

MEDIATION - BEST PRACTICES, BETTER RESULTS

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JUDGE RICK MORRIS & JOHN P. PALMER

rickmorris711@gmail.com Palmer@namanhowell.com

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John P. Palmer

- **John P. Palmer** is a trial attorney, mediator and arbitrator with Naman, Howell, Smith & Lee, PLLC. John serves as a mediator and neutral in probate, family, general civil litigation, personal injury, and employer/employee disputes at the state and federal court level. John received his undergraduate degree from the University of Texas and his J.D. from St. Mary's University School of Law. In 2002, John was an ADR Fellow with University of Texas School of Law Center for Public Policy Dispute (CPPDR).
- John is currently chair of the Texas Mediator Credentialing Association (TMCA), and a past chair of the ADR Section of the State Bar of Texas, and past President of the Texas Association of Mediators (TAM). He is a Credentialed Distinguished Mediator by TMCA. He was a founder of the McLennan County Dispute Resolution Center 20 years ago and remains on its board of directors.

Judge Rick Morris

- Nearly 24 years as Judge of the 146th Judicial District Court, Bell County, gave **Judge Rick Morris** extensive experience in all aspects of civil trial and family law practice. Judge Morris is prepared for virtually all types of dispute resolution and consultation in Central Texas.
- During 14 years in private practice, followed by more than 33 years of active and Senior judicial service, Judge Morris has gained valuable insight in problem solving and finding amicable solutions to issues over a wide array of civil and family law matters. Having presided over civil cases involving personal injury, legal and medical malpractice, commercial, banking, employment, consumer, real estate, contract, governmental, products liability, DTPA, all aspects of family law and criminal law, Judge Morris has a unique perspective in resolving and finding solutions for business and personal conflicts.
- As a Private Judge, Arbitrator, and Mediator, Rick Morris is available for conflict resolution, arbitrations, mediations, neutral evaluations and settlement conferences.

BEST PRACTICES - WHY????

- Mediation has become an integral part of practice in almost any law practice.
- Many jurisdictions, including Bell, Coryell, and Navarro Counties require the parties attempt mediation prior to receiving a court setting.
- A majority of clients have never been in a court case, and even less have experienced mediation.
- Clients deserve to understand the role of mediation in their lawsuits.
- Clients expect their attorneys to prepare them for the mediation and to be prepared for the mediation.
- To serve their clients' needs, practitioners should have protocols in place to meet these duties.
- Practitioners need to determine if and how mediation should be used and when the best time for the mediation to occur.
- Moreover, to obtain the best result for clients, practitioners must look at each case to determine the best mediator for each client in each situation.
- Practitioners must keep in constant communication with their clients so clients can likewise prepare for mediation and have realistic expectations.
- This presentation offers practitioners some thoughts and methods to best serve their clients and maximize the chance for a successful mediation.

IS A MEDIATED SETTLEMENT AGREEMENT BINDING?

- **In Family Law, YES!!!** *In re Lee*, 411 S.W.3d 445 (Tex. 2013).
 - The language of Tex. Fam. Code § 153.0071(e) means what it says: a trial court may not deny a motion to enter judgment on a properly executed MSA unless a party to the agreement was a victim of family violence.
 - § 153.0071 prevails even over best interest standard—the court must enforce the MSA even if the court believes it is not in the best interests of the child.
 - “[T]he specific statutory language of section 153.0071(e) trumps section 153.002’s more general mandate.”

IS THE MSA REALLY BINDING?

(see In re D.G.M., 2023 Tex. App. LEXIS 5915 (Dallas - August 8, 2023))

- Tex. Fam. Code Ann. § 153.0071(e) prohibits a trial court from using another rule of law to decline to render a judgment on a mediated settlement agreement.
- Evidence that a mediated settlement agreement (MSA) has become unworkable is not grounds to set aside the MSA.
- Due process requires that a party receive notice of a hearing to enter judgment based on an MSA so that he may have the opportunity to contest the MSA prior to the rendition of the judgment.
- The parties are not without recourse to address an unworkable agreement. For example, § 156.101 of the Texas Family Code provides that a trial court may modify an order if the circumstances have materially and substantially changed since the date of the signing of a mediated settlement agreement on which the order is based. Fam. § 156.101. As soon as a trial court signs a final judgment on the MSA, any party may file a suit for modification if he or she believes that standard to be met.
- Parties challenging the validity of a mediated settlement agreement may also be able to avail themselves of applicable contract defenses such as illegality, fraud, duress, or coercion. See, e.g., *Highsmith v. Highsmith*, 587 S.W.3d 771,777 n.5 (Tex. 2019) ; *In re A.C.*, 560 S.W.3d at 635; *In re Lee*, 411 S.W.3d at 455 n.10; *Milner v. Milner*, 361 S.W.3d 615, 619 (Tex. 2012); see also *In re B.H.*, No. 05-19-00324-CV, 2019 Tex. App. LEXIS 8187, 2019 WL 4254063, at *2 (Tex. App.—Dallas Sept. 9, 2019, no pet.) (mem. op.); *Boyd v. Boyd*, 67 S.W.3d 398, 405 (Tex. App.—Fort Worth 2002, no pet.).
- Parties can agree to a divorce MSA before the Petition is filed and it is binding under Sections 6.602 and 153.0071. *Highsmith v. Highsmith*, 587 S.W.3d 771 (Tex. 2019).

