"Mediation Best Practices: The Most Dangerous Hour"

Revised by Jeff Kilgore Mediator, Lawyer and Arbitrator
Original Article by Tom Allen Attorney at Law Houston, Texas

Presented to The Association of Attorney Mediators

Advanced Mediator Training

"AVOIDING THE LINE IN THE SAND"

September 11, 2009

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My understanding is that you are mediators. How many people here today, whether you are a mediator or not regularly assist clients in mediation? How many regularly do both? (very progressive).

Tom Allen is not a mediator. He is a trial lawyer — or, as he prefers to say — a Resolver of Disputes. The disputes usually have cause numbers, but not always. He handled only commercial disputes — no hurt bodies, no family law. The view point concerning Family law are added by Jeff Kilgore

Therefore, between the two authors we will attempt to prescribe the "best practices" of a mediated settlement agreement applicable to attorneys and to help guide mediators when the mediated settlement agreement is being drafted.

Comment from Tom Allen. Mostly as a result of mediation I attend earlier last year— I wrote a paper called "Mediation's Most Dangerous Hour."

He wrote the paper for litigators, not mediators. I heard Tom give a talk to the Houston Bar ADR section October 2007 and I decided the topic may have something of value to share with you. (If you conclude that I have wasted your time, please blame me, not Tom Allen.)

Bottom line: Much of what will be discussed today is not your job as mediator. But I think there is some utility in reminding you about some particular set of pressures on the lawyers at your mediations.

My comments this today concern mediations that are "successful" — that is, mediations that have not ended with the mediator's declaration of an impasse.

"Mediation's Most Dangerous Hour." Which hour of mediation is the most dangerous? **The last hour, of course.**

- What has happened in the 3 (or 10) hours prior to the last hour? ***Information gathering, saber waiving, emotional outburst, option building, discussions Negotiations, , and finally a settlement.***

What happens in the last hour? Writing the agreement.

What's the goal of the Mediated Settlement Agreement ? **TO PRODUCE AN ENFORCEABLE AGREEMENT THAT WILL RESOLVE THE DISPUTE** under Texas law in civil cases and in addition under the Texas Family Code so one that the agreement irrevocable by the parties.

So, in the last hour of mediation, there is a fundamental shift in everyone's assigned tasks. Mediators: In the last hour, what's your job?
Lawyers: In the last hour, what's your/their job?

If you accept my thesis that the last hour of mediation is the most dangerous, dangerous for whom? ..... Not the mediator.

Who recognizes this statute? **TEX. CIV. PRAC. & REM. CODE § 154.055(a)** (immunizing mediators from almost all civil liability for acts or omissions relating to mediation).

Why is the last hour the most dangerous?
The client leaves the mediation believing that the dispute has been resolved.
Why does the client believe the dispute has been resolved?
1. The lawyer told the client the dispute has been resolved.
2. There's a piece of paper signed by both sides that says the dispute has been resolved. The "Memorandum of Mediated Settlement Agreement." or Mediated Settlement Agreement.
General premises a stated in **909 S.W.2d 192**
Josephine MARTIN, Appellant, v. Dan BLACK; Mary Patricia Black; W.H. Black; Brazco Development, Inc.; Black Ranch Partnership; Dan P. and W.H. Black Partnership; James Alsup; and Lynch, Chappell & Alsup, P.C., Appellees. (Tex. App.)

A mediated settlement agreement is enforceable in the same manner as any other contract. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a)(Vernon 1997); *Martin v. Black*, 909 S.W.2d 192, 195 (Tex.App.---Houston [14th Dist.] 1995, writ denied). An agreement is enforceable if it is "complete within itself in every

material detail, and [] contains all of the essential elements of the agreement." *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex.1995). The intent of the parties to be bound is an essential element of an enforceable contract, *see Foreca, S.A. v. GRD Development Co., Inc.*, 758 S.W.2d 744, 746 (Tex.1988), and is often a question of fact. *Id.* But where that intent is clear and unambiguous on the face of the agreement, it may be determined as a matter of law. *Cf. Padilla*, 907 S.W.2d at 461--62.

The settlement memorandum in this case sets out the essential terms of the agreement. No material or essential detail was left out. All that remained were the "final documents" necessary to carry out the agreement. Hardman claims the parties contemplated that signing final documents by January 1, 1997 was a condition precedent to the formation of an enforceable agreement. Since the documents were not signed by the deadline, Hardman says there was no contract. The issue, then, is whether the contemplated documentation was a condition precedent to the formation of a contract or simply a memorial of an already enforceable contract.

