THE PSYCHOLOGY
OF
MEDIATION

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CHAPTER 2
BIOGRAphical information

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THE PSYCHOLOGY OF MEDIATION

I. INTRODUCTION
Five different alternative dispute resolution (ADR) methods are described in subchapter B of chapter 154 of the Texas Civil Practice and Remedies Code (TCPRLC): mediation, arbitration, summary jury trial, mini-trial, and moderated settlement conference.

A. Mediation
Mediation is a process in which a neutral third party acts as a facilitator to assist in resolving a dispute between two or more parties. It is an approach to conflict resolution in which the parties generally communicate directly. The role of the mediator is to facilitate communication between the parties, help them focus on the real issues of the dispute, and generate options for settlement. A mediator may not impose the mediator’s judgment on the issues for that of the parties. The goal of mediation is for the parties themselves to arrive at a mutually acceptable resolution of the dispute. As with all alternative dispute resolution procedures, the mediation process is flexible; variables affecting the process include the style of the mediator and the communication mode of the parties. Mediation is described in TCPRLC § 154.023 (Vernon 1997).

B. Arbitration
In the arbitration process, the arbitrator listens to a typically adversarial presentation of all sides of the case and then renders a decision (usually called an “award”). Arbitration awards may be binding on the parties if they have so agreed in advance. Arbitrations are usually conducted by either a sole arbitrator or a panel of three arbitrators. Arbitration is described in TCPRLC § 154.027.

C. Summary Jury Trial
During the summary jury trial, the attorneys present an abbreviated version of their evidence to an advisory jury selected from the regular jury pool. The jury, after deliberation, returns a non-binding, advisory verdict. The parties and their attorneys then poll and question the jurors. The information gained from this process is to be used as a basis for further settlement negotiations. The summary jury trial is used when the parties believe that a preview of what a jury may do would help them evaluate the case. The summary jury trial is described in TCPRLC § 154.026.

D. Mini-Trial
The mini-trial is an alternative dispute resolution process in which the attorneys and parties meet with a neutral third party and each side presents its best case. Negotiation by the parties, usually without the attorneys present, follows; if this negotiation is unsuccessful, the neutral party provides an advisory opinion about the merits of the case. This opinion is non-binding unless the parties agree that it is binding and enter into a written settlement agreement. A primary basis for settlement is often the parties’ desire to resolve the dispute without protracted litigation, thereby preserving their business relationship. The mini-trial is described in TCPRLC § 154.024.

E. Moderated Settlement Conference
The moderated settlement conference uses a panel of neutral, experienced attorneys who listen to a presentation of factual and legal arguments by counsel for each party. The panel then questions the attorneys and the clients, who are present throughout the entire process. After deliberation, the panel renders a confidential advisory evaluation of the strengths and weaknesses of the case and often provides a dollar or percentage range for settlement. The evaluation is not binding on the parties and is used as a basis for further settlement negotiations. The moderated settlement conference is described in TCPRLC § 154.025.

All five alternative dispute resolution methods are available for use in all civil cases, including family law cases under the Texas Civil Practice and Remedies Code (TCPRLC). Only mediation and arbitration are mentioned in the Family Code.

II. NOTIFICATION AND OBJECTION
A. Statutory Authority
The court may, on its own motion or that of a party, refer a pending dispute for resolution by one of various alternative dispute resolution procedures. TCPRLC § 154.021(a) (Vernon 1997). The court shall confer with the parties in determining the most appropriate alternative dispute resolution procedure. TCPRLC § 154.021(b).

If the court determines that a pending dispute is appropriate for referral, the court shall notify the parties of its determination. TCPRLC § 154.022(a).

Any party may file a written objection to the referral within ten days of receiving the notice. TCPRLC § 154.022(b). If the court finds that there is a reasonable basis for the objection, the court may not refer the dispute. TCPRLC § 154.022©).

B. Objection to Mediation
The Family Code provides that, at any time before the final mediation order, a party may file a written objection to the referral of a suit to mediation on the basis that family violence has been committed against the objecting party by the other party (in a suit for dissolution of marriage) or by another party against the objecting party or a child who is the subject of the suit
(in a suit affecting the parent-child relationship). After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party (dissolution suit) or of a party (suit affecting the parent-child relationship), a hearing is held, and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order that appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. Tex. Fam. Code Ann. (TFC) §§ 6.602(d), 153.0071(f) (Vernon Supp. 2000). These provisions do not apply to suits filed under Code chapter 262. TFC § 153.0071(f).

### III. ARBITRATION AND MEDIATION AGREEMENTS

#### A. Texas Family Code (TFC) § 154.023

Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them. A mediator may not impose his own judgment on the issues for that of the parties.

#### B. Mediation

On written agreement of the parties or on the court’s own motion, the court may refer a case to mediation. TFC § 6.602(a) (Pamph. 1998), § 157.0071©) (1996).

A mediated settlement agreement in a title 1 case is binding on the parties if the agreement provides, in a separate paragraph, that the agreement is not subject to revocation; if it is signed by each party to the agreement; and, if it is signed by the parties’ attorney, if any, who is present when the agreement is signed. TFC § 6.602(b) (Pamph. 1998). A mediated settlement agreement in a title 5 case is binding on the parties if the agreement provides, in a separate paragraph, an underlined statement that the agreement is not subject to revocation; if it is signed by each party to the agreement; and, if it is signed by the party’s attorney, if any, who is present when the agreement is signed. TFC § 153.0071(d) (1996).

If a mediated settlement agreement meets these requirements, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

#### C. TFC § 154.071 - Effect of Written Settlement Agreement

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

However, the Family Code goes further in regard to mediation. These provisions are:

1. **TFC § 6.601 - Arbitration Procedures**
   
   On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or non-binding. If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator’s award.

2. **TFC § 6.602 - Mediation Procedures**

   On the written agreement of the parties, or on the court’s own motion, the court may refer a suit for dissolution of a marriage to mediation. A mediated settlement agreement is binding on the parties if the agreement: (a) provides in a separate paragraph that the agreement is not subject to revocation; (b) is signed by each party to the agreement; and ©) is signed by the party’s attorney, if any, who is present at the time the agreement is signed.

