THE ROAD TO SETTLEMENT: RULE 11 AGREEMENTS, INFORMAL SETTLEMENT AGREEMENTS AND MEDIATED SETTLEMENT AGREEMENTS

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CHAPTER 6

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PROFESSIONAL ACTIVITIES

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Board Certified, Civil Appellate Law (1988-present)
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Texas Board of Legal Specialization

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The Supreme Court of Texas
The Supreme Court of the United States
The United States Courts of Appeals for the Fifth and Eighth Circuits
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Martindale-Hubbell - "AV" rating
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Texas Super Lawyer 2003, 2004 & 2006 Family Law (Texas Monthly and Law & Politics magazine)

Fellow, American Academy of Matrimonial Lawyers

President-Elect (2010-2011), Vice-President (2009-2010), Secretary (2008-2009), Treasurer (2007-2008), Texas Chapter of American Academy of Matrimonial Lawyers

Certified as a Matrimonial Arbitrator by the American Academy of Matrimonial Lawyers
Member, Council, State Bar Family Law Section 2006-2011

Member, Legislative Committee, State Bar Family Law Section

Member, Pro Bono Committee, State Bar Family Law Section

Chair (2009-present), Member (2007-present), Membership and Member Services Committee, State Bar Family Law Section

Member, Strategic Planning Committee, State Bar Family Law Section

Member, Board of Editors, Family Law Section Report, State Bar Family Law Section 2007-present

Member, Family Law Pattern Jury Charge Committee, State Bar of Texas (2009-present)

Advisory Member, Judicial Committee on Information Technology

Member, The Collaborative Law Institute of Texas

Member, Professionals for Collaborative Family Law

Course Director, 33rd Marriage Dissolution Seminar, San Antonio, Texas, May 2010.

Co-Chair, Family Law on the Front Lines (University of Texas 2003, 2004, 2005, 2006 and 2007)

Associate Chair, Family Law on the Front Lines (University of Texas 2002)

Co-Course Director, Texas Academy of Family Law Specialists Trial Institute (2010) (with Georganna Simpson)

Member, Planning Committee, Texas Academy of Family Law Specialists Trial Institute (2009)

Member, Planning Committee, Advanced Family Law Drafting Course (2008 & 2010)

Member, Planning Committee, Advanced Family Law Course (2003, 2007 & 2011)

Member, Planning Committee, Marriage Dissolution Seminar, Austin, Texas 2011.

Member, Planning Committee, Family Law on the Front Lines (University of Texas 2001-2007)

Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)

Member, Planning Committee, Fifth, Sixth, Ninth, Tenth, Eleventh and Thirteenth Annual Advanced Civil Appellate Practice Courses (1991-92, 1995-97, 1999)

Member, Council, State Bar Appellate Practice & Advocacy Section 1995-1998

Member, Editorial Board, APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section 1994-97

Member, Task Force on Staff Diversity, Texas Commission on Judicial Efficiency 1995-96

Chair, Civil Appellate Law Section, Travis County Bar Association November 1991-1993, 1995-1997

Member, Austin Bar Association Board of Directors November 1991-1993, 1995-1997, 2006-2007

Member, Texas Academy of Family Law Specialists

Sustaining Lifetime Member, Texas Family Law Foundation

Member, Lloyd Lochridge Inn, American Inns of Court (2010-present)

Member, Travis County Family Law Advocates; President (2002-2003), Secretary/Treasurer (2001-2002)

Public Service Award, The Women's Advocacy Project (2003)

Member, Family Law Section Board of Directors, Austin Bar Association (2003-2007); Treasurer (2004-2005); President Elect (2005-2006); President (2006-2007)

Staff Attorney, Hon. Jack Hightower,
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The Supreme Court of Texas 1989-1995

EDUCATION

Baylor University School of Law J.D., *cum laude* 1980

University of Texas at Austin B.A. 1974

SELECTED APPELLATE CASES

Fish v. Lebrie, 2010 WL 5019411 (Tex. App.- Austin 2010, no pet.).

Izzo v. Izzo, 2010 WL 1930179 (Tex. App.- Austin 2010, pet. denied).

Cox v. Cox, 298 S.W.3d 726 (Tex. App.- Austin 2009, no pet.).

Barina v. Barina, 2008 WL 4951224 (Tex. App.- Austin 2008, no pet.).

Meadows v. Midland Super Block Joint Venture, 255 S.W.3d 739 (Tex. App.- Eastland 2008, no pet.).

Holmes v. Kent, 221 S.W.3d 622 (Tex.2007).

Zeifman v. Sheryl Diane Michels, 229 S.W.3d 460 (Tex. App .- Austin 2007, no pet).

Fox v. Fox, 2006 WL 66473 (Tex. App.- Austin 2006, no pet.).

Hart v. Webster, 2006 WL 1707975 (Tex. App.- Austin 2006, no pet.).

Zeifman v. Michels, 212 S.W.3d 582 (Tex. App.- Austin 2006, pet. denied).

Sheshunoff v. Sheshunoff, 172 S.W.3d 686 (Tex. App.- Austin 2005, pet. denied).

In re J.R.D., 169 S.W.3d 740 (Tex. App.- Austin 2005, pet. denied).

In re L.M.M., 2005 WL 2094758 (Tex. App.- Austin 2005, no pet.).

Colvin v. Colvin, 2004 WL 852266 (Tex. App.- Austin 2004, no pet.).

Hoffman v. Hoffman, 2003 WL 22669032 (Tex. App.- Austin 2003, no pet.).

Rosen v. Wells Fargo Bank Texas, N.A., 114 S.W.3d 145 (Tex. App.- Austin 2003, no pet.).

Goodenbour v. Goodenbour, 64 S.W.3d 69 (Tex. App.- Austin 2001, pet. denied).

L.P.D. v. R.C., 959 S.W.2d 728 (Tex. App.- Austin 1998, pet. denied).

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"The Road to Settlement: Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements," 34th Marriage Dissolution Seminar, Austin, Texas, April 2011.

"Alternative Drafting Orders and Decrees to Those Found in the Family Law Practice Manual", Advanced Family Law Drafting Course, Houston, Texas December 2010.

"The Future of Premarital, Postmarital, and Cohabitation Agreements", New Frontiers in Marital Property Law, Scottsdale, Arizona, October 2010.

"Take This House and Shove It", Texas Advanced Paralegal Seminar 2010.

"Appellate Purgatory: Actions You Can Take During Appeal and After Remand", 36th Annual Advanced Family Law Course, San Antonio, Texas, August 2010.

"Appellate Practice From Every Angle", 36th Annual Advanced Family Law Course, San Antonio, Texas, August 2010 (with Georganna Simpson).

"Different Ways to Trace Separate Property", 35th Annual Advanced Family Law Course, Dallas, Texas, August 2009.

"Marital Property Agreements: And You Know It Don't Come Easy," 2009 State Bar of Texas Annual Meeting, Dallas, Texas, June 2009.

"Different Ways to Trace Separate Property", New Frontiers in Marital Property Law, Napa, California, October 2008.

"The Marital Residence: There's No Place Like Home," 31st Marriage Dissolution Seminar, Galveston, Texas, April 2008.

"Dealing with Unusual Trusts", New Frontiers in Marital Property Law, Memphis, Tennessee, October 2007.

"Post Judgment Issues: Sometimes Its Heaven, Sometimes Its Hell, and Sometimes You Don't Even Know," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?," APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5 (Summer 2006)

"Witness Preparation," Family Law on the Front Lines, Galveston, Texas, June 2006.

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Family Law Case Update," 20th Annual Texas Association of Domestic Relations Offices Conference, Austin 2004.

"Family Law in Probate Court," Travis County Family Law Section, Austin 2004.

"Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)", 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.

"Early Stage Companies," Family Advocate, Vol. 25, No. 3, American Bar Association Winter 2003.

Obtaining and Retaining the Benefit of the Bargain- Premarital and Martial Agreements," New Frontiers in Marital Property Law, San Antonio, Texas October 2002.

"Business Interests: Characterization as Separate or Community Interests,"Expert Witness Manual, Volume I, Chapter 2-9, State Bar of Texas August 2002.

"Contesting and Defending Premarital Agreements", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Termination and Adoption: It Ain't Over Till It's Over", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"High Tech Evidence: How to Find It, Retrieve It and Get It In", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuation of Law Practice in Divorce," American Academy of Matrimonial Lawyers, Sanibel, Florida March 2002.

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

"Professional Partings: Valuing Medical/Legal Professional Practices", 27th Annual Advanced Family Law Course, San Antonio, Texas, August 2001.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.

"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

"Pretrial and Trial Strategies for the Complex Property Case", Santa Fe, New Mexico, October 2000.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Bill of Review", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Appellate Tips: Judges Panel", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual

Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Litigating Marital Agreements: "You Can't Always Get What You Want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

"Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties," New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

"Appeal of the Coverage Suit," Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

"The New Appellate Rules -- At Last!" Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

"Factual and Legal Sufficiency in the Texas Supreme Court," Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)

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THE ROAD TO SETTLEMENT

I. INTRODUCTION

This paper attempts to enlighten the bar about the pitfalls which await those who try to navigate their way from an executed settlement agreement to a signed, written order. The paper covers the ins and outs of Rule 11 agreements, informal settlement agreements and mediated settlement agreements, and the basic reasons why it is so important to get orders timely signed which incorporate the terms of these types of agreements. This paper will not address defending or attacking a mediated settlement agreements.

II. RULE 11 AGREEMENTS

Rule 11 of the Texas Rules of Civil Procedure governs written and oral agreements that involve the settlement of pending lawsuits or contested issues in a lawsuit. The rule provides:

> "Unless otherwise provided in the Texas Rules of Civil Procedure, no agreement between attorneys or parties touching any suit pending is enforceable unless it is in writing, signed and filed with the papers as part of the record, or is made in open court and entered of record."

See TEX. R. CIV. P. 11.

Attorneys often use the term "Rule 11 Agreement" as if it were a specific type of agreement. However, Rule 11 is a rule of procedure and does not do much to define the form or substance of settlement agreements. Rule 11 simply provides that no agreement to settle a lawsuit will be enforced by a court unless "it is in writing, signed and filed with the papers as part of the record, or is made in open court and entered of record." It is only in this sense that Rule 11 defines a type of agreement (i.e., an enforceable agreement versus a non-enforceable agreement to settle a lawsuit).

A. The Prerequisites of an Enforceable Rule 11 Agreement

1. An Agreement to Settle a Pending Lawsuit

A stipulation, or agreement between the parties, in order to suffice under Rule 11, must be "an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys," and limits or excludes the issues that can be tried. *Rosenboom Machine & Tool, Inc. v. Machala*, 995 S.W.2d 817, 821 (Tex. App.-Houston [1st Dist.] 1999, pet. denied) (quoting *Hanson v. Academy Corp*., 961 S.W.2d 329, 335-36 (Tex. App.–Houston [1st Dist.] 1997, writ denied)). Thus, to be a Rule 11 agreement, the agreement or stipulation must "obviate[s] the need for proof on [one or more] litigable issue[s]." *Id.*

A Rule 11 agreement is only valid if it is entered in a pending lawsuit. A compromise and settlement of a claim prior to the filing of a suit does not fall within the ambit of Rule 11. *See, e.g., Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 393 (Tex. 1993). There is a difference between an agreement concerning a pending lawsuit, which falls under Rule 11, and a lawsuit concerning an agreement, which is merely a suit on a contract. *Id.* This distinction is illustrated in *Banda v. Garcia*, 955 S.W.2d 270 (Tex. 1997). Although *Banda* does not address Rule 11 directly, it does shed light on the enforceability of oral pre-suit agreements. In *Banda*, Garcia's attorney made an offer to settle with Banda's attorney prior to suit being filed. The offer was evidenced by a letter that set out the offer and stated that, if the offer was not accepted by a certain deadline, then the offer would be withdrawn. *Id*. at 271. The deadline passed, and Garcia withdrew the offer and filed suit to enforce the agreement. *Id.* The trial court found that an oral agreement existed, but the court of appeal reversed, stating the unsworn testimony of the attorney was not enough to support a finding of an enforceable settlement agreement. *Id.* The Supreme Court reversed the court of appeals, holding that the attorney's comments were some evidence of an enforceable pre-suit settlement agreement. *Id.* at 272.

Thus, Rule 11 requires settlement agreements in a pending lawsuit to be in writing, but is silent on the issue of settlement offers. TEX. R. CIV. P. 11; *Trinity Univ. Ins. Co. v. Bleeker*, 944 S.W.2d 672, 675 (Tex. App.—Corpus Christ 1997), *rev'd in part on other grounds*, 966 S.W.2d 489 (Tex. 1998). *See also Carter v. Allstate Ins.*, 962 S.W.2d 268, 271 (Tex. App.—Houston [1st Dist.] 1998, pet denied) (holding that a pre-suit oral settlement agreement between an insurer and a claimant against its insured is not rendered unenforceable by Rule 11); *Recio v. Recio*, 666 S.W.2d 645, 648 (Tex. App.—Corpus Christi 1984, no writ) (holding that Rule 11 did not bar ex-wife's suit because the alleged agreement was not made as an incident to the suit, but rather as a defense to it, so Rule 11 had no application in that instance).