In *Foreca, S.A. v. GRD Development Co., Inc.*, the supreme court addressed the same issue. In that case, two offer

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letters contained language specifically making them subject to "satisfactory legal documentation." *See* 758 S.W.2d at 744--45. The court held the "subject to" language raised a fact issue concerning whether the parties intended the letters to be binding. *See id.,* 758 S.W.2d at 746. Similarly, in *Martin v. Black,* a settlement memorandum prepared pursuant to a mediated settlement contained language that "the parties' understandings are subject to securing documentation satisfactory to the parties." *See* 909 S.W.2d at 196. Following *Foreca,* the Houston court held that the "subject to" language left a fact issue on the question of the parties' intent to be bound by the settlement memorandum. *Id.* at 197.

There is no "subject to" language in the settlement memorandum in this case, however. The "final documents" provision neither suggests nor infers that the parties intended that the agreement was to be subject to any subsequent action by the parties, or that the signing of documents was to be a condition precedent to the formation of an enforceable contract. Thus, since the settlement agreement contains all essential terms, and there being no fact issue concerning whether the

parties intended the settlement agreement to be binding, the partial summary judgment enforcing the written settlement agreement is affirmed.

> Is it possible that the dispute has not been resolved?
>How could that happen?
> One party reneges on the deal. May be enforced as a contract or as a Rule 11 agreement however…
> the reneging party signed the Mediated Settlement Agreement, right?
> So how can he renege, successfully?
> Because the Memorandum of Settlement may not be enforceable.
> Back up: Let me remind you when and where the last hour is taking place.

Look again at a scene you have seen countless times.

Remember, my comments are addressed to the attorneys who are participating in mediation, and I believe the mediator should be aware of the pitfalls.

1. The energy that filled the room during the opening session is fading faster than the setting sun. You are dog fired, having bailed out of bed at 4:00 a.m. to polish your opening statement. (physical exhaustion of all participants)

2. The trash receptacles overflow with crumpled paper, empty soft drink cans, and "gourmet" leftovers served earlier in the day. (physical environment is deteriorating, especially if a/c shuts down for the day)

3. Some sort of compromise seems to be emerging, although no one but the mediator feels good about it. Your client /rep are equal parts skeptical and fidgety. (client probably is disappointed and maybe worried about reporting back to his or her parents, significant other, children or superiors (or his spouse) the party is ready to leave the scene.

4. In the ancient tradition of detis at machina, the mediator taps on your conference room door and sweeps in with new notes, a relieved smile, and crow's feet you'd swear weren't there this morning. They've agreed, he/she announces.

5. The mediator presents a form on which to draft the settlement memo. Victory is at hand. Everyone maybe starts thinking about a cool and refreshing beverage (at separate establishments).

Sum up: Disputants and their attorneys are:

PHYSICALLY TIRED - MAYBE VERY TIRED - MAYBE HUNGRY;
PROBABLY A LITTLE CLAUSTROPHOBIC - *Just get me out of here*;
PROBABLY DIS PPOIN TED;
POSSIBLY WORRIED ABOUT RAMIFICATIONS;
RELIEVED; STARTING TO RELAX. CLOSURE IS NEAR;.
THINKING ABOUT OTHER MATTERS; MAKING OTHER PLANS.

Under these circumstances, is the lawyer likely to perform his or her best legal work?
And yet, at this moment what is the lawyer supposed to do?

DRAFT, OR HELP DRAFT, OR AT LEAST APPROVE THE MEDIATED SETTLEMENT AGREEMENT MEMORANDUM.

How many of you are aware of a fully executed memorandum of settlement that ultimately proved to be unenforceable or otherwise inadequate?

What happened?

Why was the agreement inadequate?

Some reasons why a mediated settlement agreement may not be adequate:

Reason No. 1 that a memorandum of settlement maybe inadequate: The phrase "formal settlement documents to follow" covers up a failure to reach an agreement on all essential terms.
This failure may be intentional or not.

Mediators: What % of your mediations does not contemplate the execution of any document other than the memorandum of settlement and some sort of dismissal order?

The known failure to agree upon every material term.

