withdrew his consent to the entry of the judgment. Mom filed a motion to enter an agreed judgment order based on TRCP 11 Stipulation and SA which had incorporated the court-ordered MSA. The Court heard that motion, as well as dad's motion not to sign the agreed order and his motion to set the case for trial. At the hearing, dad argued that since he had entered into the Rule 11, he had discovered "new evidence" that indicated that the agreement and order would not be in the best interest of the children. The T/C entered an agreed judgment granting the Rule 11 Agreed Order over his objection and dad appealed.

The Court cited the Tex. Civ. Prac. & Rem. Code 154.071(a) as a confirmation that a party may enforce the agreement without the party's consent under contract law. See also, Stephens v. Schnider, 874 S.W.2d 241 (Tex. Civ. App - Dallas 1994, writ denied). The Court held that because a MSA is enforceable under contract law, the same procedures used to enforce and enter judgment as other contracts should apply to MSA. The Davis case confirms that a MSA arising out of the court-ordered mediations under the TFC Alternate Dispute Resolution Statute is enforceable as any other contract specifically:

1. Summary Judgment proceedings, if no fact issue exists;
2. Trial, jury or non-jury, if a fact issue exists.

Davis states that a TC may enter a judgment on a MSA where one of the party's contests his or her intent to be bound to the agreement only by filing one of the following vehicles as set out in TRCP. Davis does not address TFC §153.0071. How does this square with the proposition that such matters are under the aegis of the laws of judgments and not contracts?

The 1999 Legislative amendment to §153.0071 provides that:

"An agreement, statement, or notice executed before the effective date of this act is governed by the law in effect when the agreement, statement, or notice was executed, and the former law is continued in effect for that purpose."

However, the amendment also provides that the non-revocability disclosure language being required to be included for validity purposes did apply to any suit affecting the parent-child relationship, including one coupled with the dissolution of a marriage without regard as to whether suit was commenced before or after the effective date of the amendment (August 30, 1999).

#### B. Enforceability Generally and Requirement as to Specificity

Historically, the appellate courts have required strict compliance with regard to MSA requirements. In particular, *Spinks v. Spinks*, 939 S.W.2d 229 (Tex. Civ. App. - Houston [1<sup>st</sup> Dist.] 1997, no writ). The parties signed a document entitled Rule 11 Agreement as a part of court-ordered mediation. Both parties, their attorneys and a mediator signed the agreement, which contained provisions for custody, property division, child support, alimony, health and life insurance. It also contained the language of §153.0071(d) in a separate paragraph stating that the parties stipulated that the agreement was not subject to revocation. This statement, however, was not underlined, but was in all capital letters. W revoked consent to the agreement prior to entry and the T/C signed the Decree over her objection and made some additional modifications. The CCA found the legislative intent required strict compliance with the Statute and held that the Decree should not have been entered once consent was revoked prior to entry and reversed and remanded for failure to underline the irrevocable language.

*Note: At the time that Spinks was tried, §153.0071 actually required bold type-underlined which was then amended in 1999 to square up with §6.602 which did not then, and does not now, require both underlining and bold/cap print.*

#### C. The Asset Forgotten

*Clanin v. Clanin*, 918 S.W.2d 673 (Tex. Civ. App. – Fort Worth 1996, no writ)

This is a case out of Tarrant County where the parties entered into a Rule 11 Agreement in open court on the record, the same was recorded by the court reporter and approved by the associate judge of the Court. Here, the parties actually testified in direct and cross-examination. They concluded that they had reached an agreement.

Between that day and the day of the drafting of the judgment, H decided to repudiate his consent. The Rule 11 was made on September 7, 1994 and some 90 days later on December 7, 1994, Judge Carper signed the Divorce Decree. There was a subsequent motion for new trial, a motion for corrected findings of fact and conclusions of law and then an appeal.