2. Material Terms.

To be enforceable, all the terms of a settlement agreement need not be contained in the judgment. *Compania Financiara Libano v. Simmons*, 53 S.W.3d 365,368 (Tex. 2001). Rather, a settlement agreement is enforceable as a contract even though its terms are not incorporated in the judgment. *Id.* But the Rule does require that the agreement must be complete "as to every material detail" and must contain "all the essential elements of the agreement so that the contract can be ascertained from the writing, without resort to oral testimony." *CherCo Props. v. Law, Snakard & Gambill, P.C.*, 985 S.W.2d 262, 265 (Tex. App. -Fort Worth 1999, no pet.). A stipulation must be clear enough so

that enforcement of the agreed terms can be accurately reflected in a judgment. A trial court has no power to supply terms, provisions, or details not previously agreed to by the parties. *Tinney v. Willingham*, 897 S.W.2d 543, 545 (Tex. App.-Fort Worth 1995, no writ). If a judgment does not conform to the settlement agreement, it will be rendered unenforceable. *Nuno v. Pulido*, 946 S.W.2d 448,451 (Tex. App.-Corpus Christi 1997, no writ).

3. Clear and Unambiguous

An agreement or stipulation must be clear enough so that enforcement of the agreed terms can be accurately reflected in a judgment. Further, an agreement or stipulation that is ambiguous or unclear should be disregarded by the court. *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 821 (Tex. App.-Houston [1st Dist.] 1999, pet. denied); *Laredo Medical Group v. Jaimes*, 227 S.W.3d 170, 174 (Tex. App.– San Antonio 2007, pet. denied). To construe a stipulation, a court must "determine the intent of the parties from the language used in the entire agreement, examining the surrounding circumstances, including the state of the pleadings, the allegations made therein, and the attitude of the parties with respect to the issue. *Rosenboom*, 995 S.W.2d at 821 *Laredo Medical Group*, 227 S.W.3d at 174. But a stipulation should not be given greater effect than the parties intended, nor should it be construed as an admission of fact intended to be controverted. *Rosenboom*, 995 S.W.2d at 822, *Laredo Medical Group*, 227 S.W.3d at 174.

It is particularly important in family law matters to reduce any stipulations to writing, even if it is scratched out on a notepad. The stipulation should include all aspects of the agreement, including a listing of the obligations of each party. The attorney may omit the parent-child issues (*i.e.*, support, possession and access, rights and duties), all property issues, and financial obligations of both parties; but, the attorney must remember that any omitted issue remains contested.

4. In Writing.

The Rule requires that agreements, stipulating to certain facts, "between attorneys or parties concerning a pending suit to be in writing, signed and filed in the record of the cause to be enforceable." *London Mkt. Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991); *El Paso Independent School Dist. v. Alspini*, 315 S.W.3d 144, 150 (Tex. App.– El Paso 2010, no pet.). Rule 11 exists because verbal agreements of counsel respecting the disposition of cases are likely to be misconstrued and forgotten and to lead to misunderstandings and controversies, *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *Kosowska v. Kahn*, 929 S.W.2d 505, 507 (Tex. App.– San Antonio 1996, writ denied). For example, a settlement agreement dictated during a deposition that was transcribed, filed, and signed by the court reporter, but not by the parties or attorneys, was found not enforceable as a Rule 11 agreement. *Tindall v. Bishop, Peterson and Sharp*, 961 S.W.2d 248, 251 (Tex. App.-Houston [1st Dist.] 1997, no writ). The court specifically found that the agreement was neither "(1) in writing, signed and filed with the papers as part of the record, nor was it (2) made in open court and entered of record." *Id.* Conversely, another court held that an agreement between the parties and counsel that was dictated to the court reporter was enforceable as a Rule 11 agreement. *Kosowska v. Kahn*, 929 S.W.2d 505, 507-08 (Tex. App.-San Antonio 1996, writ denied). Thus, if this type of situation presents itself, it is strongly suggested that the complete agreement, containing all salient terms, be read verbatim to the court reporter. All parties and counsel should then acknowledge the stipulation so dictated as the agreement, and that all parties intend to be bound by it. Then, as soon as possible after the deposition, a written Rule 11 agreement, memorializing the agreement, should be prepared and signed by each party. Alternatively, immediately secure a transcript of the agreement from the court reporter and attach a Rule 11 cover sheet for signature purposes. When signed by all parties, promptly file the document with the court.

The landmark case relevant to the requirement of written stipulations is *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984). This multi part suit involved a stock sale, and all of the parties, except Kennedy, signed a Rule 11 agreement in regard to their respective claims. The settling parties then amended their pleadings and alleged that Kennedy, who refused to sign the Rule 11 agreement, had orally agreed to the settlement. *Id.* at 526. In response, the trial court severed the causes and proceeded with a jury trial on the issue of enforcement of Kennedy's alleged oral contract to settle.

The Texas Supreme Court reversed, holding that once it was determined that Kennedy had not signed the Rule 11 agreement, the lower courts had erred by permitting a trial on the enforceability of the alleged oral agreement to settle. The Court specifically rejected the Court of Appeals statement that "the purpose of Rule 11 is to authorize rendition of agreed judgments." *Id.* at 528. The Court stated that, if the case proceeded to trial, it should have been on the original issue, and not on the issue of whether Kennedy orally had agreed to the Rule 11 agreement. In conclusion, the Supreme Court stated, "[t]he oral agreement was disputed and unenforceable at the moment its existence was denied in the pleadings; Rule 11 prohibits further inquiry." *Id.* at 530. *See also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (relating to pre-suit oral agreements).

5. Filed With the Court or on the Record.

When made in open court, the Rule is satisfied if the terms of the agreement are dictated before a certified

reporter, and the record reflects who was present, the settlement terms, and the parties' acknowledgment of the settlement. *Cantu v. Moore*, 90 S.W.3d 821,824 (Tex. App.-San Antonio 2002, pet. denied); *Columbia Rio Grande Healthcare, L.P. v. De Leon*, 2011 WL 227669 at *3 (Tex. App.– Corpus Christi 2011, no pet. history). Be mindful, however, that the overall purpose of Rule 11 is "to avoid disputes over the existence or terms of an oral agreement between counsel." *London Mkt. Cos.*, 811 S.W.2d at 552 (citing *Kennedy*, 682 S.W.2d at 526-27). "To have a binding, open-court stipulation, the parties must dictate into the record all material terms of the agreement and their assent thereto." *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.-Corpus Christi 1994, writ denied). The "made in open court" option in the Rule has been construed to provide an alternative way to establish an agreement between the parties when it is not practical to have a written agreement prepared. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979).

In *Enber v. First State Bank of Smithville*, the parties had drafted an assignment and agreed to it beforehand, but neither side presented it to the court or filed at a hearing. 27 S.W.3d 287, 295-96 (Tex. App.-Austin 2000, pet. denied). The bank argued that, since the parties' lawyers agreed to the settlement in open court, they thereby entered the settlement of record. *Id.* at 296. The court of appeals held that the record of the hearing in question failed to establish as a matter of law that the parties entered into an oral Rule 11 agreement. *Id*. In so doing, however, it noted that "to allow a written statement to be 'supplemented' by the parties or their attorneys' subsequent in-court oral statements lead to the very mischief that the rule seeks to prevent." *Id.*

Rule 11 does not require a writing to be filed in the trial court before the other party withdraws their consent; the filing requirement is satisfied so long as the agreement is filed before enforcement is sought. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). *Padilla* involved a dispute about whether a series of letters between the parties' representatives were enforceable as a written settlement agreement under Rule 11 even though the plaintiffs withdrew their consent before the papers were filed with the court and before judgment was rendered on the agreement. *Id.* at 455. The Supreme Court noted that "[a]lthough Rule 11 requires the writings to be filed in the court record, it does not say *when* it must be filed." *Id.* at 461. To require that the papers be filed before consent is withdrawn would not further the purpose of the rule – to avoid disputes over the terms of oral settlement agreements. *Id*. The purpose of the rule is to put the agreement before the judge so that he could determine its importance and proceed with the orderly progression of the suit. *Id.* The Court held that "[t]his purpose is satisfied so long as the agreement is filed before it is sought to be enforced. *Id*.

B. An Agreed Judgment May Not be Entered if a Party Revokes His or Her Consent to a Rule 11 Agreement Before the Court Renders Judgment

A settlement agreement upon which an eventual judgment will be based when entered into the record is subject to withdrawal by either party until judgment is rendered by the court. In other words, a party may revoke consent to a settlement agreement at any time before judgment is rendered. *San Antonio Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995).

> Although the law appears to be clear in regard to the timing of filing a Rule 11 agreement, the better practice is to file the agreement as soon as it is signed. It is also advisable to provide a signature blank for the judge to sign evidencing the court's approval. This practice will remove any doubt of the agreement's validity and enforceability

In *San Antonio Restaurant Corp.*, after the settlement agreement was read into the record, the defendants attempted to withdraw consent based on newly discovered evidence. The trial court refused to consider the new evidence and signed the judgment based on the previously entered settlement agreement. The court of appeals affirmed, but the Texas Supreme Court reversed, holding that because there was no clear language in the record of the trial court's intention to render judgment when the agreement was read into the record, the settlement agreement was subject to revocation. *Id*. at 858. The Court noted that the operative language of the trial court was "…once this judgment is signed and I approve it, … it's full, final and complete … I'll approve the settlement." *Id*. The Supreme Court held that this language was not sufficient to express a clear intent to render judgment in the case. Therefore, the agreement could still be revoked and judgment could not be rendered based on the agreement.

A judgment routinely goes through three stages: (1) rendition; (2) signing; and (3) entry. *Wittau v. Storie*, 145 S.W.3d 732, 735 (Tex. App. – Fort Worth 2004, no pet.). Generally, a judgment is rendered when the decision is officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly. *Garza v. Tex. Alcoholic Beverage Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970). The entry of a written judgment is merely a ministerial act that reflects the court's action. *Cook v. Cook*, 888 S.W.2d 130, 131 (Tex. App.—Corpus Christi 1994, no

writ). A party can revoke his consent to settle a case at any time before the judgment is rendered. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874-75 (Tex. 1982). A judgment rendered after a party revokes his consent is void. *Id.* at 875.

> Adding the phrase "THIS AGREEMENT IS NOT SUBJECT TO REVOCATION" to a Rule 11 Agreement does not necessarily make it irrevocable.

When does the actual rendition occur? In *In re Joyner*, the trial court announced "your divorce is granted." 196 S.W.3d 883 (Tex. App.—Texarkana 2006, pet. denied). Was this pronouncement the rendition of the final judgment? Is such an oral rendition effective? In *Joyner,* the parties signed a mediated settlement agreement that addressed most of their property and provided for the conservatorship and support of their minor son. *Id*. at 886. The parties attended a "final hearing" to address the few remaining property issues they had not been able to resolve in mediation. *Id.* The next day, the husband purchased a lottery ticket, which won over two million dollars. *Id.* Almost a year later, the wife filed a motion for a final trial setting, claiming that the divorce had never been finalized. *Id.* At that time, the trial court signed a "Final Decree of Divorce," which set out that the divorce had been judicially pronounced at the earlier hearing. *Id.* The wife appealed claiming that the divorce was final at the later hearing. *Id.* The court of appeals disagreed.

The appeals court observed that a judgment can be rendered either orally or in writing. *Id.* (citing *James v. Hubbard*, 21 S.W.3d 558, 561 (Tex. App.—San Antonio, 2000, no pet.)). If rendered by oral pronouncement, the entry of the written judgment is merely a ministerial act. *Id.* (citing *Keim v. Anderson*, 943 S.W.2d 938, 942 (Tex. App.—El Paso 1997, no pet.)). But in order to be an official judgment, the oral pronouncement must indicate intent to render a full, final and complete judgment when it is recited. *Id.* (citing *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995)). It cannot allude to a future act that will decide the issues before the court. *Id.* at 887(citing *Woods v. Woods*, 167 S.W.3d 932, 933 (Tex. App.—Amarillo 2005, no pet.)).

In *Joyner*, the court found that the intent of the trial court to render judgment was "undeniably there." *Id.* at 887. The court of appeals found that the trial court's statement was "made in open court while officiating as the presiding judge after all the evidence had been presented and in the presence of all parties and attorneys." *Id.* The trial judge expressly stated: "*your divorce is granted*" in the midst of other statements indicating present intent. *Id.* He also referred to the wife as "former wife." *Id.* The court of appeals found the judge's statement to indicate a "clear, present intent" that the judge was going to "rule immediately" and then did so. *Id*. at 888.