In other words, at least one of the attorneys at the mediation recognized that the settlement memorandum did not constitute a complete agreement, but he crossed his fingers and hoped that the matter would clear itself up when the parties executed the "formal" settlement document. Why would any attorney do that?

a. He believed in good faith that, on a new day with rested hearts and minds, the parties would agree.
b. Thought he could slip it by the other side, even in the formal settlement agreement.
c. Sloth.
d. Takes too much time, which brings us to the ANIMAL CRACKERS!
Liberto v. D. F Stauffer Biscuit Co. Inc. began with Liberto's 1996 suit against Stauffer for infringement of a registered package design for animal crackers. In 1998, the parties executed a settlement agreement stating that Liberto would dismiss his suit and grant Stauffer an exclusive license for use of the striped design.
The agreement, however, "contemplated that the parties would continue to negotiate
'the specific terms of [the] license to be agreed upon." The parties negotiated, sure enough, but never agreed on the license terms.
Several years and machinations later, the Fifth Circuit concluded that the 1998 settlement document was the dreaded (and unenforceable) "agreement to agree." Liberto, who had hoped to collect damages for Stauffer's failure to pay royalties, went home empty- handed. **Liberto v. D. F Stauffer Biscuit Co. Inc. 441 F.3d 318 (5th Cir. 2006).**

Drafting a license agreement at mediation sounds tough to me. What is a solution to that? Two-day or multiple mediations.

After a lengthy mediation, the parties in Martin v. Black outlined the terms of a settlement on "two handwritten documents referred to as 'term sheets' which were signed by the parties and their counsel and or advisors." One sheet, however, stated that the "parties' understandings [were**] subject to securing documentation satisfactory to the parties."**
Martin v Black 909 S.W.2d 192 (Tex. App.—Houston [14th Dist.} 1995, writ denied).

Satisfaction apparently eluded Martin, who amended her petition and returned to the battlefield. When her opponents filed a "Motion to Enforce Settlement Agreement," Martin responded by swearing that she "did not intend for the handwritten 'term sheets' executed at approximately midnight at the conclusion of the second day of mediation ... to constitute final and binding settlement agreements." The trial court was unimpressed and granted the motion. The court of appeals reversed, explaining that "we cannot say as a matter of law whether the parties intended the formal documentation to be a condition precedent to a final settlement agreement or merely a memorial of any already enforceable settlement agreement."

The Dallas court seemed to reach the opposite result in **Lerer v. Lerer**, which affirmed a summary judgment enforcing a mediated settlement agreement, despite affidavit testimony that one party did not believe the agreement was binding. Although the settlements in both Martin and Lerer cases contemplated the post-mediation execution of additional documents, the Lerer agreement may be distinguished from the Marlin agreement (maybe) by the former's lack of any indication that it was "**subject to"** the documents to come. Prudence and good drafting strongly cautions against anything that looks like a **"subject to"** provision in a mediated settlement agreement

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The Golden Belt-and-Suspenders Award goes to the drafter of the mediated settlement agreement construed in **Castano v. San Felipe Agric., Mfg., & Irrigation Co., 147 S.W.3d 444 (Tex. App.—San Antonio 2004**). Although the agreement stated that "final documentation' and 'further documents' were necessary to reach a 'closing," it also provided that "**notwithstanding such additional documents the parties confirm that this is a written settlement agreement as contemplated by Section 154.071 of the Texas**

Shorthand for Reason No. 1 that a memorandum may be inadequate:
RSTTF ("Remaining Settlement Terms to Follow").
Hardman v. Dault, 2 S.W.3d 378, 381 (Tex. App.—San Antonio 1999, no pet. rev.) (affirming summary judgment enforcing settlement agreement contemplating 'final documents" but containing **no "subject to' language'**).Civil Practice and Remedies Code." The San Antonio court affirmed the summary judgment enforcing the agreement.

P380 A mediated settlement agreement is enforceable in the same manner as any other contract. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a)(Vernon

1997); *Martin v. Black*, 909 S.W.2d 192, 195 (Tex.App.---Houston [14th Dist.] 1995, writ denied). An agreement is enforceable if it is "complete within itself in every material detail, and [] contains all of the essential elements of the agreement." *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex.1995). The intent of the parties to be bound is an essential element of an enforceable contract, *see Foreca, S.A. v. GRD Development Co., Inc.*, 758 S.W.2d 744, 746 (Tex.1988), and is often a question of fact. *Id.* But where that intent is clear and unambiguous on the face of the agreement, it may be determined as a matter of law. *Cf. Padilla*, 907 S.W.2d at 461--62.