Filing/Signing the MSA, **Attorneys and Mediators Beware:** *Daniel v. Morris, Placzek et al*, 2024 Tex. App. LEXIS 1336, 2024 WL 748081 Cause No. 01-22-0319-CV (Tex. App. [1st Dist.] Feb. 22, 2024)

- This case focuses on former spouses engaged in contentious litigation following their divorce. The parties eventually mediated and resolved several suits in a single MSA. The ex-husband later sued his ex-wife, the mediator, and the mediator's law firm, alleging violation of the settlement agreement's confidentiality statements. The agreement contained confidentiality provisions and the sealing of certain court-filed documents. Also, the mediator signed the party's MSA.
- As for signing the MSA as a mediator (pages 19-25) – The Court concluded that the mediator was not a party to the MSA but took 6 pages of analysis to do so. So why should a mediator be signing the MSA? The mediator should not. It is neither a benefit to the party nor the mediator.
- As for the act of filing the MSA, one of the party's attorneys, not the mediator should be responsible for this duty. The parties should address the filing issue during the mediation, and if there is any reason to withhold filing the MSA or to otherwise redact the terms. Therefore, ask yourself during the mediation and before filing the MSA, "Have the parties agreed to anything confidential that prevents filing or requires redactions?"

Lessons Learned from *In Re Lee* and *Subsequent Cases*

- In MSA language (*suggestion: use in all mediations*):
THE PARTIES FURTHER STIPULATE AND AGREE THAT THIS AGREEMENT, ONCE SIGNED BY THE PARTIES, IS IRREVOCABLE, NOT SUBJECT TO REVOCATION, AND MAY NOT BE REVOKED OR SET ASIDE FOR ANY REASON OR PURPOSE.
- Consider the following statements in family law cases:
 - **THE FOLLOWING AGREEMENT SERVES AS AN AGREED PARENTING PLAN AND IS IN THE CHILD'S BEST INTEREST**
 - **THE PARTIES AGREE AND STIPULATE THAT THIS AGREEMENT IS THE VOLUNTARY ACT OF THE FREE WILL AND JUDGMENT OF EACH PARTY, UNAFFECTED BY ANY ACT OF ANY OTHER PARTY OR PERSON HERETO.**
 - **BOTH PARTIES DENY THEY WERE A VICTIM OF FAMILY VIOLENCE FROM THE OTHER PARTY (IF APPLICABLE).**

When to Mediate

- Clause requiring mediation
- Scheduling Order
- Type of case
- Court Ordered/ Standing Order (mandatory Mediation)
- The attorneys' dynamics - past dealings with one another, trust issues
- The parties' dynamics - personalities, privacy issues, risk tolerances, TIMING
- The parties' and their attorneys' relationship - difficult client, trust issues
- Status of the litigation/ Discovery
- Economic considerations - amount in controversy, costs of litigation
- Status of negotiations

Where to Mediate . .

- In Person, Online, or Hybrid?
- Online – Prepare your client and signatures
- If In-Person:
 - Usually, a neutral place, such as the mediator's office is preferred for the mediation.
 - If one of the attorney's offices, consider:
 - space
 - safety considerations

WHO TO MEDIATE?

- Use your resources
 - Contact other attorneys about a potential mediator
 - Call and talk to potential mediator
 - Get the potential mediator's resumes
 - Alphabet Soup Resources:
 - TAM: Texas Association of Mediators
 - AAM: Association of Attorney Mediators
 - ACR: Association of Conflict Resolution
 - DRC: Dispute Resolution Centers
 - **TMCA: Texas Mediator Credentialing Association**
(www.txmca.org).