   If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

3. **TFC § 7.006 - Agreement Incident to Divorce or Annulment**

   To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under rule of law.

   If the court finds that the terms of the written agreement in a divorce or annulment are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.

   If the court finds that the terms of the written agreement in a divorce or annulment are not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing.
4. TFC § 153.007 - Agreement Conserving Conservatorship
To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for conservatorship and possession of the child and for modification of the agreement, including variations from the standard possession order.

If the court finds that the agreement is in the child’s best interest, the court shall render an order in accordance with the agreement. Terms of the agreement contained in the order or incorporated by reference regarding conservatorship or support of or access to a child in an order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract.

If the court finds the agreement is not in the child’s best interest, the court may request the parties to submit a revised agreement or the court may render an order for the conservatorship and possession of the child.

5. TFC § 153.0071 - Alternate Dispute Resolution Procedures
On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding. If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator’s award, unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator’s award.

On the written agreement of the parties, or on the court’s own motion, the court may refer a suit affecting the parent-child relationship to mediation. A mediated settlement agreement is binding on the parties if the agreement (a) provides in a separate paragraph that the agreement is not subject to revocation; (b) is signed by each party to the agreement; and (c) is signed by the party’s attorney, if any, who is present at the time the agreement is signed. If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

IV. HOW TO CHOOSE A MEDIATOR
A. Qualifications
The mediator should be statutorily qualified, at a minimum. Look for a mediator who regularly conducts mediation, and mediation comprises a large part of their practice, or is their sole practice.

B. Availability
Find a mediator who is not booked 2 to 3 months in advance, unless your client and case can wait. If the case is ready, mediate it then, not later.

C. People Skills
It is very important to select a mediator who can work well with people for prolonged periods. Do not choose a mediator with a “short fuse”, nor one who always has something else to do. You need a person who can relate well to others, yet strong enough to get the job done. The good mediator is one who knows when to push the parties and/or the attorneys, and especially...when not to. The good mediator is also a confidence “gainer and giver”; one who gains the confidence of the parties and gives confidence to the mediation. One who knows when to say, “that’s good, but have you considered this...” instead of, “that’s bulls__t,” and then has the feel to know when to say, “bulls__t.”

There’s an old saying... “You can’t make a silk purse out of a sow’s ear;” however, the good mediator knows how to open that purse. They must be skilled enough to find a path for both parties to at least visualize a middle ground, known as settlement.

D. Successful
Find a mediator with a good track record. One who knows how to negotiate and settle cases. Perhaps choose a mediator in whom the local family law courts have confidence.

E. Knowledgeable
Choose a mediator who possesses a very good working knowledge of family law. One who knows the statutory and case law. You should not have to educate the mediator. A mediator who knows the law, when to use it, and especially when not to use the knowledge is invaluable.

V. WHEN SHOULD THE PARTIES MEDIATE?
A. Before Discovery?
Some practitioners believe in mediating a case in its early stages. If the case is relatively simple and/or the attorney has sufficient information regarding parent-child issues and/or the issues dealing with property, there may exist a basis for mediating before or without discovery. If this stage for mediating is selected, the attorney must at least be knowledgeable of custody issues, JMC or sole managing conservatorship and possessory conservatorship, discussion of parental rights, duties and responsibilities, children’s expenses, net resources of both parents, school issues, extracurricular activities of the children, special needs, psychological or emotional issues, and desires of the children. At this stage, the
attorney must also know and have accuracy regarding property issues of:

1. Characterization of assets and issues of reimbursement and/or economic contribution;
2. Valuation of disputed assets; and
3. Division scenarios favorable to the client.

If at least all of the above-mentioned issues are addressed and known, then mediation prior to formal discovery may be appropriate, but only after securing a written waiver of discovery and a release from the client. Chances are, at some point, the attorney will also need to defend a client-filed grievance and possibly notify the legal malpractice insurance carrier. Mediation at this stage should only be considered under the strictest and most limited circumstances.

The client always wants to save added legal expenses of discovery, and most attorneys want to save time; however, this is probably not the place to do it.

B. After Discovery?

After, at least, basic formal discovery and evaluations have been completed and analyzed, is the most common time-frame for mediating a case. Both the client and the attorney are normally better informed and more confident of their legal position at this phase of the case.

Normally, at this point, the opposing party has been under oath in responding to various forms of discovery. Later, should undiscovered or unmentioned assets or liabilities surface, there may be an action available for some species of fraud against the offending party.

C. After Final Trial?

Yes, strange as it might sound, cases may be referred to mediation after trial, prior to entry of the order, or even after the filing of or granting of a motion for new trial. Mediation, at this point, may save the time and expense of another trial and the time and expenses related thereto.

Mediation, at this stage, may deal with issues that were overlooked or not covered at trial, hidden or later discovered assets or liabilities, change in circumstances regarding parent-child issues arising since the final trial or hearing, or other newly created or discovered issues.

D. Before Future Motions May Be Filed?

Many final orders contain provisions that order the parties to mediate any future controversies, prior to their filing appropriate pleadings. In most instances, these provisions are not clear and are too ambiguous to define the mediation process, as defined by statute. Exceptions to mediation prior to future filing are normally emergency and enforcement actions.

Mediations prior to filing are not recommended as they usually prove to be a waste of time. One side may believe this to be a free bite at the apple and if no agreement is reached there will be no filing. Also, at this stage, at least one side, if not both, are evidence “ill-equipped”, or unaware of the depth and breadth of the issues involved.

However, though unable to resolve all the issues, mediation here may be appropriate to resolve some of the issues, and/or to reach agreements which can streamline the discovery and other aspects of pre-trial.