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contains all essential terms, and there being no fact issue concerning whether the parties intended the settlement agreement to be binding, the partial summary judgment enforcing the written settlement agreement is affirmed.

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Reason No. 2 that a memorandum of settlement may be inadequate:
SOOFE (“Settlement Depends on Future Event”).

For example, Plaintiff maybe insisting at the mediation that he won’t eat more than 50% of his loss, but Defendant either can’t or won’t cough up enough cash to break 30%. It’s late (isn’t it always?), and the mediator has used the “I” (impasse) word twice.

Then Defendant remembers it has **a third-party deal that will close in a few months that should generate enough nickels to pay Plaintiff 65% of its loss.** The compromise is obvious, but the risk should be, too. What if the deal doesn’t close? Worse, what if Plaintiff concludes the deal didn’t close because Defendant had a little “discussion” with the third party?

Even in the absence of bad faith, **a settlement that turns on a future event** probably is an ill-advised path out of the mediator’s conference room.

The plaintiff in **Malatt v. C & R Refrigeration, 179 S.W.3d 152 (Tex. App.—Tyler 2005, no pet. rev.)** demanded the return of its deposit toward C & R’s manufacture of a super- fast freezer. When additional payments went AWOL, C & R ceased production of the machine and kept the deposit. The parties signed a settlement agreement requiring C & R to “use its best efforts to market and sell [the freezer], in an expeditious and commercially reasonable manner.” When the freezer was sold, the parties agreed, C & R would refund the deposit “immediately.”

The sale, however, was less than super-fast. In fact, the freezer remained unsold after three years of what the trial court found to be the “best efforts” required by the settlement agreement. Since the freezer’s sale was a condition precedent to C & R’s obligation to return the deposit, the trial court concluded, the deposit need not be returned. Furthermore, the court decided that the sale of the freezer had become a “commercial impracticability,” and it declared C & R discharged from the obligations of the settlement agreement. The Court of Appeals affirmed.

Look to Longfellow for this last-hour rule: "Trust no future events, howe'er pleasant!" From Henry Wadsworth Longfellow, "A Psalm of Life," in THE COMPLETE POETICAL WORKS OF LONGFELLOW (1893).

Reason No. 3 that a memorandum of settlement may be inadequate:
The scope of the release is ambiguous.

The scope of a release in a memorandum of settlement is not your job. But have compassion for the lawyers in your mediation who are parsing a settlement memorandum's release language. To say the least, the Texas courts sometimes construe releases in a manner that, well, you might not expect.

Apparently, every Texas court of appeals has a word processing macro for the following text:

"To release effectively a claim in Texas, the instrument must 'mention' the claim to be released. Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 938 (Tex. 1991). Even if the claims exist when the release is executed, any claims not clearly within the subject matter of the release are not discharged. Id."

Thanks very much, but, as a legal guide, that quote and three bucks will buy you a latte and not much else.

Nine years after Brady, perhaps sensing that "mention" comes up a little short in the Precision Department, the Supreme Court took another run at releases in **Keck, Mahin & Cate v. National Union Fire Ins. Co**. **20 S.W.3C1 692 (Tex. 2000).**

There the Court observed that **"Brady** simply holds that the release must 'mention! the claim to be effective. It does not require that the parties anticipate and identify, each potential cause of action relating to the release's subject matter." Although Keck reiterated that a claim is not released unless it is "mentioned" and explained what "mention" is not, the Court never really said what "mention" is in the context of a release.

Keck release language:

"Granada hereby releases and by these presents does hereby release, acquit and forever discharge KMC, its agents, servants, employees, partners, affiliates and all persons, natural or corporate, in privity with it, from any and all demands, claims or causes of action of any kind whatsoever, statutory, at common law or otherwise, now existing or that might arise hereafter, directly or indirectly attributable to the rendition or [sic] professional legal services by KMC to Granada between June 1, 1988 and April 1 1992." 20 SW3rd ,697

It should be no surprise, then, that the lower courts continue to wrestle with settlement agreements that recite the release of "all claims." Subsequent cases

have hammered home the rule that, in the absence of a "mention," even the broadest possible release may not be effective. See, e.g., **Davis v, American Bank of Commerce, No. 03-04-00482-CV, 2005 WE 1489751, at *3 (Tex. App.—Austin June 23, 2005, rev. denied**
(mutual release explicitly "intended to be of the broadest nature and to be dispositive of all matters involving [the parties], known or unknown" found to be ambiguous).