In the opinion, the CCA states that it is well settled that a consent judgment can not be granted when one party does not consent at the time judgment is actually rendered. Although that party previously may have consented to the agreement. A party may revoke his consent to settle a case any time before the judgment is rendered.

*Side bar - Does this sound like §7.006 TFC?*

Here, the Court held that H did not revoke his consent to the agreement prior to rendition of the Court's judgment. What got this case reversed is that the judgment as ultimately drawn deviated from the Rule 11 Agreement as to the methodology of filing a tax return and included disposition of matters that were not encompassed in the Rule 11 Agreement and for which there was opportunity for H to have been heard.

The downside of this is that the CCA confirms the granting of the divorce and then reverses the remainder of the judgment and remanded to the T/C. However, the saving grace is that on remand, the T/C was to receive it for the limited purpose of reforming the decree and entering a judgment in accordance with the agreement reached by the parties concerning the joint filing of taxes for the calendar year 1994.

Had a motion been properly filed by W to deal with the unresolved issues with a presentation of the need to do so in order to effect a just and right division of the marital estate under TFC §7.01 there is authority to go forth and have a trial as to the unresolved issues.

#### D. Suggestions for Mediation Drafting

Consider the inclusion of a separate provision in the MSA to address the issue of omitted asset or liability. One way is to utilize the exact language of the FC and that which is found in the Family Law Practice Manual, Agreement Incident to Divorce forms. What do you do here? First, it is suggested that your MSA incorporate TFC §9.201 Post Decree Division of Property language.

- a. Either spouse may file a suit as provided by this Sub-Chapter to divide property not divided or awarded to a spouse in a final decree of divorce or annulment
- b. Except as otherwise provided by this Sub-Chapter, the suit is governed by the TRCP applicable to the filing of an original lawsuit.

Another would be to include language that provided:

“Each party to this Agreement, agrees that in the event a significant asset or liability is not addressed specifically by this Agreement, that the Court shall have authority to do the following:

1. After presentation of evidence, determine if the omitted item is significant;
2. Grant a mini-trial on the admitted item;
3. If the omitted item is deemed significant by the Court, either party shall have the right to request a new trial on all issues;
4. An omitted asset or liability does not constitute a basis for revocation of this Agreement.

E. What are the answers: *In Re: Kasschau*, 11 S.W.3d 305 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 1999, no pet.).

At the time of this opinion it indicates that at the time it was written that it was only the 3<sup>rd</sup> reported case addressing §153.0071.

This is a mandamus case with all sorts of convoluted facts where there was a mediated settlement that was court approved, but before the judgment was rendered, W non-suited and H filed cross-actions alleging all sorts of torts and denying paternity.

Part of this case dealt with an agreement to turn over some wire taps that were then to be destroyed and therefore it required an illegal act and, thus, the entire MSA was deemed to be void. This is based upon the fact that a contract to do a thing which can not be performed without violation of law, violates public policy and is void.

Part of what we find in this opinion, however, is not what the case is usually cited for, which is the void against public policy issue, but rather the enforceability of the contract issue.

H contends that the T/C violated a ministerial duty by refusing to enter judgment on the MSA. §6.602(b) and §153.0071(d) of the FC state that:

“A MSA is binding on the parties 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.”

§157.0071(d) adds the requirement of an underlined statement that the agreement is not subject to revocation.”

Finally, subsections (c) and (e) of these Statutes provide that “a party is entitled to judgment” on a MSA that meets the above requirements “notwithstanding Rule 11 or another Rule of law.”

It was undisputed that the MSA met the requirements of both §6.602(b) and §153.0071(d).