VI. CONFIDENTIALITY OF COMMUNICATIONS IN ADR PROCEEDINGS

In general, any communication relating to the subject matter of the referred dispute made by a participant in the alternative dispute resolution procedure, whether before or after formal judicial proceedings are instituted, is (1) confidential, (2) not subject to disclosure, and (3) may not be used as evidence against the participant in any judicial or administrative proceeding. TCPRC § 154.073(a) (Vernon 1997).

Any record made at the alternative dispute resolution procedure is confidential; neither the participants nor the third party facilitator may be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute. TCPRC § 154.073(b).

Unless expressly authorized by the disclosing party, the third party facilitator may not disclose to either party information given in confidence by the other and must at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. TCPRC § 154.053(b). All matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the court, unless the parties agree otherwise. TCPRC § 154.053©).

An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independently of the procedure. TCPRC § 154.073.©).

Despite the requirements for confidentiality discussed above, in certain instances applicable law may require disclosure of information revealed in the mediation process. For example, section 261.101 of the Family Code may require a mediator to disclose child abuse or neglect to the proper authorities. A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by subchapter B, chapter 261, of the Code. Tex. Fam. Code Ann. § 261.101(a) (Vernon Supp. 1998). Professionals are subject to more specific requirements for reporting, which are contained in TFC § 261.101©). Consequently, a mediator, including an attorney mediator, has a duty to report as set forth in Code section 261.101. If confidential information is disclosed during a mediation that is required to be reported, the mediator should advise the parties that disclosure is required and will be made.

VII. SELECTION AND QUALIFICATIONS OF IMPARTIAL THIRD PARTY

When a dispute is referred, the court may appoint one or more properly qualified impartial third parties to facilitate the procedure. TCPRC § 154.051 (Vernon 1997). To be qualified for appointment as an impartial third party, a person must have completed at least forty hours of prescribed training in dispute resolution techniques. TCPRC § 154.052(a).

Appointment to a parent-child case requires the basic forty hours of training, plus an additional twenty-four hours of training in family dynamics, child development, and family law. TCPRC § 154.052(b). The court may appoint a person who does not have the prescribed training if the appointment is based on legal or other professional training or experience in particular dispute resolution processes. TCPRC § 154.052©).

The court may set a reasonable fee for the services of an impartial third party. TCPRC § 154.054(a). Unless the parties agree to a method of payment, the court shall tax the fee as other costs of suit. TCPRC § 154.054(b).

VIII. PREPARING FOR MEDIATION

A significant role in a successful conclusion is preparing the case for mediation. This role is very much like his or her responsibilities in preparing the case for trial because in order to be prepared for mediation, it is important to be prepared for trial and be aware of all the “good facts - bad facts” of the case. A mediation notebook will resemble a trial notebook in that it may contain the live pleadings, discovery, inventories, expert’s reports and important supporting documents or evidence. If a mediation notebook is prepared and the case does not settle at mediation, then the mediation notebook may serve as the trial notebook. In complex litigation, a notebook may be compiled which contains the inventories of the parties, along with copies of documents supporting the value, characterization, other claims, pleadings, reports, prior settlement proposals, etc. These tools can help expedite the mediation process and make it more efficient.

A. Preparing a Pre-Mediation Checklist

A very important function of the “prep” may be to prepare a Pre-Mediation Checklist. An excellent source for forms for mediation and other stages of litigation in a family law case is the Checklist (✓ List) Form book which is a publication prepared by the Family Law Section of the State Bar of Texas. This form book contains a specific section (VII) dedicated to mediation.

There can be a state of confusion during the mediation process while negotiations are in process and, particularly when the mediation agreement is being prepared and routed for signatures. Emotions of the litigants may be elevated, the atmosphere can be hurried, but it is critical to not overlook important aspects of the case. A Pre-Mediation Checklist can be helpful in avoiding mistakes and insuring that the relief sought on behalf of a litigant is addressed, accomplished, and not overlooked.

B. Attorney’s Information Sheet

Many mediators will request the attorneys to prepare and submit an Attorney Information Sheet in advance of mediation. This form contains important information for the mediator to review prior to and during the mediation. Receiving the information sheet in advance allows the mediator an opportunity to prepare for the mediation and to utilize the time allotted for mediation efficiently and effectively.

C. Property Division Form

Another important form is the Property Division Form, which should contain a specific list of assets and debts to be divided and/or addressed during the mediation process. This provides a “snapshot” of the inventories of the parties and is an instrument which can expedite the mediation process. It is important that the values and debts be updated and verified in order to insure the appropriate division of the estate. Cross-references to the party’s inventory can be helpful in avoiding confusion as to the identity or specifics about an asset or indebtedness. The Property Division Form can be in spreadsheet format such as Lotus 1-2-3, Excel, or Quattro Pro; and, changes can be made on a laptop computer and printed in order for various proposals to be quickly and accurately evaluated.
D. Mediation Agreement
Perhaps the most important document in the mediation process is the Mediation Agreement. It is therefore critical that the agreement be specific, clear, and concise in setting forth the agreement of the parties in order to avoid any confusion or problems with interpretation. The mediation agreement is utilized in preparing the final judgment and closing documents, thus any confusion about the intent of the parties or the terms of their agreement can be avoided by ensuring that every “I” is dotted and every “t” is crossed.

IX. WHAT HAPPENS IN MEDIATION?
A. Confidential Proceeding
As stated before, the mediation proceeding is confidential, not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding unless as otherwise authorized by law.

B. Authority of Mediator
The mediator does not have authority to decide any issue for the parties, but attempts to facilitate the voluntary resolution of the dispute by the parties. The mediator is authorized to conduct joint and separate meetings with the parties, and to offer suggestions to help the parties achieve settlement. If necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining the advice. Arrangements for obtaining such advice may be made by the mediator or by the parties, as the mediator determines.

C. Parties Responsible for Negotiating Their Own Settlement
The parties need to understand that the mediator will not, and cannot, impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The mediator, as an advocate for settlement, uses every effort to facilitate the negotiations of the parties. The mediator will not warrant or represent that settlement will result from the mediation process.

D. Authority to Settle
Parties must have authority to settle and all persons necessary to the decision to settle are asked to be present.