Factors to consider in choosing a mediator:

- Experience as a mediator
- Personality: aggressive/passive, listener/problem solver
- Mediation style -Interest based, needs based, evaluator or a hybrid?
- Attorney/non-attorney
- Substantive experience with the disputes at issue
- Experience as an attorney
- Training/Qualifications as a mediator
 - 40-hour basic training
 - 24-hour additional "family training" (Additional Family Violence Training (required))
 - "credentialed", "trained" or "certified" mediator
 - **Is the mediator a credentialed mediator by the Texas Mediator Credentialing Association (TMCA)?**
- Associations with mediator organizations
- Ethical guidelines the mediator follows
 - i.e. Ethical Guidelines for Mediators as promulgated by the ADR Section of the State Bar of Texas and adopted by the Texas Supreme Court Misc. Docket No. 11-9062, as amended April 11, 2011, effective June 1, 2011)
- Cost of the mediator
- Availability of the mediator

HOW TO "ORDER" THE MEDIATION

- The Court on its own motion, or counsel for any party may request referral to mediation. Tex. Civ. Prac. & Rem. Code § 154.021; Decker v. Lindsay, 824 S.W.2d 247, 250 (Tex. App.--Houston [1st Dist.] 1992, no writ); Downey v. Gregory, 757 S.W.2d 254 (Tex. App.--Houston [1st Dist.] 1988, no writ).
- If you and your client have decided to try mediation, contact the opposing party to determine whether mediation is agreeable. Under most circumstances the parties should enter an agreed order on mediation to protect the confidential nature of the mediation.
- If the opposing party will not agree to mediation, you should file a motion to mediate pursuant to sections 154.021-154.022 of Texas Civil Practice and Remedies Code.
- The court's decision on mediation will be reversed only upon a finding that the court abused its discretion.
- A court can order the parties and representatives with settlement authority to participate in the mediation, but the court cannot require the parties to participate in good faith. Decker v. Lindsay, 824 S.W.2d 247, 251 (Tex. App.--Houston [1st Dist.] 1992, no writ).

TOP IMPEDIMENTS IN MEDIATION

(informal survey of mediators and attorneys)

- SETTING A FULL DAY CASE FOR A HALF DAY
- NOT SENDING THE MEDIATOR ANYTHING
- NO PLAN/NO FIRST OFFER
- NOT KNOWING YOUR OWN INFO
- CLIENT NOT PREPPED
- ATTORNEY NOT PREPPED
- CONFUSION ON TIME, PLACE, DATE, COST
- NOT PAYING ATTENTION TO YOUR CLIENT
- UNREALISTIC OFFERS

PREPARE, PREPARE, PREPARE

- Check any mediator rules as to the mediation and comply with the rules.
- Read the Mediator's Requests and comply with it:
 - Return position papers and other forms timely
 - Make payment timely and in the form required by the mediator
 - Have a person with authority to settle at the mediation
- Prepare the client for mediation
 - Educate your client on how a usual mediation proceeds. Consider sending a letter to your client
 - Talk with your client about the approach to the mediation and settlement ranges. **BE ABLE TO KNOW WHAT YOUR CLIENT WANTS.**

Prepare Yourself - Family Law

Clauses You Want: Children's Issues

- Rights & Duties – geographic limitation/exclusive/independent/joint/Immunizations/homeschool/N
- Access (No Friday School/Exchanges/Build Up/Firefighters/Police /Shift Workers/ Military/Holidays/Summers/Right of First Refusal, Exclusion of Parties' Relatives/ Others)
- Non-Disparagement Clause, Paramour Clause/ Drug Testing Clauses
- Child Support info/language/ Health Care coverage/cost/ Tax Credits for children

Prepare Yourself - Family Law

Clauses You Want: Property Issues

- Retirement – Military/TRS/FERS/401(K)
- Spousal Maintenance/Alimony
- *Sale of Residence* (time period/residency/paying costs/split)
- Liens/ Security Interest Language in complex property cases/ Refinance Clauses
- Exchange of Personal Property – How, When, Why
- Taxes/ Tax returns/Refunds/Etc.
- Attorneys Fees/Court Costs

Why Do Mediator's Do this?