In a similar case, the parties filed a stipulation resolving their divorce case. *Keim v. Anderson*, 943 S.W.2d 938 (Tex. App.—El Paso 1997, no writ). After reviewing the agreement, the trial court pronounced, "I will grant the divorce as of this time on June 30, 1995." *Id.* at 942. There was no mention in the stipulation in regard to the resolution of any outstanding temporary orders, or prior award of attorney's fees granted to wife's attorney as discovery sanctions. Later that same day, the wife's prior attorney filed an intervention for attorney's fees previously awarded as a discovery sanction. *Id.* at 940. At the entry hearing the court found that the Rule 11 agreement entered into the record did not seek to withdraw or vacate by the stipulation the prior order award of interim attorney's fees; therefore they should be included in the decree. *Id.* at 941. In remanding the case, the appellate court held that the trial court could consider the intervention, filed after rendition, only if it had set aside the prior judgment. *Id.* at 945. The trial court had no authority to modify the agreement. *Id.*

In an injunction suit, the parties announced to the Court that they had reached a settlement. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874 (Tex. 1982). Based on this announcement, the Court stated on the record that "all of you did agree in open Court to this settlement, the Court approves the settlement...and orders all parties to sign any and all papers necessary to carry out this agreement and...the agreement that was...dictated into the record." *Id.* at 874. The day after the stipulation, the defendant revoked consent to the agreement. The Supreme Court held that the revocation was too late because the court's statement on the record constituted a rendition of judgment. *Id.* at 875.

C. Uses for Rule 11 Agreements

Agreements or stipulations are useful tools that can be used for many purposes. They can be utilized to narrow complex issues, alleviate the need to call witnesses, and resolve the entire lawsuit. But if not properly implemented, another lawsuit inevitably follows. There is a fundamental difference between an agreement concerning a law suit and a suit concerning an agreement. The remedy for a failed stipulated agreement is a suit for breach of contract. In that situation, not only is the suit in regard to family matters not resolved, but a whole new suit must be initiated to enforce the attempted agreement. This generates more fees and expenses for the parties, and escalates the hard feelings and mistrust among all those involved. It is therefore imperative that the applicable rules be followed and statutes read carefully for strict compliance.

> Stipulations pursuant to Rule 11 Agreement refer only to agreements in regard to facts; legal conclusions cannot be stipulated.

A stipulation of a legal conclusion is not binding on a court or the parties. *Cartwright v. Mbank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App.-Corpus Christi 1993, writ denied). For example, in *Caprock Investment Corp. v. Federal Deposit Insurance Co.*, the court noted that the question of whether Caprock was the proper plaintiff was a question of law, so the stipulation could not be determinative. 17 S.W.3d 707, 713 (Tex. App.¬Eastland 2000, pet. denied).

D. Modification of a Rule 11 Agreement

A trial court has no power to supply terms, provisions, or details not previously agreed to by the parties. *Tinney v. Willingham*, 897 S.W.3d 543, 545 (Tex. App. – Fort Worth 1995, no writ). If a judgment does not conform to the settlement agreement, it will be rendered unenforceable. *Nuno v. Pulido*, 946 S.W.2d 448, 451 (Tex. App. – Corpus Christi 1997, no writ).

That said, the Court does have the power and duty to supply additional terms when the additional term are needed to effectuate the parties' agreement and the additional terms do not "alter, change, amend, and/or modify" the material terms to which the parties have already agreed. *Beyers v. Roberts*, 199 S.W.3d 354, 362 (Tex. App.¬Houston [1st Dist.] 2006, pet. denied)(holding that the court did not alter settlement agreement by adding terms meant to effectuate parties intent regarding child attendance of private school); *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App. – Dallas 2006, no pet.)(holding that court did not alter settlement agreement by adding terms regarding how wife could exercise stock options); *McLendon v. McLendon*, 847 S.W.2d 601, 606 (Tex.App.– Dallas 1992, writ denied)(holding that court had power to add terms needed to effectuate settlement agreement's substantive terms).

In *In re Nolder*, the court of appeals modified a provision of a Rule 11 settlement agreement that awarded the wife 55% of the husband's stock options when the husband failed to disclose that he had already exercised the options and sold the stock. 48 S.W.3d 432, 434-35 (Tex. App.-Texarkana 2001, no. pet.). The court held that because it was impossible for the trial court to enforce the terms of the agreement, it was entitled to modify the agreement and render a judgment that awarded the wife 55% of the cash value of the in-kind options. *Id.*

In addition, it should be noted that if the Rule 11 agreement does not dispose of all issues which the court is required to rule upon, the trial court has a duty to resolve the issues not addressed by the agreement. *See In re Hallman*, 2010 WL 619290 at *4 (Tex. App.– Texarkana,2010, pet. denied)(holding that trial court had authority to decide tax liability that was not addressed in parties' Rule 11 agreement).

E. Actions of an Associate Judge

An associate judge has only limited authority to render and sign a final judgment which incorporates the terms of a Rule 11 Agreement. The associate judge may only sign a judgment that is "agreed to in writing as to both form and substance by all parties" or they may sign "a final default judgment." TEX. FAM. CODE § 201.007(a)(14)(A),(B). But it must be a final order from the associate judge in order to be enforceable. *See In re Lausch*, 177 S.W.3d 144, 151 (Tex. App.-Houston [1st Dist.] 2005, no pet.) (holding that an associate judge's oral pronouncements from the bench, combined with a handwritten report do not constitute a final order of enforcement)). In *Stein v. Stein*, the parties entered into a settlement agreement that was initialed but not signed by an associate judge. 868 S.W.2d 902, 903 (Tex. App.-Houston [1st Dist.] 1994, no writ). Before the referring court could sign the settlement, one of the parties revoked consent to the agreement. *Id.* The court of appeals determined that the associate judge never generated a *signed* report and therefore the provisions of former section 54.010 of the Government Code did not apply. *Stein*, 868 S.W.2d at 904. The court of appeals further held that no rendition of judgment occurred until the referring court signed the settlement agreement, and because this came after one of the parties had revoked consent, the judgment was void. *Id.* This rule comports with the previous discussion that judgment cannot be entered on a Rule 11 agreement when one side as withdrawn consent.

An associate judge entering an agreement into the record can likewise constitute entering a Rule 11 agreement into the record. For example, in *Clanin v. Clanin*, the appeals court upheld a Rule 11 agreement that had been entered by an associate judge. 918 S.W.2d 673 (Tex. App.-Fort Worth 1996, no writ). The parties in *Clanin* entered into a Rule 11 agreement that was filed in court with the associate judge. *Id.* at 675. Three months later, the referring court signed a final order on the matter. *Id.* Afterwards, one of the parties attempted to repudiate the agreement, which the trial court denied. *Id.* On appeal, the court found that "the statement of facts clearly shows that the parties and attorneys announced in open court they had reached an agreement and that the agreement was dictated into the record in the form of sworn testimony of the parties. Further, the handwritten statement styled 'Rule 11 Agreement,' announcing their agreement and that the terms of the agreement had been entered of record, was signed by the parties and attorneys and filed with the papers as part of the record. Clearly, there was sufficient evidence for the

court to conclude the existence of a valid Rule 11 agreement." *Clanin*, 918 S.W.2d at 677.

It is important, however, to note the distinction between *Stein* and *Clanin*. In *Stein*, it was held that one party repudiated before final rendition of judgment, so no valid judgment could be entered based on the agreement. On the other hand, the party in *Clanin* attempted to repudiate only **after** a final judgment had been rendered. Therefore the agreement was upheld. *See also Sohocki v. Sohocki*, 897 S.W.2d 422 (Tex. App.-Corpus Christi 1995, no writ) (holding that entering a decree based on a Rule 11 agreement improper when wife had revoked consent before the special master made his recommendation to the trial court and trial court adopted the recommendation).

F. Judicial Admission from Rule 11 Agreements

Once a clear and unambiguous stipulation is made as to specific facts issued pursuant to Rule 11, that stipulation becomes a judicial admission and is conclusive on all parties, which estops the complaining party from further disputing the stipulated facts. *Shepherd v. Ledford*, 962 S. W.2d 28, 33 (Tex. 1998). A judicial admission is a formal waiver of proof usually found in pleadings or the stipulations of the parties. *Hennigan v. I.P. Petroleum Co.*, 858 S.W.2d 371, 372 (Tex. 1993). A true judicial admission is conclusive on the party making the admission and not only relieves the opposing party from making proof of the fact admitted, but also bars the admitting party from disputing that the admission made. *Id.*; *Gevinson v. Manhattan Const. Co. of Okla.*, 449 S.W.2d 458, 466 (Tex. 1969).

In contrast, a Rule 11 stipulation is sometimes a contractual agreement, which must include the following--express or implied: an offer, acceptance, and consideration. At other times, it is a mere concession or admission made by one or both parties to save time and expense, requiring none of the usual contractual elements. *Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 887 (Tex. App.-El Paso 1993, orig. proceeding). The actual stipulation filed with the court or dictated into the record which meets the requirements of Rule 11 is controlling, not the erroneous recitation by the trial court of the agreement. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.-Corpus Christi 1994, writ denied).

G. Motion to Enforce a Rule 11 Versus a Motion to Enter Judgment

A trial court is not authorized and cannot render a judgment on a Rule 11 stipulation if it is repudiated before rendition of judgment. *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.-Houston [1st Dist.] 1996, no writ). So what does a party, who wants to enforce the settlement agreement, do if the other party revokes his or her consent before rendition? File a motion for enforcement and sue for breach of contract.

In *Davis*, the parties had reached a settlement that was reduced to a Rule 11 agreement and signed by all parties. Prior to rendition of judgment, the husband repudiated the agreement based on newly discovered evidence. The wife's attorney filed a motion to enter final judgment based upon the agreement between the parties. *Id.* at 416. The trial court granted the motion and entered judgment. The Court of Appeals reversed, holding that because the husband revoked the agreement, the court was without power to enter a binding final judgment. It held further that the sole issue before the trial court was whether to enter, or not to enter, the agreement as a final judgment. The issue of whether the Rule 11 agreement should or should not be enforced was not before the court. Citing *Padilla*, the court opined that, before the trial court could have considered the enforcement issue, the wife would have to have proper pleadings on file, and would have to introduce proper proof. *Id.* at 416-17. *See Sampson v. Ayala*, 2010 WL 1438932 at *4-6 (Tex. App.– Houston [14 Dist.] 2010, no pet.). *Padilla v. LaFrance* is the leading Supreme Court case to provide guidance, and provides a warning not to "confuse the requirements for an agreed judgment with those for an enforceable settlement agreement." *Padilla,* 907 S. W.2d at 461. The Court explained:

> Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.

Id.

In *CherCo Prop., Inc. v. Law, Snakard, & Gambill, P.C.*, 985 S.W.2d 262 (Tex. App.-Fort Worth 1999, no pet.), the parties reached an agreement in a malpractice case. Plaintiffs refused to approve the formal agreed settlement and withdrew consent because the agreement did not include a time for performance. Defendants filed a motion to enforce the agreement, together with a motion for summary judgment in support of their contention, which the trial court granted. In upholding the trial court's ruling, the appellate court stated that "although withdrawal of CherCo's consent to the agreement may have been fatal to an agreed judgment, it has no effect on Law's motion to enforce the settlement as a contract," and "under the facts of this case, a time for performance is not a material term, and thus its omission does not render the parties' settlement agreement unenforceable." *Id.* at 266.

H. The Relationship Between Rule 11 and Other Statutory Authorities that Cover Settlement Agreements

There are several statutory provisions which govern settlement agreements which impact the practice of family law. For example, there is Section 154.071 of the Texas Civil Practice and Remedies Code, and Sections 7.006 and 153.007 of the Texas Family Code. These statutory provisions clarify that the types of settlement agreements discussed in each of the statutes are enforceable, just like any contract. Thus, each of the settlement agreements discussed in these statutory provisions is enforceable in the same manner as any agreement which complies with Rule 11 of the Texas Rules of Civil Procedure.

1. Section 154.071 of the CPRC

Section 154.071 of the Texas Civil Practice and Remedies Code makes written agreements which settle and dispose of a pending lawsuit enforceable in the same manner as any other written contract. TEX. CIV. PRAC. & REM. CODE § 154.071(a). A written settlement agreement executed pursuant to § 154.071 may be enforced under Rule 11. *Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 366-67 (Tex. 2001).