E. Privacy
Mediation sessions are private. The parties, their attorneys and experts, if needed, should attend mediation sessions. Other persons may attend, only with the permission of the parties and the consent of the mediator.

F. Confidentiality of Information
Confidential information disclosed to a mediator by the parties or by witnesses in the course of mediation shall not be divulged by the mediator. In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, section 261.101 of the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed that is required to be reported, the mediator will advise the parties that disclosure is required and will be made.

All records, reports, or other documents received by a mediator while serving in that capacity is confidential. The mediator cannot be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum. Any party who violates this agreement should be ordered to pay all fees and expenses of the mediator and other parties, including reasonable attorney’s fees, incurred in opposing the efforts to compel testimony or records from the mediator.

The parties maintain the confidentiality of the mediation and cannot rely on or introduce as evidence in any arbitration, judicial, or other proceeding (a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; (b) admissions made by another party in the course of the mediation proceedings; (c) proposals made or views expressed by the mediator; or (d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

G. No Record of Session
There is no electronic or stenographic record of any session.

H. Joint Opening Session or Not?
Often times an opening session is preferred. In this, only the mediator, parties, and attorneys are present (even if others, such as experts, are in attendance). The mediator will make introductions, describe the process of the day, notify those present of the creature comforts and lunch, identify a prospective ending time, and ask for non-confrontational position statements from the attorney and parties.

This opening session should be conducted (if at all) only for the security and well-being of the client and to provide information. Other than for these purposes, it can become a “saber-rattling” opportunity which usually proves to be counter-productive for a desired successful mediation.

The decision to have the mutual opening session is usually within the mediator’s discretion, relying on their feel for the issues and emotional investment of the parties.
At the conclusion of the joint opening session, the parties are placed in separate rooms and usually do not see each other again until the conclusion of the day, if then.

I. Shuttle Diplomacy and Negotiation

The mediator normally begins the private sessions, called “caucus,” with the party that filed first or the party who received the last offer if any. The mediator, at this point, begins to establish a rapport with the party and his or her attorney. After a discussion of their side of the case, emotional venting, and “posturing,” the mediator secures the initial proposal for settlement of all or part of the case issues.

The mediator then meets with the other party and attorney, again establishing rapport with them, and pursues the same process as accomplished with the other side.

The remainder of the day is a repetition of the above described procedure until one of the following occurs: (a) a previously agreed ending time; (b) a recess is declared; (c) an impasse is declared; or (d) an agreement is reached, reduced to writing, and signed by all parties and their attorneys.

J. Mediation - Offers

The following are the types of mediation offers which usually occur: (a) the one offer mediation; (b) multi-offer mediations; and (c) the mediator’s offer.

K. The Mediator’s Expert: Come Back Jim Farris Wherever You Are

In the proper case, with the approval of all parties, the mediator may have their own (neutral) expert. This is a new concept in Texas mediation and has not yet been introduced into a family law mediation to this author’s knowledge.

This revolutionary concept is, therefore, combining a feature of the collaborative law process with that of the mediation process.

X. CONCEPTS OF MEDIATION: IF YOU HANG THE MEAT TOO HIGH, THE DOG WON’T JUMP

A. In the Beginning...

Be prepared. Several factors need to be set in motion and completed prior to the date(s) of mediation to better insure a successful result. Some of these factors are: (1) Lawyers be prepared; (2) Clients be prepared; (3) Mediator be prepared; and (4) Issues enumerated and clearly defined.
iv. can’t do something that can be accomplished in mediation
v. even if they could do certain things in their decisions, probably wouldn’t, if against the “norm.”

b. That judges have an age old saying - “If I make a decision that neither party likes - it was probably the right decision.”
c. Judge in Particular - the judges in their case -
i. What they are prone to do in “given” or similar fact situations.

4. Talk about creative approaches that can read desired results in mediation, but probably not in Court.
   a. Allow the parties to begin to visualize the concept of “other choices” than their first choice.
   b. Example with client of:
      i. Ice cream
      ii. NASCAR racing
      iii. Wine
      iv. Golf
   c. Which do they like “better” and then lead them through to the final result that they won’t receive their “favorite flavor” - but they commit to consider something other than their first 5 favorite flavors (desired results).

5. Talk about every case can settle - There’s not a case that can’t settle at mediation. Don’t know if their case will, but statistics prove there is a 90% probability that it will settle at mediation.

6. Talk about the fact that the case will not settle on any party’s “best day” or “worst day” in Court - but rather somewhere between best case and worst case scenarios.

7. Talk about emotions versus business decisions.
8. Talk about the fact that mediation is not a “cure-all” but that resolution via mediation can bring finality, closure, and proper safeguards.
9. Talk about the party’s trial, if they don’t settle -
   a. Is it set?
   b. Length of trial
   c. Dynamics of trial

10. Talk about how long they’ve been in the litigation process -
   a. How they’ve “enjoyed” it.
   b. How they don’t like it and want out of it.

11. Talk about the Temporary Orders and Rule 11 Agreements, if any.
   a. If these are in place and working ... leave it alone (If it ain’t broke, don’t fix it.)
   b. If Temporary Orders or arrangements are not working -
      i. What is not working?
      ii. Why is it not working?
      iii. When did it stop working?
      iv. How to “fix it?”
      v. Where: Mediation is the place to attempt to fix it.

12. Talk about positive “signs.”
13. Talk about positive movement.
14. Talk about the dynamic of bad things happening in good cases/to good lawyers.
15. Talk about the atmosphere being more desirable for the children to cross the border between the United States and Canada, rather than between Iraq and Iran.
16. Talk about the “settlement zone” - where it is more economical to settle the case at a certain level than to pay to go through a trial.
17. Talk about the levels of settlement offers and, if rejected, that the “attorney for rejection” guarantee in writing to their client that they can do as good or better in court for the client, versus the offer.
18. Talk about the statistics of settling at mediation versus going through a contested final proceeding.
   a. If settled at mediation - only a 20% chance of being back in court in the next 2 years.
   b. If final contested proceeding, there is an 80% chance they will be back in court within the next 2 years.