H says that relying on these two Statutes, W could not revoke consent to the agreement by non-suiting her divorce and, therefore, the T/C violated a ministerial duty by refusing to enter judgment on the agreement. H goes on to argue that without mandamus relief, he will be deprived of the rapid, inexpensive alternative to litigation provided by the FC. The CCA concluded that H lacked an adequate remedy from the T/C’s ruling because he would be deprived of the settlement benefits if forced to expend further time and resources litigating a suit that may have been settled. Mandamus was not granted based

upon a finding that the Court did not violate a ministerial duty in this case. The CCA went on to say that the T/C is required to enter judgment on a MSA that meets the requirements of subsection (d). Here the issue is not whether W could revoke or consent to the MSA, but whether the agreement itself was valid and enforceable. Notably, the lower court did not rule that W had revoked her consent to the MSA by taking a non-suit. To the contrary, in consolidating the two divorce actions, the Court expressly stated that W's non-suit did not defeat the agreement. Instead of immediately entering judgment on the MSA; however, the T/C reviewed the agreement and concluded it was void.

#### F. Rendition

Much has been said about rendition and how it relates to the timing of a repudiation. Therefore, a brief visit to what constitutes rendition seems appropriate.

Rendition is the judicial act whereby the Court settles and declares the decision of the law upon the matters at issue. *Comit Aluminum Company v. Dibrell*, 450 S.W.2d 45 (Tex. 1970). A judgment is rendered when the Judge either orally in open court, or by written memorandum filed with the Clerk announces the decision of the Court. *Sampels Exterminators v. Sampels*, 640 S.W.2d 873 (Tex. 1982). The entry of a written judgment is merely a ministerial act that reflects the Courts action. *Cook v. Cook*, 888 S.W.2d 130 (Tex. Civ. App. – Corpus Christi 1994, no writ). A party is entitled to revoke its consent to a SA at any time prior to the rendition of judgment. *Sampels*, supra at 875. A judgment rendered after a party revokes his consent is void. *Sampels* at 875. However, as has been noted, *Sampels* is not a Rule 11 or a mediation case, but rather a CSA case.

Additionally, there may be circumstances where the parties present an agreement to the court that does not completely comply with Rule 11, or, perhaps it does comply with Rule 11, but the Court does not instantly render and grant the divorce. Rather, there are circumstances where the Court “will” grant the divorce and “will” approve the property settlement as to be set forth in a final decree of divorce. Thus, there can be a distinction between whether or not there is an intent by the Court to sign the Decree in the future and for that to simply be entry and that rendition has occurred at the time that the prospective pronouncement as opposed to a future rendition. Therefore, the words used by the T/C must clearly indicate the intent to render judgment at the time the words are expressed. *Kelley v. Pirtle*, 826 S.W.2d 653 (Tex. Civ. App. – Texarkana 1992, writ denied). Likewise, where the SA is dictated into the record, it is indicated to be judgment of the court and any subsequent repudiation is ineffective, even though it leaves the signing of the final judgment to some future date. *Burrus v. Burrus*, No. 13-96-435 CV.

#### G. Mutual Mistake

The Appellate Courts of this State have stated that a party to an agreement may rescind that agreement if there is a mutual mistake of law. *Williams v. Glash*, 789, S.W.2d 261 (Tex. 1990). However, to avoid the contract, both parties must have acted under the same misunderstanding of the same material facts. *Lacy v. Ticor Title*, 794 S.W.2d 781 (Tex. Civ. App. – Dallas 1990, writ denied). There is a mutual mistake of facts “where the

parties in an agreement have a common intention, but the written contract does not reflect the intention of the parties due to mutual mistake.” *Okon v. Mbank, N.A.*, 706 S.W.2d 673 (Tex. Civ. App. – Dallas 1986, writ ref’d n.r.e.).

#### H. Entitlement to Judgment!

The crux of *Kasschau* as well as both *Spikes* and *Alvarez* is that under §6.602 and §153.0071 TFC “a party is entitled to judgment” on a MSA if certain requirements of those Statutes are met. Where the Legislature has not defined the terms in the Statute, the Court must apply the ordinary meaning.

Black’s Law Dictionary 553 (7<sup>th</sup> Edition, 1999) indicates “entitle“ means, in part, “to grant a legal right or qualify for”.