In *Compania Financiara Libano, S.A. v. Simmons*, the underlying lawsuit claimed a fraudulent transfer of property interests. 53 S.W.3d 365, 366 (Tex. 2001). The parties subsequently entered into an agreed settlement, which was filed as a Rule 11 and signed by the court; however, the judgment did not refer to all the provisions of the agreement, and it also contained a "Mother Hubbard" clause. *Id. Compania Financiara Libano* filed a timely motion to modify the judgment but it was never ruled upon and was overruled by operation of law. *Id.* Later, *Compania Financiara Libano* filed suit against Simmons to compel performance of the agreement, claiming breach of contract, fraud, tortuous interference and specific performance. *Id.*

The trial court granted *Compania Financiara Libano*'s summary judgment and ordered Simmons to specifically comply and pay attorney fees. *Id.* The court of Appeals reversed, holding that the action was an impermissible collateral attack, and that the agreement had been merged into the agreed judgment based on the Mother Hubbard clause. *Id.* The Supreme Court reversed, holding that nothing in the settlement agreement stated that all the terms were intended to be in the judgment. *Id.* at 367. The statute sets out that the agreement may be enforced as a contract. *Id.* The Court concluded that all settlement terms are not required to be incorporated into a judgment to be enforceable. *Id.*

2. Texas Family Code Section 7.006.

To promote amicable settlement of disputes in a suit for divorce or annulment, spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. *Engineer v. Engineer*, 187 S.W.3d 625, 626 (Tex. App.—Houston [14th Dist.] 2006, no pet.); TEX. FAM. CODE § 7.006(a). The agreement may be revised or repudiated at any time before rendition of the divorce or annulment unless the agreement is binding under another rule of law. TEX. FAM. CODE § 7.006(a).

> But remember, just like any other agreement that is enforceable under Rule 11, it is still enforceable under contract law if a party withdraws their consent before rendition of judgment.

See, e.g.,, Michael Mantas, M.D. v. The Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996); *Padilla v. LaFrance*, 907 S.W.2d at 461.

If the trial court finds that the terms of the agreement are just and right, those terms are binding on the court. *Engineer*, 187 S.W.3d at 626; TEX. FAM. CODE § 7.006(b). If the trial court approves the agreement, the court may set forth the agreement in full, or incorporate the documents by reference in the final decree. *Id.* But if the trial court finds that the terms of the agreement are not just and right, it may either request that the spouses submit a revised agreement or set the case for a contested hearing. *Id.*; TEX. FAM. CODE § 7.006(c). A trial court is not bound to accept the parties' agreement. *In re McFarland*, 176 S.W.3d 650, 659 (Tex. App.—Texarkana 2005, no pet.). So a trial court has only two options when it finds that the terms are not just and right: it can request the parties to revise the agreement or set a hearing on the matter. There is no discretion to do otherwise; it cannot change an agreement before entering it. If an appellate court determines that a decree contains terms and provisions that were never agreed upon by the parties, it must reverse the judgment and remand the case. *Engineer,* 187 S.W.3d at 626.

In *Engineer*, the mediated settlement agreement provided that alimony would be paid to child in the event of wife's death. It also provided that the alimony would qualify and be taxable as to wife under the IRS Regulations. The trial court deleted the after death payments to child, holding such provisions to be in conflict with the IRS requirements. Wife appealed, contending the deletion was a material alteration of the mediated settlement agreement. *Id.* at 625-26.

In its findings, the trial court stated that there was no trial on the merits, nor were there independent findings as to the property division. *Id.* at 626. The trial court's conclusions stated that the decree incorporated the agreement as modified and clarified by arbitration, and further modified by the court. In reversing the case,

the appellate court conceded that certain provisions in the agreement were ambiguous, noted that the Family Code does not authorize a trial court to modify an agreement before incorporating it into the decree. *Id.* at 626-27.The case was remanded back to the trial court for further proceedings.

Compare *Engineer* to *Haynes v. Haynes*, 180 S.W.3d 927 (Tex. App. – Dallas 2006, no pet.) in which parties' mediated settlement agreement allocated a portion of Husband's stock options to Wife, but failed to provide a mechanism by which to achieve same. It was determined that the options were not transferable and further only exercisable by Husband. The mediated settlement agreement contained the boiler-plate provision that if language is disputed, the Texas Family Practice Manual language would control. The Court of Appeals affirmed and imposed language necessary to implement the terms of the mediated settlement agreement. The Court also adopted the terms of the mediated settlement agreement imposing provisions set out in Texas Family Practice Manual.

3. Texas Family Code Section 153.007.

Section 153.007 is almost a mirror image of section 7.006, but deals with child conservatorship and possession. Texas Family Code section 153.007 encourages parties to settle their disputes amicably and allows parties to enter into agreements to modify orders concerning possession of their children. TEX. FAM. CODE § 153.007(a); *Wyatt v. Wyatt*, 104 S.W.3d 337, 339 (Tex. App.—Dallas 2003, no pet.). Such an agreement must be in writing or be made part of the record in open court. *Wyatt*, 104 S.W.2d at 339; *Skidmore v. Glenn*, 781 S.W.2d 672, 674-75 (Tex. App.-Dallas 1989, no writ). If the trial court finds the agreement is in the children's best interest, then the court is to render an order in accordance with the agreement. TEX. FAM. CODE§ 153.007(b); *Wyatt*, 104 S.W.2d at 339.

> An important distinction between section 153.007 and section 7.006 is that, under Texas Family Code section 153.007, an agreement regarding conservatorship, child support and possession is **not** enforceable as a contract.

TEX. FAM. CODE § 153.007(c); *In re T.J.K.*, 62 S.W.3d 830 832-33 (Tex. App.—Texarkana 2001, no pet.). As such, agreements regarding conservatorship, child support and possession are construed differently than other property settlement agreements, which are construed under the law of contracts. *See Hill v. Hill*, 819 S.W.2d 570, 572 (Tex. App.—Dallas 1991, writ denied). But the parties can contract apart from section 153.007, and a contract made as part of divorce judgment under section 153.007 is, in absence of fraud, accident or mistake, enforceable and not subject to alteration, modification or cancellation merely because conditions or circumstances have changed, notwithstanding custody or support provisions of divorce decree might be subject to modification because of changed circumstances. *Kolb v. Kolb*, 479 S.W.2d 81, 83 (Tex. Civ. App. – Dallas 1972, no writ)(involved the right to claim children as dependents for federal income tax purposes). If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan or the court may render an order for the conservatorship and possession of the child. TEX. FAM. CODE § 153.007(d).

I. Rule 11 Agreements in the Digital Age

We are communicating more and more using e-mail and even social media. Rule 11 Agreements will need to adapt to the evolving communication methods. The Uniform Electronic Transactions Act governs electronic transactions. TEX. BUS. & COM. CODE Chapter 322. Section 322.002 defines electronic as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." TEX. BUS. & COM. CODE § 322.002(5). Section 322.002 defines electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." TEX. BUS. & COM. CODE § 322.002(8). Section 322.002 defines record as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." TEX. BUS. & COM. CODE § 322.002(12).

The critical elements of a Rule 11 Agreement are (1) an agreement between attorneys or parties, (2) in writing, (3) signed, and (4) filed with the papers as part of the record. Section 322.007 provides

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

TEX. BUS. & COM. CODE § 322.007.

Based upon Section 322.007, there should be no impediment to the use of e-mail or other digital medium for the creation of the Rule 11 Agreement. In my opinion, the only "ambiguity" involves the electronic signature. Is having my name typed or written at the end

of my e-mail an “electronic signature?” Must I have a electronic symbol of my actual signature? In her article, Jennifer Stanton Hargrave makes a convincing argument that a signature does not have to be an actual signature but can also be the written or typed name. Jennifer Stanton Hargrave, E-MAIL AGREEMENTS: CAN THEY SATISFY RULE 11 REQUIREMENTS?, Family Law Section Report Volume 2009-3 (Summer) pp. 11-13. I agree with Ms. Hargrave.

Ms. Hargrave states that “[i[f attorneys are seeking to enter into enforceable agreements via e-mail that comply with the requirements of Rule 11, the attorneys should clearly express their intent in the e-mail correspondence.” *Id.* at 12. However, for an e-mail to be an enforceable Rule 11 Agreement, I don’t believe that attorneys or parties have to clearly express their intent to enter into a Rule 11 Agreement any more so than they do in a letter or letters. I agree that it would be prudent for attorneys or parties to clearly express their intent to enter into a Rule 11 Agreement in e-mails. However, I don’t see any reason why someone couldn’t take an e-mail exchange, attach a cover sheet with the court and cause number and file it with the court as a Rule 11 Agreement.

III. INFORMAL SETTLEMENT AGREEMENTS

When does an agreement fall under the provisions of section 7.006 and when does an agreement fall within the more restrictive provisions of sections 6.602 or l53.007l? In *Lee v. Lee*, the parties met and negotiated an agreement to settle their divorce case. 158 S.W.3d 612 (Tex. App.-Fort Worth 2005, no pet.). Except for the first page, which was prepared by the husband's attorney, the entire document was prepared by the husband. *Id.* at 612. The agreement was titled "Binding Settlement Agreement" and contained following statement on the first page: "PURSUANT TO SECTION 6.602 OF THE TEXAS FAMILY CODE, THIS AGREEMENT IN [SIC] NOT SUBJECT TO REVOCATION." *Id.* Both parties signed the agreement. *Id.* Before rendition of the divorce and the property division, however, the husband attempted to revoke his consent. *Id.* But the trial court refused and found the agreement between the parties to be a valid settlement agreement and not revocable under section 6.602 of the Family Code. *Id.* at 612-13.

On review, the appellate court noted that the ordinary meaning of the word "mediation" was "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." *Id.* at 613. The court of appeals reversed, holding that "[b]ecause there was no third party present at the settlement conference between [the parties], there was no mediated settlement agreement." *Id.* at 614. In doing so, the court reasoned that "[g]iven that section 7.006(a) of the Texas Family Code, which has been in force for many years, already allows divorcing parties to enter into written agreements without requiring mediation concerning the division of the community assets and liabilities as well as spousal maintenance," and "decline[d] to carve a common-law exception into section 6.602(b) that allows an unmediated settlement agreement to morph into a mediated settlement agreement based on mere form." *Id.* at 613-14. The document in dispute was then held to be "an agreement under section 7.006(a)," which can be "revised or repudiated before the divorce is rendered unless the agreement is binding under another rule of law." *Id.* at 614. The effect of the ruling was to require that a separate suit be filed for a breach of contract claim to enforce the signed agreement.

Perhaps in response to *Lee v. Lee*, in 2005, the Legislature added section 6.604 to the family code. Section 6.604 was effective September 1, 2005. Section 6.604 provides:

> (a) The parties to a suit for dissolution of a marriage may agree to one or more informal settlement conferences and may agree that the settlement conferences may be conducted with or without the presence of the parties' attorneys, if any.
>
> (b) A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement:
>
> > (1) provides, in a prominently displayed statement that is in boldfaced type or in 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.
>
> (c) If a written settlement agreement meets the requirements of Subsection (b), a party is entitled to judgment on the settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (d) If the court finds that the terms of the written informal settlement agreement 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.
>
> (e) If the court finds that the terms of the written informal settlement agreement are not just and right, the court may request the

> parties to submit a revised agreement or set the case for a contested hearing.

Section 6.604 essentially permits parties to enter into a written informal settlement agreement without attorneys and the informal settlement agreement is binding on the parties if it complies with the requirements of an enforceable mediated settlement agreement.

However, informal settlement agreements under section 6.604 are subject to review by the trial court. For example, the terms of the informal settlement agreement are binding on the trial court if the trial court finds that the terms of the written informal settlement agreement are just and right. But if the trial court finds that the terms of the written informal settlement agreement are not just and right, the terms of the informal settlement agreement are not binding on the trial court and the trial court may request the parties to submit a revised agreement or set the case for a contested hearing. Note that Section 6.604 informal settlement agreements do not apply to suits affecting the parent-child relationship.

IV. MEDIATED SETTLEMENT AGREEMENTS

A written mediated settlement agreement in a suit affecting the parent-child relationship is enforceable notwithstanding Rule 11. *See* TEX. FAM. CODE § 153.0071 (d), (e). A written mediated settlement agreement in a suit for divorce is enforceable in the same manner. *See* TEX. FAM. CODE § 6.602(b). Under these provisions, a mediated settlement agreement is binding in a suit if it:

> (1) provides, in a prominently displayed statement that is in boldfaced type **or** capital letters **or** underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

Id. §§ 6.602(b); 153.0071 (d) (emphasis added). If a mediated settlement agreement meets these requirements, a party is entitled to judgment on the mediated agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. *Id.* §§ 6.602(c); 153.0071(e). Notwithstanding the preceding subsections, a court may decline to enter a judgment on a mediated settlement agreement under section 153.0071 if the court finds that (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; **and** (2) the agreement is not in the child's best interest. *Id.* § 153.0071(e-1) (emphasis added).