19. Talk about the fact that nothing ever seems fair - The fair is once a year, in October, with Big Tex, corn dogs, bumper cars, and the ferris wheel - that’s the Fair. - But, the result can be
reasonable and make sense, even though not appearing to approach “fair.”

   a. Not legal advice
   b. Experience talking
   c. Only shared to be productive
   d. Would never knowingly do anything counter-productive to the mediation process.

21. Talk about “commitments”.
   a. Commitment for party to settle.
   b. Commitment for party to work hard through the mediation process.
   c. Commitment to accept a middle ground.
   d. The mediator’s commitment.
      i. Creativity
      ii. Energy
      iii. Experience
      iv. Knowledge

22. Talk about the 4 possible outcomes of mediation.
   a. Sign MSA - settle all the issues in the case.
   b. Sign MSA - settle all but one or two issues in the case.
   c. Recess, only with the permission of all attorneys.
   d. Impasse.

23. Talk about 3 of the outcomes being positive and only one negative.

24. Talk about commonality with the parties and the mediator - probe in a nice way.

25. Talk about attorneys not wanting to disappoint the client or look bad in court.

XI. WHAT HAPPENS AFTER A MEDIATION
A. Litigation After Agreement Reached -

   Both prior to and since the enactment of Texas Family Code sections 153.0071 and 6.602, there are numerous cases where the attorney regretted the fact that the case had ever “settled” since there was more litigation regarding the settlement agreements than if the entire case had simply been tried to the court. Anecdotally, this is the common experience heard from other attorneys across the state. Further, in cases where one party revokes consent to the agreement prior to entry of the order, where the agreement fails to address a significant asset or liability of the parties, or where something new or substantial is discovered or occurs between mediation and entry of the order, the court is faced with litigation that may address both the merits of the original case and the enforceability of the settlement agreement. See, George B. Murr, “In the Matter of the Marriage of Ames and the Enforceability of Alternative Dispute Resolution Agreements: A Case for Reform” 28 Tex. Tech L. Rev. 31 for an excellent discussion of the problems in enforcing mediated settlement agreements. Although Texas Family Code sections 153.0071 and 6.602 are improvements on the civil remedies for enforcement of these agreements since an agreement in compliance with either statute is irrevocable, the legislature did not give any direction or assistance to the issues of omitted assets or liabilities, incomplete agreements, or significant new issues, assets or liabilities that occur between mediation and the signing of the order. It is also questionable whether any common law defenses previously available with regard to such agreements still remain. (See, Alvarez v. Reiser, 958 S.W.2d 232 ([Tex. Appl. - Eastland, 1997, no writ]).

B. Case Law -

   Prior to the adoption of Texas Family Code Sections 153.0071 and 6.602, settlement agreements, mediated or not, were covered by Rule 11 of Texas Rules of Civil Procedure, Chapter 154 of Texas Civil Practice and Remedies Code. For your reference, the important cases are:

   (1) In Re Ames, 860 S.W.2d 540, (Tex. App. - Amarillo, 1993, writ ref’d.)

Because of the enactment of Texas Family Code § 153.0071 and 6.602, it is most informative to concentrate on cases occurring after the enactment of such sections.

   In Davis v. Wickham, supra the court confirmed the remedy of a breach of contract suit for enforcement of an agreement revoked prior to judgment. The parties were ordered to mediation in a custody modification suit and entered into a mediated settlement agreement as a result of that mediation. The parties and their attorneys also signed a Rule 11 stipulation and settlement agreement based on the mediated settlement agreement reflecting that the parties and their attorneys agreed to be bound by the terms of the mediated settlement agreement. Prior to rendition of the judgment, Husband repudiated the agreement and withdrew his consent to the entry of judgment. Wife filed a motion to enter and agreed order based on the Rule 11 Stipulation and settlement agreements.
agreement which incorporated the court ordered mediation settlement agreement. The court heard that motion, as well as Husband’s motion not to sign the agreed order and his motion to set the case for trial. At the hearing, Husband argued that since he had entered into the Rule 11 stipulation, he had discovered “new evidence” that indicated that the agreement and order would not be in the best interest of the children. The trial court entered judgment granting the Rule 11 agreed order over Husband’s objection and he appealed.

The appellate court cited Texas Civil Practice and Remedies Code Annotated 154.071a, as confirmation that under contract law one party may enforce the agreement without the other party’s consent. Stevens v. Snyder, 874 S.W.2d 241, 243 (Tex. App. Dallas 1994, writ denied). The court held that because a mediated settlement agreement is enforceable under contract law, the same procedures used to enforce and enter judgment as procedures used to enforce and enter judgment as other contracts should apply to mediated settlement agreements. The Davis case confirms that a mediated settlement agreement arising out of court ordered mediation under the Texas Family Code Alternative Dispute Resolution statute is enforceable as any other contract. Specifically: (1) summary judgment proceedings are appropriate, if no fact issues exist, and (2) trial, jury or non-jury, if a fact issue exists. The appellate court further stated that a trial court may enter a judgment on a mediated settlement agreement where one of the parties contests his or her intent to be bound to the agreement only by following one of the vehicles set out in the Texas Rules of Civil Procedure.

In Davis, the appellate court then found that the trial court’s hearing on the motions to enter the Rule 11 agreed order repudiated by Mr. Davis was not an “action to enforce a settlement agreement based on proper pleading and proof” under Padilla v. LaFrance, supra, and reversed the judgment of the trial court which had entered the order based on the Rule 11 stipulation and remanded the case for trial.

Another important case is Alvarez v. Reiser, 958 S.W.2d 232, 234 (Tex. App. - Eastland 1997, writ denied). In Alvarez, the husband sued the wife for divorce. The wife filed a cross-petition. At mediation, the parties reached a settlement agreement that complied with the requirements of section 153.071(d). The trial court entered judgment on the mediated settlement agreement even though the wife had withdrawn her consent to the agreement. The wife appealed and the appellate court affirmed, concluding that: (1) a party’s unilateral withdrawal of consent does not negate the enforceability that complies with section 153.0071(d), and (2) “a separate suit for enforcement of a contract is not necessary to enforce a mediated settlement agreement.” Id. At 234.