That a party has a “right to” judgment, or qualifies for judgment on a MSA, does not deprive the Court a discretion to review an agreement before entering judgment. While *Alvarez* precludes a party from revoking consent to a MSA that complies with §153.0071, it does not hold that the Court’s duty to enter judgment on such an agreement is ministerial. A Court’s duty to enter judgment on a SA becomes ministerial only after it has rendered judgment on that agreement. Here, the T/C approved the SA, but never rendered judgment on the agreement. As a result, the Court had no ministerial duty to enter judgment and, thus, did not violate such a duty.

The CCA goes on to say that notwithstanding their legal conclusion, they surmise from the underlying facts of the case that the parties did not intend for the Court to immediately enter judgment on the MSA. Specifically, the MSA expressly contemplated certain contingencies in connection with an intervention. A portion of the MSA was rather prospective as to what would happen in certain events as opposed to what the totality of the agreement was.

The case winds up with a conclusion that weights the Court’s responsibility of carrying out the States policy on encouraging the peaceable resolution that disputes involving the parent-child relationship through voluntary settlement procedures. On the other hand, public policy prohibits Courts from enforcing illegal contracts.

There was some splitting of the hairs, but the result probably was right and we have some good law if we read the case.

#### VI. No Treat When You are Guilty of a Trick

*In re Marriage of Nolder*, 2001 WL 568574 (Tex. Civ. App. – Texarkana 2001).

Dale O’Neil Nolder appeals from a final decree of divorce which he contends the trial court erred in rendering as a judgment that was not in conformity with the Rule 11 Agreement. The short facts are that H had stock options that expired on June 14, 1999. They entered into a SA on June 10, 1999 that divided the options.

*(One has to wonder why, with the options expiring 4 days after the Rule 11 Agreement, that someone did not suspect that there might be a problem with these options and make some further inquiries.)*

At any rate, as time went on, it was learned that Dale had actually exercised the options on June 7<sup>th</sup>, 3 days before the Rule 11 Agreement and he had decided to take 100% of the money and day-trade. Low and behold, Dale was lucky. Instead of loosing everything, he made a bunch of money.

The MSA Rule 11 Agreement gave W 55% of the value of the options, plus 10% interest until the funds were paid to her.

Obviously, under the facts of this case the 10% was not nearly as much as the day-trade growth.

The T/C awarded W 55% of everything that stems from the exercise of the options.

But, was W entitled to get, a windfall? The Restatement of Restitution, and *Medas v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974) indicate that the law of this State is clearly enunciated as:

“Where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and, not merely for the value of the property of the other with which he wrongfully dealt.....” Restatement of the Law: (*Restitution §1cmt. 1937*).

One could visualize this as nothing more than a post-divorce partition of a non-divided asset. One can argue that it is a mutation of what was a divorce asset, or one can argue that it is being divided under §9.203 TFC. This is your authority to go to court and deal with the non-divided, non-addressed asset or problem. The Court is not changing the agreement. The Court is going to enter a judgment based upon the MSA to the extent that the MSA addresses the problem. The Court can grant a summary judgment for that. The Court can then conduct a mini-trial, jury or non-jury, to deal with the other issues, if there are any. The thing to remember is, if you are faced with that problem, realize that you are faced with a problem. File a motion, give notice, have a hearing, have a trial, let the Court rule, build a record. Do not try and just ram an incorrect document referred to as an “agreed” decree or, perhaps even a non-agreed decree through that does not conform with the MSA. The same set of rules apply if it is not an MSA, but rather if it is a CSA or a Rule 11.

## VII. Conclusion

Do not rely upon the other party, nor the mediator, or any other third person to draft the document upon which you hope to have your client hang his/her hat as to settlement. If it

is a MSA, I suggest that the written court record clearly reflect that the parties went to mediation. If you are going to mediation, enter into a Rule 11 Agreement or an Agreed Order that you are going, and see that it is filed with the Court. That will make it clear that you have complied with at least the threshold question of whether or not it is a MSA under the non-revocation rules.