Sections 6.602(b) and 153.0071(d) are virtually identical and are construed the same way. *See, e.g., In re Joyner*, 196 S.W.3d 883 (Tex. App.- Texarkana 2006, pet. denied); *Beyers v. Roberts*, 199 S.W.3d 354 (Tex. App.¬Houston [1st Dist.] 2006, pet. denied); *In re Calderon*, 96 S.W.3d 711 (Tex. App.-Tyler 2003, orig. proceeding); *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.).

A. Strict Compliance

At the outset, it is important to reiterate that, under sections 6.602 and 153.0071, the statutory language clearly set out that, if the terms of either section 6.602(b) or 153.0071(d) are complied with, a party is **entitled to judgment on the mediated settlement agreement**. Clearly, this means that there is no requirement for a separate suit to enforce the agreement, and that it cannot be repudiated to prevent judgment on the matter. *See Beyers v. Roberts*, 199 S.W.3d 354, 358 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). Additionally, "[a] fundamental principle of statutory construction is that a more specific statute controls over a more general one." *Id.* at 359. (citing *Horizons/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000)). Thus, sections 6.602 and 153.0071 of the Family Code will control over any over general provision in regard to settlement agreements. *See Id.* (holding that section 153.0071(d) controls over section 153.133, which deals with agreed parental plan that create joint managing conservatorships); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331 (Tex. App.-Dallas 2004, no pet.) (holding that section 153.0071 controls over 153.007, because section 153.0071 deals specifically with mediated settlement agreements, while section 153.007 deals generally with agreements for joint managing conservatorships).

A mediated settlement agreement must meet all of the requirements of the Family Code in order to bind the parties. *See* TEX. FAM. CODE § 153.0071(d), (e); *Beyers v. Roberts*, 199 S.W.3d 354 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). In *Vickery v. American Youth Camps, Inc.*, the Texas Supreme Court held that a final judgment founded upon a mediated settlement agreement must be in strict and literal compliance with the agreement. 532 S.W.2d 292, 292 (Tex. 1976).

In *Spinks v. Spinks*, the parties reached an agreement through court-ordered mediation. 939 S.W.2d 229, 229 (Tex. App.-Houston [1st Dist.] 1997, no writ). The agreement was signed by the parties, their attorneys, and the mediator. *Id*. The agreement provided for custody, property division, child support, alimony and insurance. *Id.* It also contained a statement that the parties stipulated and agreed that the agreement was not subject to revocation. *Id.* The appellant repudiated the agreement while testifying at trial, but the trial court rendered a decree based on the mediated settlement. *Id.*

Appellant appealed, and because the stipulation by the parties that the agreement was not revocable was not underlined, which was the statutory requirement at the time, the case was reversed and remanded. *Id. See Streety v. Hue Thi*, 2010 WL 2278617 at *4 (Tex. App. – Dallas 2010, no pet.)(The mediated settlement agreement contains no language indicating the agreement is not subject to revocation. In addition, it does not contain any language from which one could infer that further disputes on the agreement are foreclosed).

In *In re A.H*, the appellant argued that a mediated settlement agreement was not in strict compliance because the statement, "This is a binding and IRREVOCABLE agreement" that was located in paragraph eight of the agreement was insufficient to meet the statutory requirements. 114 S.W.3d 750, 752¬53 (Tex. App.-Dallas 2003, no pet.). The court dismissed this argument, however, because in addition to the language above, the bottom of pages two and three also contained that following statement: "THE PARTIES AGREE THAT THIS SETTLEMENT AGREEMENT IS BINDING AND NOT SUBJECT TO REVOCATION. THIS AGREEMENT MEETS THE REQUIREMENTS OF SECTION 153.0071 OF THE TEXAS FAMILY CODE." *Id.* at 753. The court held that this statement clearly complied with statutory requirements regardless of the statement made in the body of the agreement. *Id.*

Apparently, it also does not matter whether the court orders the parties to mediation or the parties attend at their own initiative. *See In re J.A. W.-N.*, 94 S.W.3d 119 (Tex. App.-Corpus Christi 2002, no pet.). In *J.A. W.-N.*, the parties agreed to meet with a mediator to discuss their concerns regarding an agreed order in a SAPCR proceeding. *Id.* at 120. Following the meeting, they signed a "Mediated Settlement Agreement" that modified the terms of support and possession of and access to the child. *Id.* The agreement was signed by the parties, their attorneys, was initialed on each page, and recited the required language from the Family Code section 153.0071. *Id.* Later, appellant repudiated the agreement, but at a hearing held after that, the trial court signed a written order on the agreement. *Id.* On appeal, appellant argued that the agreement was not a statutory mediation agreement because the court did not refer the parties to the mediation as set out in section 153.0071(c). *Id.* The appellate court rejected that argument, holding that nothing in that section requires a written request or written order of referral based in either the parties' or the court's own motion in order for parties to mediate their differences and execute a mediated settlement agreement. *Id.* at 121. The court stated that there was no authority for such a proposition and to hold so "would have a chilling effect on the mediation process." *Id.* In overruling appellant's point, the court noted that "the plain language...of the agreement indicated that the parties intended their agreement to be final." *Id.*

Likewise, it does not matter if the dispute is in regard to a suit or a post-suit dispute. *In re J.A.W.-N.* involved a dispute about terms and conditions of a pre-existing order. 94 S.W.3d at 119 (Tex. App.-Corpus Christi 2002, no pet.). To address these concerns, the parties agreed to meditation. *Id.* at 120. The result was an agreement that was signed by the parties, attorneys, and the mediator. *Id.* When appellant refused to sign an agreed order based on the mediated agreement, appellee filed a motion for judgment, which the trial court granted and signed a written order on the agreement. *Id.* On appeal, appellant complained that section 153.0071 applies to suits only and did not apply to post-suit disputes. As support for this argument, he pointed to the language of section 153.0071(c), which states that "the court may refer a suit affecting a parent-child relationship to mediation." *Id.* at 123. The court stated that, as the parties had "agreed to mediation without court intervention" and also "came within the statute by satisfying the elements of section 153.0071(d)," the section applied to the case and the appel1ate court affirmed the judgment of the trial court. *Id.* at 123. *See also Kilroy v. Kilroy*, 137 S.W.3d 780, 789 (Tex. App.-Houston [1st Dist.] 2004, no pet.) (holding that because the parties' Rule 11 agreement did not require that they petition the trial court before initiating arbitration proceedings, there was no requirement under section 153.0071(c) or any other rule to do so).

B. Cannot Withdraw Consent

In *In re Circone*, it was argued that the appel1ant should be able to withdraw consent after the requirements of the Family Code had been met. 122 S.W.3d 403, 404 (Tex. App.-Texarkana 2003, no pet.). Appellant contended that the trial court erred in its application of the alternative dispute resolution procedures of the Family Code. *Id.* at 405. To support that position, appellant argued that the court erred when it refused to permit him to introduce evidence about the actions or inaction of the attorney ad litem who represented the children. *Id.* at 406. But the court pointed out that the Code provides for this within the context of a binding arbitration proceeding under section 153.0071(b) of the Family Code, and the *Circone* case dealt with mediation under section 153.0071 (c)-(e). As the requirements under that provision were met, the court held that "the trial court had no authority to go behind the signed agreement of the parties, which explicitly... stated in underlined capital letters that agreement was not subject to revocation." *Id.* at 406.

In making this determination, the court noted that the language of the statute at that time differed from that which existed at the time of another case that was frequently cited and had analyzed the statute, *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.-Houston

(14th Dist.] 1996, no writ). The *Davis* court held in that case that, if the parties reach a settlement through alternative resolution procedures and execute a written agreement pursuant to Rule 11 disposing of the dispute, the agreement is enforceable in the same manner as any other written contracts. *Id.* at 406 n.4. The Texarkana Court noted that it had since been recognized that the *Davis* case did not address mediation agreements that meet the requirements of either section 6.602 or 153.0071 of the Family Code and so provided no guidance for those provisions. *Id.* (citing *Cayan v. Cayan*, 38 S.W.3d 161 (Tex. App.-Houston [14th Dist] 2000, pet. denied)). The Court pointed out that two other courts had reviewed the current statute and applied it as written. The Corpus Christi court held that a trial court is required to enter judgment on a mediated settlement agreement even if the mediation is not under the direction of the court. *In re J.A.W.-N.*, 94 S.W.3d 119, 121 (Tex. App.-Corpus Christi 2002, no pet.). Likewise, the Eastland court analyzed a similar case and held that, in a mediated settlement agreement context under the statute, even if one party did withdraw consent, the trial court was required to enter judgment on the agreement. *Alvarez v. Reiser*, 958 S.W.2d 232, 233-34 (Tex. App.¬Eastland 1997, pet. denied).

C. Best Interest of the Child.

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

Further, several courts have held that a trial court does not err in failing to conduct a best interest hearing when the parties waived their right to challenge best interest in a binding arbitration agreement. *In re T.B.H.-H.*, 188 S.W.3d 312, 315 (Tex. App.-Waco 2006, no pet.); *In the Interest of C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.-San Antonio 2004, pet. denied). The court in *C.A.K.* also held that allowing parties to contract away their right to challenge best interest did not violate public policy given that alternate policy of encouraging "peaceful resolution of disputes, particularly those involving the parent-child relationship, including mediation of issues involving conservatorship, possession and child support." *In the Interest of C.A.K.*, 155 S.W.3d at 560. In this manner, the court rejected the argument that trial courts have an independent duty to hold a best interest hearing. *Id.* In 2005, the legislature added subsection (e-l)(2) to section 153.0071 of the statute, which provides that "[n]otwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that...the agreement is not in the child's best interest." TEX. FAM. CODE § 153.0071 (e-1)(2). *Beyers* stated that this provision expressly allows a trial court to conduct a best hearing only at its own discretion. 199 S.W.3d at 361. The court noted that "the agreement is 'subject to the Court's approval,' but not 'subject to the court determining the agreement is in the children's best interest.'" *Id.* at 361. The court concluded that "[i]f parties were free to repudiate their agreements, disputes would not be finally resolved and traditional litigation would recur...but if a voluntary agreement that disposes of the dispute is reached, the parties should be required to honor the agreement." *Id.* at 361. (quoting *In the Matter of the Marriage of Ames*, 860 S.W.2d 590, 592 (Tex. App.-Amarillo 1993, no writ)).

> It is important to note that section 153.0071 (e-1) actually provides that "a court may decline to enter a judgment on a mediated settlement agreement if the court finds that: (1) a party to the agreement was a victim of family violence, and that circumstances impaired the party's ability to make decisions; **and** (2) the agreement is not in the child's best interest. TEX. FAM. CODE § 153.0071 (e-1) (emphasis added). Thus, a court may not decline to enter a judgment on a mediated settlement agreement if the court finds **only** that the agreement is not in the child's best interest.

D. Deviation or Modification

As a general rule, a court has no authority to alter, change, amend, or modify the material terms to which the parties have already agreed by inserting additional terms into the Court's order enforcing the agreement. *Vickrey v. American Youth Camps, Inc.*, 532 S.W.2d 292 (Tex. 1976); *In Matter of Marriage of Ames*, 860 S.W.2d 590, 594 (Tex.App.--Amarillo 1993, no writ); *McLendon v. McLendon*, 847 S.W.2d 601, 610 (Tex.App.--Dallas 1992, writ denied).

For example, in *Garcia-Udall v. Udall*, temporary orders gave one parent the exclusive right to consent to

"invasive medical, dental, or surgical treatment." 141 S.W.3d 323, 327 (Tex. App.—Dallas 2004, no pet.). The parties subsequently executed a Section 153.0071 mediated settlement agreement that incorporated the temporary orders into the divorce decree, and also provided that one parent would have the final decision "in the event parties cannot agree on medical, dental or surgical treatment involving invasive procedures." *Id.* at 327-28. The appellant argued the provision in the mediated settlement agreement changed the decision on invasive treatment from appellee's exclusive right to a joint right of the parties, with appellee having the authority to make the decision if they cannot agree. *Id.* at 328. Recognizing that an unambiguous contract must be interpreted as a matter of law, and ambiguity does not arise merely because the parties advance differing interpretations, the court of appeals held that the adjectives "medical, dental or surgical" modified the same noun, "treatment" and the phrase "involving invasive procedures" modified the noun "treatment" and was not limited to surgical treatment. *Id.* The court of appeals reversed the trial court and modified the agreement to make the decree conform to the mediated agreement. *Id.* at 329. The court observed that "[t]he fact that the trial court interpreted the mediated settlement differently is irrelevant because the trial court has no discretion to misapply the law." *Id.*

However, it should be noted that there is one notable exception to the general rule that a court has no power to supply additional terms: a court does have the power and duty to supply additional terms when the additional terms are needed to effectuate the parties' agreement and the additional terms do not alter, change, amend, or modify the material terms to which the parties have already agreed. *Beyers v. Roberts*, 199 S.W.3d 354, 362 (Tex.App.--Houston [1st Dist.] 2006, no pet.); *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex.App.-Dallas 2006, no pet.); *In re Kasschau*, 11 S.W.3d 305, 311 (Tex.App.--Houston [14th Dist.] 1999, orig. proceeding); *McLendon*, 847 S.W.2d at 606.