In the recent case In Re Kasschau, 11 S.W.2d at 305 (Tex. App. - Houston [14th Dist.] 1999, orig. pro), a mandamus proceeding, the court held that mandamus was the proper procedure to address the court’s refusal to enter judgment on a mediated settlement agreement.

In Kasschau, the wife brought a divorce action against her husband, requesting dissolution, conservatorship of two children, and division of community estate. Before judgment was entered on the court-approved mediated settlement agreement, wife nonsuited the divorce petition. Unaware of the nonsuit, husband filed a counter-petition for divorce, seeking enforcement of the settlement, denying paternity of second child, and asserting various tort claims. The wife filed a new petition for divorce. Ultimately, Judge Squier denied husband’s motion to reinstate the counter-petition and set aside the settlement agreement. Husband filed a petition for writ of mandamus. The court held that wife’s nonsuit did not defeat the agreement. Instead of immediately entering judgment on the mediated settlement agreement, however, the trial court reviewed the agreement and concluded it was void.

While Alvarez precludes a party from revoking consent to a mediated settlement agreement that complies with section 153.0071, it does not hold that the court’s duty to enter judgment on such an agreement is ministerial. A court’s duty to enter judgment on a settlement agreement becomes ministerial only after it has first rendered judgment on that agreement. Here, the trial court approved the settlement agreement, but never rendered judgment on the agreement. See, e.g., S & A Restaurant Corp. V. Leal, 892 S.W.2d 855, 587-58 (Tex. 1995) (holding that approval of a settlement does not necessarily constitute a rendition of judgment in the absence of a clear intent to render judgment). As a result, if the court does not approve the settlement agreement and render judgment, the court has no ministerial duty to enter judgment and thus, did not violate any duty.

The appellate court hedged by saying that the facts of the underlying case demonstrate that the parties did not intend for the court to immediately enter judgment on the settlement agreement. Specifically, the mediated settlement agreement expressly contemplates certain contingencies in connection with an intervention. It states that the court would likely require an intervention to resolve certain issues regarding the second child and that entry of a decree would, therefore, be delayed and agreed temporary orders would be entered while those issues were resolved. Thus, the facts of this case establish the trial court’s discretion to review the agreement before entering judgment. Further, the trial court refused to enter judgment because the MSA called for the performance of an illegal act. See, Tex. Pen. Code Ann. § 16.02 (a)(1) Vernon 1994) (“a person
commit an offense if he intentionally intercepts...a wire, oral, or electronic communication’

Specifically, the court heard uncontroverted testimony that husband secretly tape recorded wife’s phone conversations with various third persons. Aware of these tape recordings at the time of mediation, the parties included the following provision in their settlement agreement:

“Husband ordered to deliver all tape recordings of Wife and transcripts and all copies thereof to [husband’s attorney] by 5:00 p.m., five days after entry of decree. Attorneys to meet, inspect, and destroy all of same. Parties enjoined from disseminating or distributing a copy of tapes or transcripts.”

The court concluded:

“In conclusion, we recognize that there are competing public policy interests at stake here. On the one hand, courts are responsible for carrying out this state’s policy of encouraging the peaceable resolution of disputes involving the parent-child relationship through voluntary settlement procedures. See, Tex. Civ. Prac. & Rem. Code Ann §§154.002, 154.003 (Vernon 1997). On the other hand, public policy prohibits courts from enforcing illegal contracts. See, Lewis, 199 S.W.2d at 151; See also, Montgomery, 930 S.W.2d at 778. Here, we are unable to find the trial court violated the public policy encouraging settlements by refusing to enforce a settlement agreement that it found contained in illegal provision.”

2. How effective are these agreements? Is there a conflict between the role of mediator and, subsequently, the arbitrator? Can he or she wear the same hat? How binding is the arbitration agreement? The recent case of Koch v. Koch, June 20, 2000, (CA, San Antonio) a divorce case shows us how important arbitrations are in family law cases.

In that case, the wife complained that the trial court abused its discretion in setting aside and vacating a corrected arbitration award and ordering the case to a jury. Prior to the marriage, the parties entered into a prenuptial agreement, which stated: “Neither party will assert or seek any right, title, interest, award, charge, or benefit from the separate property of the other party owned at the time of divorce. Each party will take in full settlement of his or her property and all other rights due upon divorce his or her own separate property estate and his or her one-half (½) share of the community property estate of the parties. All liabilities benefitting community property alone, or representing expenditures for community living expenses, shall be assumed one-half (½) by each party.” The prenuptial agreement also specified that “[a]ll community property is to be divided equally between the parties according it its value.” During the marriage, the parties entered into a post-nuptial agreement, which maintained: “In the event the parties obtain a divorce, the parties agree to split all assets and liabilities equally.” The trial court found both agreements valid in a declaratory judgment action.

C. Suggested Solutions - Mediated Agreement Forms.

1. One solution for failed or problematic mediated settlements are the types of clauses that many mediators are using which provide for the conversion of mediation into arbitration. Examples from mediated settlement agreements:

“The parties agree to submit all drafting disputes, pre-Decree enforcement matters and issues relating to omitted property or terms of this Agreement to (name of mediator), who shall first try to mediate such disputes. If mediation fails, (name of mediator) shall be an arbitrator on such matters, and his decision on such drafting matters shall be binding on the parties, including any decision as to the allocation of the costs of the arbitrator in the arbitration...”