In the MSA itself, assuming that it is in fact a mediation, name who the mediator is, name the date that the mediation took place, have the mediator sign the MSA. If, in fact, one party is without counsel, or for some reason counsel will not be signing, be sure that you comply with the requirements of both §6.602 and §153.0071 as to the necessity of a lawyer who represents a party, sign if present when the document is signed.

*Note: The Statute does not say that she has to sign if she is present during the mediation. She signs if she is present during the “signing”.*

TFC §153.0071 and §6.602 has been refined, sharpened and changed every time some problems come up. As an example, both have been amended to address issues of revocation prior to entry of an order, but problems still exist in these agreements that are not addressed by the statutes. There are so few cases addressing §153.0071 and §6.602 and those cases require strict compliance. There is an indication of a mandate that the agreement stands on its face and anything left out goes unaddressed. However, it is this writer’s opinion that that is not the case. These statutes are no more than slicked up Rule 11’s with seat belts and shoulder harness and they are not much different than the form of District Court Rule 28 adopted in 1840 under the Laws of the Republic of Texas.

Bend over backwards, **CAPITALIZE IT, BOLDFACE IT, and UNDERLINE IT.** On the original, take a yellow highlighter and highlight it like a neon sign.

In spite of what some of the cases such as *Padilla* say about not rushing to the courthouse to file the MSA, get the original filed as quick as you can. The mediators all will tell you that they will get it filed, but they don’t always do it and they don’t always do it timely. My observation of nearly everyone who is a mediator, is that they don’t have much staff. They don’t have a high speed copier. They don’t go to the courthouse every day. They don’t have a postage meter. They don’t have anybody to type the cover letter. They “go” on your mediation until late at night and start another one the next morning. What does that tell you? It tells me that your MSA may sit around for awhile before it goes anywhere. No service or disrespect to the fine men and women of our profession who serve as Family Law Mediators. In fact, I take my hat off to them, but those are the facts.

If it is not a MSA, but instead a Rule 11 or some other form of a CSA, you do not have to comply with the TFC Mediation Rules.

What to do about the opposition who whips out the SA which is clearly entitled “Rule 11 – Settlement Agreement” or MSA? Take some time to read the boiler plate. In fact, if you can, insist that the boiler plate be read as soon as the opening session starts. It is very hard late in the day to go back and focus on the boiler plate. Look at the language for the

federal income taxes, the management of the children accounts and the actual boiler plate of the agreement. Later in the day and into the night you will be focused on who gets alternating Fall break, or has the right to use the football game parking pass for home games that fall on the 2<sup>nd</sup> and 4<sup>th</sup> weekends.

Every time you are faced with trying to defend or bust one of these agreements, the very best thing you can do is back up and look at why is the law like it is and what was the law that got us here. Go back to Birdwell of 1857. Go to Matthews v. Looney, 123 S.W.2d 871 (Tex. 1939) which simply stated:

**“An agreed judgment may not be rendered based upon a settlement if a party withdraws its consent prior to judgment”.** (*id at 874*)

Now, doesn't that sound a lot like TFC §7.006?

It seems the law of settlements has been reasonably well understood in the context of civil litigation, both for SA's and for court-ordered mediations. But, also understand that those circumstances are, in fact, in the commercial litigation context and it is highly unlikely that the parties continue to stand with fiduciary relationships one to the other. Nor, that they bring the same emotional baggage to the settlement arena that our clients are burdened with.

All of the cases are fact specific and Statute or Rule specific. Thus, one size does not fit all.

Has the Legislature helped or hurt the resolution of matrimonial law cases by holding it to higher standards for enforceability than in any other arena of dispute resolution of litigation in our court system?

Most of all, understand there is a difference between an MSA, a CSA, a Rule 11 and a plain old vanilla contract. Each are enforceable based upon their own special requirements. Each can be busted for failure not to comply with those requirements.