In *Beyers*, husband and wife entered into a mediated settlement agreement which provided, among other things, that the child would attend a certain private school. *Beyers*, 199 S.W.3d at 357. After the mediation, husband moved to rescind the agreement because the private school the parties agreed upon could not accept the parties' child by mid-semester transfer. *Id*. The trial court refused to rescind the agreement, and entered a modification order which required the child to remain in its current school. *Id*. On appeal, husband argued that the trial court exceeded its authority by entering a final order which included terms to which the parties never agreed. The court of appeals rejected husband's argument holding that the additional terms were only a slight modification and were needed to effectuate the intent of the parties' agreement. *Id*. at 362-63.

Similarly, in *Haynes*, husband and wife entered into a mediated settlement agreement. *Haynes*, 180 S.W.2d 928. Attached to the agreement was a single page spreadsheet with "*Haynes v. Haynes* Property Division" handwritten at the top of the page. This spreadsheet listed several assets, their net value, and contained two columns dividing the value between Husband and Wife. The total property division was approximately sixty percent to Wife and forty percent to Husband. Attached to the property division was a single sheet handwritten division of liabilities between Husband and Wife. The main settlement agreement provided that its terms would be incorporated in a final decree of divorce following the forms published in the Texas Family Law Practice Manual and prepared by Wife's attorney. Wife's attorney prepared an agreed final divorce decree containing detailed procedures for the exercise and division of the stock options and making Husband constructive trustee for the options awarded to Wife. At a hearing on Wife's motion to enter the decree, Husband objected to the procedures relating to the options because they imposed additional duties, liabilities, and burdens on him. The trial court took the case under advisement and later signed the proposed decree with some modifications.

On appeal, husband argued that he never agreed to the specific terms of the decree regarding the stock options such as the constructive trust, the terms relating to the exercise of the options by Wife, and the tax issues involved with exercise of the options. Husband argued that the trial court erred in entering the divorce decree because the trial court had no authority to enter a judgment that varied from the terms of the mediated settlement agreement. *See Haynes*, 180 S.W.3d at 929. The court of appeals rejected husband's argument on the grounds that the additional terms did not materially alter the parties' agreement. Instead, the additional terms were necessary to effectuate the intent of the parties' agreement. *Id.* at 930. The court of appeals stated that to be an enforceable agreement:

> The law does not require the parties to dictate and agree to all of the provisions to be contained in all of the documents necessary to effectuate the purposes of the agreement; it only requires the parties to reach an agreement as to all material terms of the agreement and prevents the trial court from supplying additional terms to which the parties have not agreed.
>
> Terms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation by the parties or consideration by the trial court.

* * * *

> A trial court has no power to supply terms not previously agreed to by the parties; however, the parties here agreed to the material terms of their property division and nothing in the divorce decree varies from that agreement. The divorce decree's provisions implementing and effectuating the agreed division of the options do not vary the terms of the mediated settlement agreement; rather, they carry those terms into effect. Thus, the trial court did not supply terms to which the parties had not agreed.

Id. at 930 (citation omitted).

E. Fraud, Failure to Disclose

"If a party fails to exercise diligence in investigating facts or law or otherwise enters into a section 6.602 agreement unadvisedly, he will not be rewarded for doing so with a reprieve from the agreement." *Cayan v. Cayan*, 38 S.W.3d 161, 167 (Tex. App.-Houston [14th Dist.]

> In summary, a court has no authority to alter, change, amend, or modify the material terms to which the parties have already agreed by inserting additional terms into the Court's order enforcing the agreement. However, a court does have the power and the duty to interpret the parties' agreement and to enter an order which effectuates the true intent of that Agreement.

2000, pet. denied). In *Cayan*, the husband and wife attended mediation and entered into a Rule 11 agreement and mediated settlement agreement. *Id.* at 163. Both parties and their attorneys signed the agreement and it was approved by the court. *Id.* The wife filed a motion for the court to sign and enter a final decree based on the agreement. *Id.* On the day the motion was set, the husband filed a motion to revoke the agreement alleging mistake and misrepresentation. *Id.* He claimed that he relied on the representations of the wife's CPA in regard to his retirement benefits. *Id.* The trial court entered the decree and the husband appealed, claiming that the wife could only enforce the agreement via a contract claim. *Id.* The court of appeals stated that, "[t]he plain meaning of section 6.602 could hardly be more clear," that it is an agreement that is "binding, i.e., irrevocable, and a party to one is entitled to judgment based on the agreement." It further reasoned that "the purpose of alternative dispute measures is to keep parties out of the courtroom. When a mediated settlement agreement is not summarily enforceable, the trial court 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." *Id.* at 165-66 (citations omitted). In conclusion, that court noted that, if a party was wrongfully induced to sign a mediated settlement agreement that falls under section 6.602, they have the same recourse as one who discovered the same thing after the judgment was entered as a party who signed an agreement that did not fall under the statute. *Id.* at 167.

A material misrepresentation by one party to an agreement can support rescission or repudiation by the other party. *Boyd v. Boyd*, 67 S.W.3d 398, 404-405 (Tex. App.-Fort Worth 2002, no pet.). A failure to disclose material information by one contracting party can lead to the rescission of an otherwise enforceable settlement agreement under what is essentially fraudulent inducement. *Id. Boyd* involved undisclosed retirement accounts, stock options, and an earned, unpaid bonus. After the parties entered into a mediated settlement agreement, the wife repudiated the agreement, contending that the husband failed to make proper disclosures. The trial court denied enforcement of the agreement because it failed to include substantial assets of the parties. The appellate court agreed, stating that a duty to speak exists when "the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them." *Id.* at 405. “[W]hen one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression.” *Id.* (quoting *World Help v. Leisure Lifestyles, Inc*., 977 S.W.2d 662, 670 (Tex. App.-Fort Worth 1998, pet. denied). In addition, the mediated settlement agreement included a full disclosure provision which stated: “Each party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them.” *Id* at 404. The court further held that "inserting a catchall provision" like "[a]ny undisclosed property is specifically awarded in equal shares to the parties" into a mediated settlement agreement "while at the same time intentionally withholding information about substantial marital assets will not save the mediated settlement agreement from being held unenforceable." *Id. But see Milner v. Milner*, 2010 WL 2243558 (Tex. App. – Fort Worth 2010, pet. filed)(mediated settlement agreement was set aside because there was no meeting of the minds regarding the transfer of a community property partnership interest).

F. Illegal/Void Provisions

It is possible that a settlement agreement can be found unenforceable, even though it meets the requirements of sections 6.602(c) or 153.0071(d). Contracts, including mediated settlement agreements, can be found void if the agreement results in fraud, or if

its provisions are illegal, although contracts are generally voided for illegality only when performance requires fraud or a violation of criminal law. *Beyers*, 199 S.W.3d at 358 (citing *In re Kasschau*, 11 S.W.3d 305, 314 (Tex. App.-Houston (14th Dist.] 1999, orig. proceeding)).

In *Kasschau*, a mandamus action was brought by the husband in regard to the trial court's refusal to enter judgment based upon a mediated settlement agreement that complied with the Family Code. The appellate court denied the mandamus on multiple grounds, even though it was undisputed that all the provisions of the code had been complied with. The appellate court noted that, because the mediated settlement had certain contingencies, the court had discretion to review the agreement before entering the judgment. The court reasoned that, although the trial court had approved the settlement agreement, it had never rendered judgment on it. More importantly, the court found that particular provisions of the agreement were illegal and violated public policy. On this ground, the entire agreement was found to be void. In the agreement, the husband had agreed to turn over certain telephone recordings he had made of the wife, without her consent, with third parties. This would constitute an illegal act. The settlement also provided that these recordings would be destroyed. The trial court found, and was upheld on appeal, that these actions were illegal since it contemplated the destruction of evidence related to a possible criminal proceeding, and refused to enter judgment on the entire agreement.

Settlement agreements are subject to review for duress, coercion, or other dishonest actions. *Boyd*, 67 S.W.3d at 403. *See Sudan v. Sudan*, 199 S.W.3d 291 (Tex. 2006) (the Supreme Court found that there was no evidence of economic duress to justify rescinding an amendment to a settlement agreement). The Supreme Court "characterized duress as the result of threats which render persons incapable of exercising their free agency and which destroy the power to withhold consent." The Court further stated that "[t]he compulsion must be actual and imminent, and not merely feigned or imagined." *Id.* at 292 (citations omitted). S*ee also Ward v. Scarborough,* 236 S.W. 434, 437 (Tex. 1922) ("The restraint must be imminent and such as to destroy free agency without present means of protection."). A settlement agreement will not be invalidated, however, if the duress or coercion emanates from a disinterested third party. *King v. Bishop*, 879 S.W.2d 222, 224 (Tex. App.-Houston [14th Dist.] 1994, no writ).

G. Limitations on Settlement Agreements

Parties cannot contract around the mandatory venue requirements in the Family Code. *See In re Calderon*, 96 S.W.3d 711 (Tex. App.-Tyler 2003, orig. proceeding). In *Calderon*, the parties entered into a mediated settlement agreement. *Id.* at 714. The agreement provided that jurisdiction would remain in Smith County for three years. *Id.* at 715. The court approved the agreement and incorporated its terms into its order. *Id.* Seventeen months later, the wife filed a motion to transfer venue to Bexar County and sought modification of the trial court's order. *Id.* The husband contended that transfer would not be proper because the agreement expressly stated that jurisdiction would remain in Smith County for three years. *Id.* The trial court denied the motion to transfer and the wife filed a petition for writ of mandamus asking the appellate court to order the trial court to transfer the proceedings to Bexar County. *Id.* Citing *Cassidy v. Fuller*, 568 S.W.2d 845, 847 (Tex. 1978), the court of appeals first noted that the language of the venue statute in the Family Code was mandatory in a SAPCR suit. Thus, a trial court has no discretion but to transfer the proceeding if the child has resided in another county for six months or more, and there was no dispute in this case that this requirement was satisfied. *Id.* at 716. The court based its decision, in part, on *Leonard v. Paxson*, 654 S.W.2d 440 (Tex. 1983).

The *Leonard* court held that despite an agreement to the contrary, a trial court has a mandatory duty to transfer such a proceeding. *Leonard*, 654 S.W.2d at 441. It noted that "the fixing of venue by contract, except in such instances as permitted by Article 1995, § 5 [inapplicable here] is invalid and cannot be the subject of private contract." *Id.* The *Calderon* court "found no indication in section l53.0071(e) or any other Family Code provision that the legislature, by adopting a policy favoring alternative dispute resolution, intended to abrogate its longstanding policy...that matters affecting the parent-child relationship be heard in the county where the child resides." *Id.* at 719 (citing *Leonard*, 654 S.W.2d at 442). The *Calderon* court then held that "any attempt to supplant the mandatory transfer provision applicable in a SAPCR is void." *Calderon*, 96 S.W.3d at 719. The court further held that the mediated settlement provision did not constitute a waiver of venue because "a settlement agreement attempting to change venue contrary to the statutory law of the state cannot constitute a waiver of venue. *Id.* at 720 (citing *Johnson v. U.S. Indust., Inc.*, 469 S.W.2d 652, 654 (Tex. Civ. App.-Eastland 1971, no writ)). If the provision were allowed to contravene the statutory scheme, it would "defeat the legislature's intent that matters affecting the parent-child relationship be heard in the county where the child resides." *Id.* (citing *Leonard*, 654 S.W.2d at 442).

A court may also deny a motion to enforce a mediated settlement agreement if the agreement does not include substantial community assets. *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.). In *Boyd*, the husband failed to disclose retirement accounts, stock options, and an earned, unpaid bonus in a mediated settlement agreement. *Id.* at 401. The husband moved to enforce the mediated settlement agreement based on sections 6.602 and 153.0071 of the family

code. *Id.* The trial court held a hearing on the husband's motion and entered an order denying the motion. *Id.* The court concluded that the mediated settlement agreement was unenforceable and had to be set aside so the court could make a fair and just division of the marital property and enter enforceable orders for the protection and best interest of the couple's child. *Id.* The trial court denied enforcement of the agreement because it did not include substantial community assets. *Id.* On appeal, the appellant argued that the trial court had no discretion to deny his motion to enforce an agreement because it complied with statutory requirements. *Id.* at 401. The Fort Worth Court of Appeals disagreed, and held that the phrase "notwithstanding Rule 11 [...] or another rule of law" does not require a trial court to enforce a mediated settlement merely because it complies with statutory requirements. *Id.* at 403.