“Arbitration. Any claim or controversy arising out of the Final Decree of Divorce or the Agreement to Divorce that cannot be resolved by direct negotiation or mediation will be submitted to binding arbitration as provided in chapter 171 of the Texas Civil Practices and Remedies Code. Each party expressly waives any right to trial by a court or trial by a jury as to disputes or controversies that are to be submitted to binding arbitration pursuant to this section 7.15. The parties hereby appoint (name of mediator/arbitrator) as the arbitrator with respect to such and, by the execution hereof, agree to be bound by the arbitrator’s findings and conclusions. Any arbitrator appointed by the parties must be a member in good standing of the State Bar of Texas and have completed training in the arbitration of family law matters conducted by the American Academy of Matrimonial Lawyers or the Family Law Section of the American Bar Association.”
Husband filed for divorce and pursuant to the arbitration provision in the prenuptial agreement, Husband requested arbitration. The arbitrator entered a preliminary award and filed a Corrected Arbitration Award. Wife filed a motion to enter a divorce decree and requested that the arbitration award be confirmed. Husband filed an application to vacate and/or modify the arbitration agreement. The trial court granted Husband’s application to vacate the arbitration agreement, denied Wife’s motion to enter the divorce decree, and on its own motion, ordered the divorce to trial on the merits.

On appeal, Wife complained that the trial court abused its discretion by vacating the arbitration award and ordering the case to trial. Specifically, Wife asserted that the trial court failed to give the appropriate deference to the arbitration award by not following the provisions outlined in the Texas General Arbitration Act (“TGAA”). Wife contended that Husband waived his right to a jury trial by requesting arbitration.

The court held:


The appeal focused on the authority of a trial court to order matters to trial when there is an agreement to arbitrate. Mrs. Koch argued that the trial court failed to give the appropriate deference to the arbitration award by not following the provisions in the TGAA. Furthermore, Wife contended that when the trial court is permitted to vacate an arbitration award, the trial court may only: (1) modify the award to correct any proven error by the arbitrator under section 171.091, or (2) refer the matter back to the arbitrator who made the award for a rehearing directed by section 171.089. In response, Husband asserted that when the trial court vacates an arbitration award, section 171.098 of the TGAA gives the trial court discretion to order the parties to trial.

Husband argued that the trial court has discretion to set the case for trial because the “may” language in section 171.089 is permissive. Wright v. Ector County Indep. Sch. Dist., 967 S.W.2d 863, 868 (Tex. App. - El Paso 1993, no writ) (“shall” is mandatory, “may” is permissive).

However, despite this language, the statute is silent on whether this grant of discretion includes the right to order the parties to trial when the arbitration is vacated. Because the statute does not provide language that allows the court to set the case for trial the explicit language in the statute is followed. Since the statute provides that the trial court is limited to either modifying the agreement or referring the matter back to the arbitrator for a rehearing, the appellate court finds that the trial court abused its discretion when it sent the parties to trial because setting the dispute for trial is not within the alternatives permitted by the statute. We find that the trial court abused its discretion. Thus, the appellate court held that the trial court had abused its discretion.

XII. UNDERSTANDING PERSONALITY TYPES AND IT’S USAGE IN MEDIATION

A. NLP: Neuro Linguistic Programming

NLP started on the campus of The University of California at Santa Cruz in the mid seventies. It was the product of Dr. John Grinder and Richard Bandler. Grinder was professor of linguistics at U.C. and Bandler was one of his students.

Through use of physiology, anchoring and chaining, negative behavior becomes the driver for the positive. NLP means different things to different people.

The use of NLP in mediation is a revolutionary process. If the mediator can successfully utilize NLP, there is the opportunity to help people change by allowing them to program their brains. NLP can be an agent for this change.

NLP consciously or unconsciously relies heavily upon (the notion of the “unconscious mind” as constantly influencing conscious thought and action; and, (2) metaphorical behavior and speech.

One common thread in NLP is the emphasis on utilizing a variety of communication and persuasion skills. NLP is a combination of the study of the structure of subjective experience, observing behavior, and “reading” body language.

There are some well-defined culturally determined non-verbal ways of communicating, e.g. pointing the back of the hand at another, lowering all fingers but one in the middle has a definite meaning in American culture. However, much of NLP “reading” is not based on such obvious modeling behavior, but rather cold reading. This is valuable, but is art not a science and must be used with caution.

Most NLP practitioners operate under the dynamic that each of us has a Primary Representational System (PRS), a tendency to think in specific modes: visual, auditory, kinaesthetic, olfactory, or gustatory. A
person’s PRS can be determined by words the person tends to use or by the direction of one’s eye movements. Therefore, supposedly, a mediator may have a better rapport with a client in one room if there is a matching PRS.

In summary, NLP (as Bandler believes) is defined as the study of the structure of subjective experience and what can be calculated from that and is predicated upon the belief that all behavior has structure. NLP is designed to create new ways of understanding how verbal and non-verbal communication affects the human brain. As such, it presents us with the opportunity to not only communicate better with others, but also learn how to gain more control over what we consider to be automatic functions of our own neurology.

Cavaet: On a cheerful ending note for NLP, Bandler has sued Grinder for millions of dollars. Apparently, the two great communicators and innovators could not follow their own advice or perhaps they are modeling their behavior after so many other great Americans who have found that the most lucrative way to communicate is by suing someone with deep pockets.

B. Using the Enneagram

Imagine if the mediator could quickly “read” your clients and guess their next likely moves. Imagine if you could understand your clients in a way that makes them marvel at your insight or makes them feel instantly in tune with you.

Of course, as professionals in the “people business,” we all draw upon our intuition when dealing with others as we anticipate their needs and try to understand their behavior. However, we do not have a real system or method to do this.

There are many personality-profiling tools on the market, and all of them are helpful in our never-ending quest to understand what makes the other guy tick. Many psychologist, sociologists, and progressive organizations (including Stanford University’s School of Business, the CIA, and the Pentagon) have recently begun using a tool that surpasses all others in its depth and accuracy in understanding the inner barriers, drives, motivations, and dispositions of different personality types. The ancient symbol of the Enneagram has become one of today’s most popular systems for understanding nine personality types. This symbol, with the nine types placed around it, has become a remarkable tool that can be used to understand oneself and others in amazing detail. The symbol, with the nine types, is shown in Appendix A.