Other recent cases illustrating that the scope of releases continues to be problematic:
Kalyanaram v. Burck, No. 08-05-00132-CV, 2006 WE 1559230 at *6 (Tex. App.—E1 Paso June 8, 2006, no pet. hist.) (holding that release of all civil claims ... aris[ing] out of the subject matter of [the settled) litigation" included release of later claim for malicious prosecution).

Biggs v. ABCO Props, hic., No. 13-03-00398-CV, 2006 WE 414919 at *3 (Tex. App.—Corpus Christi Feb. 23, 2006, Rule 53.7(f) motion granted) (holding that lender's release from "all claims ... arising out of or in any manner relating to any of the commercial agreements and/or relationships existing among or between any of them" did not "mention" guaranty and, therefore, did not release guarantor).
Reason No. I that a memorandum of settlement may be inadequate:
RSTTF ("remaining settlement terms to follow")

RECAP

Reason No. 1 that a memorandum may be inadequate:
RSTTF ("Remaining Settlement Terms to Follow").

Reason No. 2: SDOFE
("settlement depends on future event")

Reason No. 3: The scope of the release is ambiguous.

In the case of a Family Law mediation reference to the **Texas Family Code Section 153.0071 and Texas Family code 6.62** that requires the irrevocable nature a mediated agreement be bolded and in (good practice 16 point type) be included in the agreement before the signature lines.
"THIS AGREEMENT IS IRREVOCABLE" or THE AGREEMENT IS NOT SUBJECT TO REVOCATION

The additional problems of a family mediated agreement desires a review pertaining to Mediated Agreements effecting the children is a SAPCR
A Good analysis if found in
199 S.W.3d 354 (TX 2006)
BEYERS v. ROBERTS

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199 S.W.3d 354 (TX 2006)
BEYERS v. ROBERTS

Kenneth C. BEYERS, Appellant,
v.
Jeanette F. ROBERTS, Appellee.

No. 01-04-00619-CV.

Court of Appeals of Texas, Houston (1st Dist.).

April 27, 2006
Rehearing Overruled June 14, 2006.

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This Page Contains Headnotes.

Appeal from the 311th District Court, Harris County, Doug Warne, J.

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Shawn Casey, Shawn Casey & Associates, Houston, for appellant.

Judson W. Roberts, Beverly B. Lord, Houston, for appellee.

Panel consists of Justices TAFT, HIGLEY and BLAND.

OPINION

JANE BLAND, Justice.

In a suit to modify the parent-child relationship, Kenneth Beyers appeals from an order establishing a joint managing conservatorship with appellee Jeanette Roberts of minor children L.R.B. and C.A.B. On appeal, Beyers contends the

trial court erred in entering the order because (1) the mediated settlement agreement on which the order is based is void for its failure to designate a conservator with the exclusive right to designate the primary residence for the children, (2) the court's refusal to determine whether the mediated settlement agreement was in the children's best interest violates the Family Code and public policy, and (3) the court's order did not strictly comply with the agreement of the parties and ought to have been rescinded for mutual mistake. Beyers also complains that the trial court erred in signing a conclusion of law stating that it had granted the relief Roberts requested when, in fact, it did not. We affirm.

Facts

Beyers and Roberts divorced in 1998. Following the divorce, Beyers received custody of the children under a settlement agreement. Shortly after the divorce, Beyers alleges that Roberts began engaging in a pattern of parental alienation behaviors by repeatedly calling him disparaging names to the children, by mocking and ridiculing him to the children, by undermining his reasonable discipline of the children,

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and by otherwise disparaging and verbally attacking him to the children.

In 2002, Beyers petitioned the court for child support and for injunctive relief against further parental alienation behaviors by Roberts. Beyers also asserted a tort claim for intentional interference with a family relationship. Roberts counter-petitioned, requesting that the court appoint her to be the primary custodial parent, and award her the exclusive right to determine the primary residence of the children. Roberts also unsuccessfully sought temporary custody of the parties' daughter during the pendency of the case.