The court reasoned that the appellant's argument, if taken to its logical end, could require "enforcement of an agreement that was illegal or that was procured by fraud or duress, coercion, or other dishonest means," which would be "an absurd result" and not one intended by the legislature. *Id.* Adopting a less restrictive interpretation, the court held that the quoted phrase means "the requirements of Rule 11 and common law that ordinarily apply to the enforcement of settlement agreements do not apply to mediated settlement agreements," if the agreements meet statutory requirements. *Id.*

If the trial court enters a judgment based on a mediated settlement agreement, and the trial court did not have jurisdiction to do so, then that portion of the agreed judgment is void. *Seligman-Harris v. Hargis*, 186 S.W.3d 582, 586-87 (Tex. App.-Dallas 2006, no pet.). In that case, appellant filed suit in Texas although the entire family lived in Germany. *Id.* at 584. The parties entered into a mediated settlement agreement regarding custody, visitation, child support and division of property. *Id.* at 585. The parties agreed to have the decree registered in Germany. *Id.* Based on the agreement, the trial court entered an agreed final decree. *Id.* On appeal, the appellant contended that under the UCCJEA, the trial court did not have jurisdiction to include in its decree provisions regarding child custody because Texas was not the "home state" of the children. *Id.* The court initially noted that, although the mother agreed to the trial court's jurisdiction, subject-matter jurisdiction cannot be conferred by consent, waiver, or estoppel. *Id.* (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000)). The court then reiterated that section 152.201(a) of the UCCJEA is the exclusive jurisdictional basis for making a child custody determination by a Texas court and the trial court could not acquire jurisdiction based on those statutory provisions. *Id.* at 585-86. It then concluded that under the plain terms of the UCCJEA, a Texas court lacked subject matter jurisdiction over child custody issues in this case. As such, those provisions pertaining to child custody issues were void. *Id.* at 586-87. The court also noted that the entire agreement would be void "if the contract is entire and indivisible." *Id.* at 587 (citing *In re Kasschau*, 11 S.W.3d 305, 311 (Tex. App.-Houston [14th Dist.] 1999, orig. proceeding). But the court found that, in this instance, "the effect the trial court's lack of jurisdiction over the child custody has on the underlying settlement agreement is an issue that has not been presented to the trial court" because the Father was unable to raise them. *Id.* Therefore, the court of appeals reversed the provisions of the decree that dealt with the division of property and child support and remanded the case back for further development. *Id.* The child custody claims were dismissed for want of jurisdiction. *Id.*

H. Death of a Party

What happens if a party to a mediated settlement agreement dies before judgment is rendered and the order is signed? In *Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237 (Tex. App. – Austin 2007, pet. denied), husband filed for divorce and subsequently husband and wife attended mediation and signed a mediated settlement agreement. *Id.* at 239. The mediated settlement agreement included the required statutory language. *Id.* at 240. For more than two years after the mediated settlement agreement was signed, husband unsuccessfully used various legal maneuvers attempting to rescind the agreement. Wife died on the day before the hearing to enter the final divorce decree was to occur. *Id.* at 239. The independent executor of wife's estate filed a declaratory judgment action concerning the enforceability of the mediated settlement agreement. *Id.* The trial court held that the mediated settlement agreement was enforceable. *Id.* at 239.

On appeal, husband argued that although he and wife intended to make a mediated settlement agreement pursuant to section 6.602 of the Family Code, the agreement was unenforceable because wife's death precluded any possibility that the agreement could be incorporated into a final divorce decree as intended by the parties. *Id.* at 241. The court of appeals held that the mediated settlement agreement was enforceable based upon the plain language of the statute and the public policy underlying it as well as the parties' intent as expressed in the language of the agreement. *Id.*

The court noted that section 6.602 allows spouses to enter into settlement agreements that are immediately binding and do not require the approval of the court. *Id.* Furthermore, by providing that when an agreement meets the requirements of section 6.602, the agreement is binding and a party is entitled to judgment on it, the court recognized that the statute shows the legislature's intention that the agreement be binding even in the absence of a judgment incorporating it. *Id.* at 242. The court also relied on the plain language of the agreement

which indicated that the parties intended that the agreement be immediately effective. *Id.*

I. Drafting Considerations

1. Include Statutory Language

It is obvious, but make sure that the mediated settlement includes the required statutory language. I include this language in my mediated settlement agreements:

> **THIS AGREEMENT IS NOT SUBJECT TO REVOCATION.**
>
> **Pursuant to Sections 153.0071 and/or 6.602 of the Texas Family Code, this Mediated Settlement Agreement is not subject to revocation and is signed by both parties and their attorneys, who were present at the time that their respective clients signed this Mediated Settlement Agreement. The parties and their attorneys recognize that this provision means that either party is entitled to judgment on this Mediated Settlement Agreement as a matter of law.**

2. Include "Partition" Language

Even though *Spiegel v. KLRU Endowment Fund* held that mediated settlement agreements are immediately binding and do not require the approval of the court, I want "partition" language included in the mediated settlement agreement. The following are a couple of examples:

> **Partition. The parties agree that this Mediated Settlement Agreement constitutes a partition pursuant to Section 4.102 of the Texas Family Code, and will survive the death or disability of either party.**
>
> **Partition. The parties agree that pursuant to Section 4.102 of the Texas Family Code, this Mediated Settlement Agreement constitutes a partition to each party all of the property awarded to the party herein and any and all interests, income or debts acquired after March 1, 2011, and will survive the death or disability of either party.**

3. Include a Full Disclosure Provision

After *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.), every mediated settlement agreement should include a full disclosure provision. The provision in Boyd stated: "Each party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them."
Id. at 404. Another example of a full disclosure provision states: "Each party represents that they have made a full and complete disclosure of all assets and debts of the community and separate estates and that such disclosure is a material part of the consideration for the agreements set out herein."

4. Be Very Cautious When Including a Residuary Clause

Practitioners need to be very cautious when including a residuary clause in a mediated settlement agreement because there can be significant unintended consequences.

There are two general types of residuary clauses used in mediated settlement agreements. One category is the "possession and/or control residuary clause, generally treated as the more narrow of the two types. The other general category, referred to as the broadly worded clauses, uses language intended to cover a wider range of property. *Marriage of Smith*, 115 S.W.3d 126, 133 (Tex. App. – Texarkana 2003, pet. denied).

a. Possession And/or Control Residuary Clauses

In *Soto v. Soto*, 936 S.W.2d 338 (Tex. App. – El Paso 1996, no pet.), the divorce decree stated that wife was awarded "All property in [wife's] possession" and that husband was awarded "All real and personal property in [husband's] possession." *Id.* at 339-340. Several years later, wife filed suit to partition property alleged not divided upon divorce. *Id.* at 340. The trial court ruled that at the time of the entry of divorce, husband had actual control, access and possession of all real properties. *Id.* at 340, 342. On appeal, wife argued that because her name was listed on the deeds to the properties, the court of appeals should determine that she was in legal, as opposed to actual, possession of the properties. *Id.* at 342. In other words, because she had legal possession of the parcels of real estate, the trial court was precluded as a matter of law from finding that husband had possession and control of the properties. *Id.* The court of appeals rejected wife's legal possession argument stating that "'Possession' as used in the context of divorce decrees, means the physical control of the property, or the power of immediate enjoyment and disposition of property." *Id.* at 343.

In *Marriage of Malacara*, 223 S.W.3d 600 (Tex. App. – Amarillo 2007, no pet.), husband and wife executed a settlement agreement in which they agreed that husband "shall own, possess, and enjoy, free from any claim of [wife], the property listed in Schedule 2 of this agreement...." The property described in Schedule 2 consisted of "[a]ll personal property in [his] possession." *Id.* at 602. Husband's retirement benefits were not expressly mentioned in the agreement. *Id.* at

601. Once husband retired and began receiving benefits, wife filed suit to partition the community portion of the retirement benefits. *Id.* at 601. The trial court determined that the retirement benefits were not divided in the settlement agreement or the divorce decree and awarded wife a portion. *Id.* at 601-602. The court of appeals rejected husband's argument that the retirement benefits were in his possession. The court explained that settlement clauses encompassing property within the possession of a spouse do not affect intangible property, that is, property not subject to physical control or immediate enjoyment or disposition. The court further explained that choses-in-action or contract rights are such property, as is a right to retirement benefits. *Id.* at 602.

b. Broadly Worded Residuary Clauses

In *Marriage of Smith*, 115 S.W.3d 126, 133 (Tex. App. – Texarkana 2003, pet. denied), husband and wife entered into a partition agreement. Paragraph 12 stated:

> The parties agree that, except as provided herein, each party shall own, have, and enjoy, independently of any claim or right of the other party, all property of every kind, nature, and description, wheresoever situated, which is now owned or held by him or her, or which may hereafter belong or come to belong to him or her, with full power to him or her to dispose of the same as fully and effectively in all aspects and for all purposes, as if he or she were unmarried.

Id. at 129. The partition agreement made no specific reference to the disposition of husband's GOSI retirement benefits. *Id.* A few years later, husband began receiving payments from his GOSI retirement benefits. *Id.* at 129. Years later, wife filed for divorce. The trial court concluded that the partition agreement did not cover the GOSI retirement benefits and awarded a portion to wife. *Id.* at 129-130.

The court of appeals noted that the residuary clause was a broadly worded residuary clause. The court further noted that language of the clause clearly indicates that the parties intended that it cover all other property not specifically divided by the agreement regardless of possession or control. *Id.* at 134. Because the agreement does not specifically allocate the GOSI retirement benefits to either husband or wife, the court concluded that the residuary clause governed the disposition of the funds. That being so, the funds, having "come to belong" to husband, still belong to husband independent of any claim or right of wife. *Id.* at 134. *See Buys v. Buys*, 924 S.W.2d 369, 371-372 (Tex. 1996).

In *Fillingim v. Fillingim*, 2011 WL 117664 (Tex. 2011), husband's parents conveyed four deeds for mineral rights to him during the marriage. Husband and wife subsequently divorced. The divorce decree stated that "the estate of the parties be divided as follows"and divides property in the community estate into two schedules, one for husband and one for wife. The decree did not specifically mention the mineral rights that originally belonged to husband's parents in the division, but it did include residuary clauses in each schedule awarding both parties a "one-half interest in all other property or assets not otherwise disposed of or divided herein." *Id.* at *1. Years later, after husband discovered that wife was receiving royalties, he filed a petition to clarify the divorce decree and a declaratory judgment action concerning his separate property mineral interests. The trial court determined that the deeds were gifts from husband's parents and his separate property, and that the divorce decree did not partition the separate property of the parties. *Id.*

The Texas Supreme Court first addressed husband's claim that the mineral rights were his separate property and could not be awarded to wife. The Court noted that even if husband's separate property claim is valid, section 3.003(a) of the Family Code states that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property." Parties claiming certain property as their separate property have the burden of rebutting the presumption of community property. Husband did not attend the final divorce hearing or offer proof that the deeds were his separate property. As a result, the deeds must be characterized as community property even if the characterization is mistaken. *Id.* at *2. The Court next addressed the residuary clause. The divorce decree did not specifically divide the mineral deeds, but the schedules included residuary clauses that awarded each party "[a] one-half interest in all other property or assets not otherwise disposed of or divided herein." The Court explained that such residuary clauses, as opposed to the more limited clauses that divide only the property "in possession" of the former spouses, have been held to effectively divide property not explicitly mentioned in the decree. The Court concluded that because husband did not provide any evidence that the deeds were separate property, the deeds were encompassed in the "estate of the parties" and were divided by the divorce decree's residuary clauses. *Id.*

5. Arbitration Provisions

A mediator may also serve as an arbitrator if the parties consent. *In re Provine*, 12 S.W.3d 824, 829 (Tex. App.– Houston [1st Dist.] 2009, no pet.). *See In re Cartwright*, 104 S.W.3d 706, 714 (Tex.App.-Houston [1st Dist.] 2003, orig. proceeding) (noting mediator should not act as arbitrator in the same or a related dispute without the express consent of the parties). The arbitrator usually decides disputes regarding the interpretation or performance of the mediated settlement

agreement or any of its provisions as well as disputes regarding the form of the Decree. Some mediators prefer not to act as the arbitrator but I usually prefer the mediator to act as arbitrator.

I would usually want the following language in the mediated settlement agreement regarding what the arbitrator will decide and how the arbitrator will decide the disputes:

> If any dispute arises with regard to the interpretation or performance of this Mediated Settlement Agreement or any of its provisions, including the necessity and form of closing documents, the parties agree to try to resolve the dispute by telephone conference with Jimmy Vaught, the mediator who facilitated this settlement. If the parties are unable to agree, the parties agree that Jimmy Vaught shall serve as the sole arbitrator of disputes regarding the interpretation or performance of this Mediated Settlement Agreement or any of its provisions. In addition, the parties agree that Jimmy Vaught shall serve as the sole arbitrator of disputes concerning the form of the Decree. The parties agree that, at the sole discretion of the arbitrator, the arbitration of disputes may be by written submissions without a hearing. The parties agree that the arbitration shall be binding arbitration.