- Send Out a Letter
- Go over the rules
- Ethical Guidelines For Mediators ([Ethical Guidelines for Mediators](#) as promulgated by the ADR Section of the State Bar of Texas and adopted by the Texas Supreme Court Misc. Docket No. 11-9062, as amended April 11, 2011, effective June 1, 2011)
 - **3. Mediation Costs**
As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation.
 - **5. Mediator Qualifications**
A mediator should inform the participants of the mediator's qualifications and experience.
 - **6. The Mediation Process**
A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.
 - *Comment (b)*
At a minimum, the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceeding, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law. (See e.g., Sec.154.053 and 154.073, Tex. Civ. Prac. & Rem. Code.)
 - **10. Disclosure and Exchange of Information**
A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

JUDGES' VIEWS ON MEDIATION

(informal survey of Judge's)

- Know your Judge's tendencies
- Ordering
- Qualifications Matter
- Enforceability
- Looking at Conduct in the Mediation
- Subpoenaing Mediators

GRIPES ABOUT MEDIATORS IN MEDIATION

(informal survey of mediators and attorneys)

- Mediator talks to much about him or herself
- Mediator insulted my client
- Mediator doesn't convey the offer appropriately
- Mediator is too slow
- Mediator is biased
- Mediator has "checked out"
- Mediator didn't draft the agreement/didn't do it correctly

On-Line Mediation Checklist

- 1. Be comfortable with the online mediation platform you are using. **Update** the day before the mediation your online platform application and your computer. **Practice** the share screen feature.
- 2. If your client will not be in your office, **make sure** your client knows how to use the online mediation platform and **practice using it with them**. Make sure their computer and application is updated.
- 3. Do not let your client use his or her phone for the online mediation and it should at least be a laptop.
- 4. Notify your client of online signature platforms in advance.

Pre-Mediation Checklist

- 1. Provide your client all documents the mediator has provided to you and the documents your have provided to the mediator.
- 2. Make sure your client knows where to go and insist on punctuality.
- 3. Discuss with the client the mediator fee and assure payment is made as required by the mediator.
- 4. Educate the client as to the mediation rules, the format of the mediation (in person, online or hybrid). See separate checklist for online mediation.
- 5. Educate client as to the format used by the mediator, the possibility of a joint session, private caucuses, lawyer & mediator conferences and shuttle diplomacy.

Pre-Mediation Checklist

- 6. Let the client know that the process works only if given sufficient time. Encourage babysitting arrangements and the like to be made in advance.
- 7. Discuss positives and negatives of the client bringing a friend or family member. Let the client know that an individual who is harmful to the process may be asked to leave. *(Check in advance with Mediator/ Opposing Party).*
- 8. Review the issues in the case. This discussion should be comprehensive so that you are certain that your file is mediation-ready.
- 9. Discuss with your client the preparation of a first offer to be presented at mediation.

Pre-Mediation Checklist

- 10. A review of the issues should lead directly into a specific discussion of the strengths and weaknesses of their case. Include factual and legal weaknesses.
- 11. Try to provide your client with a range of outcomes. Clients quickly gather perspective in their case if they can see the distance between Best Case Scenario and Worst-Case Scenario.
- 12. Be fair with the client about attorneys' fees, expenses and time to trial when making the strength/weakness analysis and discussing outcomes.
- 13. Discuss with your client what their secret expectation, fears, and needs are.
- 14. Ask your client to evaluate for you what the other side expects, fears, and needs.

Pre-Mediation Checklist

- □ 15. Prepare the client for some of the more obvious negotiating techniques:
 - a. "Either/or" offers. Explain that sometimes these are hard to evaluate. Usually these offers contain hidden traps and hidden jewels. Let the client know that the format of this type of offer can be ignored if necessary.
 - b. The "high offer" offer. Let the client know that you can recognize an offer that is totally unreasonable and not to be alarmed by same.
 - c. No offer. Advise the client not to panic. This is probably going to be the mediator's problem. Despite all wisdom to the contrary, we sometimes bid against ourselves.
 - d. The walk-out. It happens. Do not let this take your client by surprise. Let the client know that there may be courthouse remedies if the other sides' behavior is extreme.

Pre Mediation Checklist

- 16. Discuss the dynamics of reaching settlement and the nature and enforcement of a Mediated Settlement Agreement.
- 17. Advise your client that they will be called upon to carefully read the Mediated Settlement Agreement because this agreement, if signed, is binding.
- 18. Let your client know that reducing the "agreement" to writing is a vitally important aspect of the mediation and will take time. This is the all-important road map for the divorce decree.
- 19. Remind your client that the MSA is not the final document in their case and the MSA is a guideline. After the MSA is signed, there will be additional closing documents needed such as a release, a dismissal order, or in a family case, a Divorce Decree or Modification Order.

**EMAIL US IF YOU NEED A FORM
OR HAVE A QUESTION**

THANK YOU!

JUDGE RICK MORRIS & JOHN P. PALMER

rickmorris711@gmail.com Palmer@namanhowell.com