In December 2003, the parties attended a mediation session, which resulted in a settlement agreement providing for joint managing conservatorship and for increased periods of possession of the children by Roberts. Roberts and Beyers each signed the agreement, along with their attorneys. The agreement provided that neither party was to have primary designation, expressly stating, "Parties are appointed Joint Managing Conservators with no primary designation." The agreement provided, however, that the children's domicile be restricted to Harris County, Texas. The agreement further provided that, effective January 2004, C.A.B. would attend Emmanuel Lutheran School and L.R.B. would attend

Lutheran High North School. The agreement was made "subject to the Court's approval."

Shortly after the mediation, Beyers objected to entry of a court order based on the agreement because it failed to designate a parent with the right to determine the children's primary residence. The court sent the parties back to mediation to resolve the issue. After the second mediation session resulted in impasse, Beyers asked the court to declare the settlement agreement void for failing to assign one parent the right to designate the children's primary residence. Beyers also moved to rescind the agreement because Emmanuel Lutheran School could not accept C.A.B. by mid-semester transfer, and alternatively, for the court to determine whether the agreement was in the children's best interest. The trial court denied all of Beyers's motions, and entered a modification order incorporating the terms of the settlement agreement.

Failure to Include Primary Residence Designation

In his first issue, Beyers contends the mediated settlement agreement is void and thus unenforceable because it fails to designate a conservator with the exclusive right to determine the children's primary residence as required by Family Code section 153.133(a)(1). *See* Act of Apr. 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 149-50, *amended by* Act of May 17, 1999, 76th Leg., R.S., ch. 936, § 1, 1999 Tex. Gen. Laws 3674, 3674, *further amended by* Act of May 27, 2003, 78th Leg., R.S., ch. 1036, § 10, 2003 Tex. Gen. Laws 2990, 2990 (amended non-substantively 2005) (current version at TEX. FAM.CODE ANN. § 153.133 (Vernon Supp.2005)).(fn1) The mediated settlement agreement and the order signed by the trial court both state that Roberts and Beyers are appointed joint managing conservators with no primary designation, and the children are to be domiciled in Harris County, Texas. Roberts responds that the mediated settlement agreement complies with the requirements set forth in Family Code section 153.0071, pertaining to child custody lawsuits, and

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thus it is binding on the parties. *See* TEX. FAM.CODE ANN. § 6.602 (Vernon Supp. 2005); *see also* Act of May 25, 1995, 74th Leg., R.S., ch. 751, § 27, 1995 Tex. Gen. Laws 3888, 3899, *amended by* Act of May 13, 1997, 75th Leg., R.S., ch. 937, § 3, 1997 Tex. Gen. Laws 2941, 2941, *further amended by* Act of May 6, 1999, 76th Leg., R.S., ch. 178, § 7, 1999 Tex. Gen. Laws 645, 647, *further*

amended by Act of May 30, 1999, 76th Leg., R.S., ch. 1351, § 2, 1999 Tex. Gen. Laws 4577, 4578 (amended 2005) (current version at TEX. FAM.CODE ANN. § 153.0071 (Vernon Supp.2005)).(fn2) We agree.

Family Code section 153.133 states that a "court shall render an order appointing the parents as joint managing conservators only if," among other requirements, an agreed parenting plan "designates the conservator who has the exclusive right to designate the primary residence of the child." TEX. FAM.CODE ANN. § 153.133(a)(1). Another Family Code provision, however, applies to mediated settlement agreements. Section 153.0071 states that a mediated settlement agreement is binding on the parties if (1) it 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. *Id.* § 153.0071(d). The statute further provides that, if a mediated settlement agreement meets the requirements of section 153.0071(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." *Id.* § 153.0071(e).

The Fort Worth Court of Appeals has held that the "notwithstanding" clause contained in Family Code section 6.602(c), which is identical to section 153.0071(e), but applies to divorce actions rather than child custody lawsuits, means the requirements of Rule 11 and the common law that ordinarily apply to the enforcement of settlement agreements do not apply to mediated settlement agreements in divorce proceedings, if the agreements meet the three requirements listed in Section 6.602(b). *Boyd v. Boyd*, 67 S.W.3d 398, 403 (Tex. App.-Fort Worth 2002, no pet.). A settlement agreement could nonetheless be unenforceable, even though it meets the requirements of section 6.602(b), if it results from fraud, or if its provisions are illegal. *See id.* Contracts, including mediated settlement agreements, generally are voided for illegality only when performance requires fraud or a violation of criminal law. *See In re Kasschau*, 11 S.W.3d 305, 314 (Tex. App.-Houston [14th Dist.] 1999, pet. denied) (mediated settlement agreement voided for requiring criminal act of destruction of evidence).