There are several critical concepts to include in the arbitration provision: (1) the mediator will serve as the sole arbitrator of disputes; (2) at the sole discretion of the arbitrator, the arbitration may be by written submissions without a hearing; and (3) the arbitration shall be binding.

J. Mediation Notebook

Frequently I encounter difficulties "converting" the mediated settlement agreement into a Final Decree of Divorce which results in increased expenses for the client (or the lawyer if the client doesn't pay the extra expense) and delay in getting the case wrapped up and finished. There are several ways to remedy this problem. First, have a Decree prepared and revise it as the mediation progresses and have the parties sign a mediated settlement agreement incorporating the Decree. Second, have "form" Decree language prepared so that it can be revised or marked up and attached to the mediated settlement agreement. As a result, there is less conflict over the drafting and language in the Decree.

I suggest the preparation of a mediation notebook with "form" Decree language that can be edited and revised as necessary for each particular mediation. I also suggest that you include other items such as a checklist to make sure that everything has been covered, the airline regulations regarding unaccompanied minors which is available on the Family Law Section website, the child support guidelines, and IRS form 8332. I don't particularly like some of the Family Law Practice Manual forms and frequently insist that my forms be utilized.

V. THE IMPORTANCE OF RENDITION

There are several reasons for getting the Court to "render judgment' based upon your settlement agreement and getting the order timely signed.

Generally, a judgment is rendered when the decision is officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly. *Garza v. Tex. Alcoholic Beverage Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970). The entry of a written judgment is merely a ministerial act that reflects the court's action. *Cook v. Cook*, 888 S.W.2d 130 (Tex. App.-Corpus Christi 1994, no writ). A party can revoke his consent to settle a case at any time before the judgment is rendered. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874-75 (Tex. 1982).

A. When Does Rendition Occur?

When does the actual rendition occur? In *In re Joyner*, the trial court announced "your divorce is granted." 196 S.W.3d 883, 885 (Tex. App.-Texarkana 2006, pet. denied). Was this pronouncement the rendition of the final judgment? Is such an oral rendition effective? In *Joyner*, the parties signed a mediated settlement agreement that addressed most of their property and provided for the conservatorship and support of their minor son. *Id.* at 885-886. The parties attended a "final hearing" to address the few remaining property issues they had not been able to resolve in mediation. *Id.* at 886. The next day, the husband purchased a lottery ticket, which won over two million dollars. *Id.* Almost a year later, the wife filed a motion for a final trial setting, claiming that the divorce had never been finalized. *Id.* At that time, the trial court signed a "Final Decree of Divorce," which set out that the divorce had been judicially pronounced at the earlier hearing. *Id.* The wife appealed claiming that the divorce was final at the later hearing. *Id.* The court of appeals disagreed.

The appeals court observed that a judgment can be rendered either orally or in writing. *Id.*. (citing *James v. Hubbard*, 21 S.W.3d 558, 561 (Tex. App.-San Antonio, 2000, no pet)). If rendered by oral pronouncement, the entry of the written judgment is merely a ministerial act. *Keim v. Anderson*, 943 S.W.2d 938, 942 (Tex. App.-El Paso 1997, no pet.). But in order to be an official judgment, the oral pronouncement must indicate intent to render a full, final and complete judgment when it is

recited. *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995). It cannot allude to a future act that will decide the issues before the court. *Woods v. Woods*, 167 S.W.3d 932,933 (Tex. App.-Amarillo 2005, no pet.). *Compare James v. Hubbard*, 21 S.W.3d 558, 561 (Tex. App.-San Antonio, 2000, no pet)(judge's statement he was "going to grant the divorce" once the final decree was on his desk did not suffice as a rendering) *with Baize v. Baize*, 93 S.W.3d 197, 200 (Tex.App.-Houston [14th Dist.] 2002, pet. denied) (judge's statement "I'll grant your divorce today" was found to be sufficient rendition of judgment).

In this case, the *Joyner* court found that the intent of the trial court to render judgment was "undeniably there." *Id.* at 887. The court of appeals found that the trial court's statement was "made in open court while officiating as the presiding judge after all the evidence had been presented and in the presence of all parties and attorneys." *Id.* The trial judge expressly stated: "*your divorce is granted*" in the midst of other statements indicating present intent. *Id.* He also referred to the wife as "former wife." *Id.* The court of appeals found the judge's statement to indicate a "clear, present intent" that the judge was going to "rule immediately" and then did so. *Id.* at 888.

> A trial court's approval of a settlement does not necessarily constitute rendition of judgment.

In *San Antonio Rest. Corp. v. Leal*, 892 S.W.2d 855 (Tex. 1995), the parties settled their lawsuit and dictated their agreement on the record before the court. *Id.* at 856-57. At the end of the discussion, the court stated "I'll approve the settlement." *Id.* at 857. Subsequently one party revoked its consent to the settlement. *Id.* The question before the Supreme Court was whether the trial court had rendered judgment when it approved the settlement.

The Court noted that approval of a settlement does not necessarily constitute rendition of judgment. Judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk. The judge's intention to render judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made. *Id.* at 857-58. Although oral rendition is proper under the present rules, orderly administration requires that form of rendition to be in and by spoken words, not in mere cognition, and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment. The words used by the trial court must clearly indicate the intent to render judgment at the time the words are expressed. *Id.* at 858. The Supreme Court concluded that the trial court did not render judgment. *Id.*

B. Prevent a Party from Revoking Consent.

One of the most common pitfalls of negotiating a settlement of a lawsuit is that the parties become so fixated on certain issues, they leave out others. When issues that are important to the parties are left out of a settlement agreement, this often results in one or both sides wanting to repudiate the deal.

Rule 11 Agreements are vulnerable to these types of disputes in the sense that if a party revokes his or her consent, then there will be no quick and easy resolution of the case through an agreed judgment. Rather, the party who desires to enforce the Rule 11 Agreement must file a motion to enforce the agreement as written. In addition, the party seeking to enforce the agreement will also need to set a trial to litigate the issues that were not addressed in the Rule 11 Agreement. This is time consuming and expensive.

The best way to guard against repudiation of a Rule 11 Agreement is to have the court approve and render judgment on the agreement. *Padilla v. LaFrance*, 907 S.W.3d 454, 461 (Tex. 1995); *San Antonio Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995); *In re Joyner*, 196 S.W.3d 883 (Tex. App.—Texarkana 2006, pet. denied).

As discussed above, mediated settlement agreements are not vulnerable to attack on the grounds that a party has withdrawn its consent prior to rendition of judgment. *In re Circone*, 122 S.W.3d 403, 406-07 (Tex. App.-Texarkana 2003, no pet.); *Cayan v. Cayan*, 38 S.W.3d 161, 164-67 (Tex. App.-Houston [14th Dist] 2000, pet. denied). The statutes governing these agreements expressly authorize the court to enter judgment on the agreement with or without the consent of the parties. Thus, mediated settlement agreements are superior to mere Rule 11 Agreements when it comes to obtaining judgment in the most expeditious and least expensive manner. It should be noted that if the settlement agreement is a Rule 11 Agreement, and it is not a final deal, but one which addresses temporary orders to be entered by the court, then a party who desires to enforce the agreement must move quickly and reduce the agreement to writing so as to not allow the other party an opportunity to revoke their consent.

As discussed earlier, it is important to note that an associate judge has only limited authority to render and sign a judgment which incorporates the terms of a settlement agreement.

C. End the Marital Estate.

One of the most important reasons to get an order signed which approves the settlement agreement of the parties is to end the marital estate of the parties. It is to the benefit of the higher income producing spouse to end the marital estate as soon as possible and to give an

incentive to everyone involved to work quickly towards implementing the settlement agreement's terms. An oral rendition of judgment is the first step towards getting the parties divorced and their property divided, but as discussed in detail, below, it does not absolutely ensure that the estate of the parties will be divided as of the date of rendition. The only way to ensure that is by obtaining a signed written decree which states that the parties were divorced, and the community estate closed, on the date of oral rendition of judgment.

The Family Code requires that the court divide the estate of the parties any time it enters a decree of divorce. *See* TEX. FAM. CODE § 7.001 (instructing court that it "shall" divide the estate of the parties in its divorce decree). It is error for a court to grant a divorce and sever the issue of property division for a later trial and decision. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998); *Phillips v. Phillips*, 75 S.W.3d 564, 567 (Tex.App.—Beaumont 2002, no pet.).

Because the court is required to divide the estate of the parties at the same time it grants a divorce, the community estate of the parties remains open until the court grants a divorce and divides the estate of the parties. So when does this occur? At oral rendition of judgment or at the signing of the written decree? The answer is: it depends on what the court does.

An oral rendition is effective as a judgment if the record unequivocally shows that the judge intended for his or her oral rendition to finally dispose of all claims and parties. *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995); *Woods v. Woods*, 167 S.W.3d 932, 933 (Tex. App.—Amarillo 2005, no pet.); *Keim v. Anderson*, 943 S.W.2d 938, 942-43 (Tex. App.—El Paso 1997, no pet.).

Thus, if the court orally renders judgment which divorces the parties and divides their estate by adopting a settlement agreement executed by the parties, and the oral rendition unequivocally shows that the court intends to dispose of all claims and issues, then the parties are divorced, and the community estate ends, the day the oral rendition is pronounced.

Now, here's the catch. An oral rendition of divorce and property division is final and effective (i.e., its only good) so long as the court doesn't change its mind before signing a written decree. This is so because the court does not lose plenary power over its judgment until thirty days after it signs a written judgment unless a post-trial motion extending its plenary power is filed. *See* TEX. R. CIV. P. 306a (holding that date a written judgment is signed is the date for calculating when the trial court's plenary power ends); TEX. R. CIV. P. 329b (holding that trial court has plenary power for thirty days after a judgment is signed unless a post-trial motion is filed which extends the court's plenary power); *Stallworth v. Stallworth*, 201 S.W.3d 338, 349 (Tex.App.—Dallas 2006, no pet.)(holding that a trial court can alter its oral rendition of divorce at any time while it still retains plenary power to grant a motion for new trial);*Cook v. Cook*, 888 S.W.2d 130, 132 (Tex. App.—Corpus Christi 1994, no writ)(accord); *Ex parte Chunn*, 881 S.W.2d 912, 915 (Tex.App.—Houston [1st Dist.] 1994, orig. proceeding)(accord).

So long as the court stands by its original rendition, then the oral rendition is good and it divorces the parties and divides their property as of the date of rendition. *See In re Joyner*, 196 S.W.3d 883 (Tex.App.—Texarkana 2006, pet. denied)(affirming trial court's refusal to change its oral rendition). However, if the court decides to alter its oral rendition of judgment in its written judgment, then the date of the divorce and property division may become the date of the written judgment. *Cook*, 888 S.W.2d at 131-32; *Ex parte Chunn*, 881 S.W.2d at 915.

In summary, the careful practitioner will move quickly to have the court orally render judgment based upon the parties' settlement agreement. In addition, the careful practitioner will then follow up the oral rendition with a written order for the court to sign. By doing this, the careful practitioner will ensure that the community estate will come to an end and there will not be any nagging issues related to the division of assets and liabilities which can be created by leaving the estate open while the wording of a final decree is being put together.

D. Create Duties that Can Later Be Enforced.

The last reason for why it is so important to get a signed written order entered which adopts the parties' settlement agreement is the most obvious and the reason which requires the least amount of discussion.

While a settlement agreement can always be enforced through a breach of contract action, it cannot be enforced by contempt or any other method which applies to the enforcement of judgments. Why? **A settlement agreement is not a judgment!** Thus, until you get the settlement agreement reduced to a written order, your client does not have any of the remedies available for enforcing a judgment (i.e., contempt, writ of execution, writ of garnishment, reduction to a money judgment, etc.) provided by the rules and statutes governing judgments. *See,e.g., Ex Parte Chambers*, 898 S.W.2d 257, 262 (Tex. 1995)(holding that a contemnor may not be held in constructive contempt of court for actions taken prior to the time that the court's order is reduced to writing); *Dechon v. Dechon*, 909 S.W.2d 950, 958 (Tex. App. – El Paso 1995, no writ)(holding if order or agreement dividing marital property lacks order language then party must seek clarification of the order or agreement before it may be enforced).

As a consequence, it is very important to move quickly to have your client's settlement agreement reduced to a written order in order to broaden the tools in your toolkit for enforcing what your client obtained in the agreement. An agreement on division of property,

payment of child or spousal support, custody, or visitation and access cannot be enforced by contempt or any other mechanism for the enforcement of court orders until the agreement is accepted by the court and incorporated into a written order.