Beyers relies upon *In re Calderon* to assert that any violation of the Family Code constitutes illegality and thus is grounds for voiding a mediated settlement agreement. *See In re Calderon*, 96 S.W.3d 711 (Tex.App.-Tyler 2003, no pet.). In *Calderon*, the court held that Family Code section 153.0071 did not permit the

parties to contract around the mandatory venue requirements in Family Code section 155.201. *Id.* at 718; *see* TEX. FAM. CODE ANN. § 155.201(b) ("If a suit to modify or a motion to enforce an order is filed in the court having continuing, exclusive jurisdiction of a suit, on the timely motion of a party the court shall, within the time required by Section 155.204, transfer the

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proceeding to another county in this state if the child has resided in the other county for six months or longer."). The statute that Beyers contends the agreement violates, however, is not mandatory under these facts. Although section 153.133 states that a court "shall render an order" granting a joint conservatorship if the requirements of that statute are met, it does not otherwise preclude a court from entering such an order pursuant to a mediated settlement agreement that complies with section 153.0071 where section 153.133's requirements are not met.

While section 153.133 deals generally with agreed parental plans creating joint managing conservatorships, section 153.0071(d) deals specifically with mediated settlement agreements. A fundamental principle of statutory construction is that a more specific statute controls over a more general one. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex.2000). The Government Code provides that general and specific provisions should be construed, if possible, to give effect to both, but when they cannot be reconciled, the specific provision should prevail. *See* TEX. GOV.CODE ANN. § 311.026 (Vernon 2005); *State v. Alley*, 137 S.W.3d 866, 868 (Tex.App.-Houston [1st Dist.] 2004), *aff'd*, 158 S.W.3d 485 (Tex.2005). In *Garcia-Udall v. Udall*, the Dallas Court of Appeals determined that section 153.0071 controlled over section 153.007, because section 153.0071 deals specifically with mediated settlement agreements, while section 153.007 deals generally with agreements "containing provisions for conservatorship and possession of the child." 141 S.W.3d 323, 331 (Tex.App.-Dallas 2004, no pet.). Like section 153.007, section 153.133 deals generally with agreements containing provisions for "joint managing conservatorship." Thus, as long as the settlement agreement complies with section 153.0071, its failure to include all the elements required under section 153.133 does not render it void.

Here, it is undisputed that the parties' agreement meets the requirements set forth in section 153.0071(d). Paragraph 10 of the agreement states ***"THIS AGREEMENT IS NOT SUBJECT TO REVOCATION,"*** and the agreement is

signed by each party and by each party's attorney. We hold that the mediated settlement agreement meets the requirements of section 153.0071, and thus the trial court did not err in entering the order enforcing the parties' agreement.

This time in the mediation can be very treacherous for the lawyers.
What as mediators can you do — if anything — to make it less treacherous?

1. Review the agreement of the parties that is on your tablet or on a board to see if all points are covered. Are all provisions of a contract stated

2. Live in the Question:

a. Is the release language or scope ambiguous?

b. Are the issues and disputed areas covered in the Mediated Settlement Agreement?
c. Is the Mediated Settlement Agreement based upon third party actions?

d. Is the agreement contingent on future events? or ask if **subject to** language should be in the agreement or left out

e. Are all elements of the agreement present?

f. Possibly build into the form the language **notwithstanding such additional documents the parties confirm that this is a written settlement agreement as contemplated by Section 154.071 of the Texas Civil Practices and Remedies Code**

Remain impartial throughout the mediation and remember that ultimately the settlement is the parties with advice of their attorneys or that they have had an opportunity to review the agreement with an attorney if they desire to do so.

The discussion of whether a mediator should help prepare the mediated settlement agreement is where we now. Participant discussion w panel.

The language to keep your insurance in effect is part of this hand out.

I have also attached my basic form for civil and family mediation in case it can be of value to anyone.