An in-depth study of the Enneagram reveals why the symbol is so helpful in undertaking a study of personality. For example, type-2 “helpers” can revert to combative type-8 behavior in times of stress or if their good efforts are not appreciated. Type-7 personalities, if in an unhealthy state, constantly move from topic to topic and cannot focus; when in a healthier state, they become more focused and analytical like type-5 personalities.

When personality types manipulate others, they reveal their darker sides. For example, type-8 personalities generally make big promises, bluff, or throw their weight around. Type-5 personalities, on the other hand, detach emotionally from others and may sequester themselves in their offices in an attempt to stay preoccupied.

No personality type is “good” or “bad,” and each appears to be hardwired from birth. If we understand our own hardwiring and that of others we deal with, we can more easily understand the sources of conflict between ourselves and other personality types. In addition, when we understand others better, we have the opportunity to approach them in ways that are more compatible with their styles. Using a system like the Enneagram can make us much better as attorneys, mediators, and negotiators.

For more information regarding the Enneagram, you may contact Kathy Fragnoli, a Dallas mediator. She teaches half-day and full-day classes on the Enneagram for lawyers. People interested in knowing more about the Enneagram can contact Kathy at kfragnoli@aol.com. (this portion of my article is from her analysis of the Enneagram in the Texas Association of Mediators Newsletter).

XIII. COLLABORATIVE LAW: NEW OPPORTUNITIES FOR MEDIATORS

Several years ago, collaborative law began to make its way into the Texas scene in family disputes. Since that time, the collaborative process has been accepted by many family attorneys as a superior method of handling cases. In 2001, the Texas legislature enacted sections 6.603 and 153.0072 of the Family Code, which outline the collaborative process as used in family matters.

Collaborative law has many advantages over other types of alternative dispute resolution. It is a highly structured, voluntary, process that relies on the honesty and good faith of participants working together in joint meetings crafting solutions to achieve the greatest possible benefit to each party. Should the parties fail to settle and the collaborative process terminate, the collaborative lawyers must withdraw, and the parties must hire new litigation counsel who are not associated with the collaborative lawyers in order to go forward with the lawsuit. For all of the above reasons, all participants are motivated to seriously commit to settlement.

Face-to-face meetings of all participants eliminate most of the misunderstandings that occur with the “he said, she said” method of filtered communication found
in traditional litigation, and this serves to further expedite resolution. In addition, discovery is speeded and simplified by the terms of the Participation Agreement. This contract requires complete, prompt, and full disclosure of all relevant information and tangible things that would have an impact on the final resolution of any issue in the dispute.

When an opinion is needed in the collaborative process, the parties are encouraged to jointly retain a neutral expert. The benefits of jointly retained experts are three-fold: costs are cut in half; more experts are available since they will never be required to testify in court; and the expert is not put in the position of justifying the retaining party’s position. Parties receive an objective and relatively inexpensive professional opinion.

Just as in ordinary litigation, there will be times that the participants in the collaborative process will need assistance in resolving certain issues. The process is designed to employ all forms of dispute resolution, and mediation is one of the first alternatives the parties will visit. The good news is the parties will not be coming to the mediator due to court order; they will be coming because they sincerely desire to avoid their “day in court” and resolve their differences.

It has become apparent to collaborative lawyers that mediators who are not trained in the collaborative process are not efficient in resolving issues. In fact, some mediators have caused harm because they did not understand the collaborative process and were unfamiliar with the participation agreement and protocols. The nature of the process is such that trained mediators are necessary.

XIV. MEDIATION IN THE COLLABORATIVE LAW PROCESS

A. Collaborative Process Advantages in ADR -

1. The Greatest Possible Benefit
   Collaborative law has many advantages over other types of alternative dispute resolution. It is highly structured, voluntary, and is a process that relies on the honesty and good faith of the participants working together in joint meetings and crafting solutions to achieve the greatest possible benefit to each party.

2. If Collaborative Fails
   Should the parties fail to settle and the collaborative process terminate, the collaborative lawyers must withdraw and the parties must hire new litigation counsel who are not associated with the collaborative lawyers in order to go forward with the family law matter. For all the above reasons, all participants are motivated to seriously commit to settlement.

B. Face-To-Face Meetings
   Face-to-face meetings of all participants eliminate most of the misunderstandings that occur with the “he said, she said” method of filtered communication found in traditional litigation and this serves to further expedite resolution.

   In addition, discovery is speeded and simplified by the terms of the Participation Agreement. This contract requires complete, prompt, and full disclosure of all relevant information and tangible things that would have an impact on the final resolution of any issue in the dispute.

C. Neutral Experts
   When an opinion is needed in the collaborative process, the parties are encouraged to jointly retain a neutral expert. The benefits of jointly retained experts are three-fold: costs are cut in half, more experts are available since they will never be required to testify in court, and the expert is not put in the position of justifying the retaining party’s position. Parties receive an objective and relatively inexpensive professional opinion.

D. Mediation
   What has all this got to do with mediation? Just as in ordinary litigation, there will be times that the participants in the collaborative process will need assistance in resolving certain issues. The process is designed to employ all forms of dispute resolution, and mediation is one of the first alternatives the parties will visit.

XV. STRUCTURED SETTLEMENT ANNUITIES: “THE NEWEST KID ON THE BLOCK”

A. Something New
   There is something that Personal Injury attorneys have known a long time but Family lawyers have yet to discover. That is, how to use Structured Settlement Annuities to benefit their clients with effective negotiations that lead to settling your cases.

   Often times, in the division of property, the need arises for a spouse to have payments over a period of time or in lump sums for anticipated needs such as children’s education, compensation for loss of retirement benefits, and so on. However, these income needs are difficult to structure for a variety of reasons and are often clouded by relying on a “promise to pay” by an ex-spouse who can die, become disabled, lose a job or business, or move away with a new spouse. In addition, the “ex” may not want to continue contact and a long obligation to someone they want “rid of”, nor do they want a lien on assets.
B. Not Traditional Annuities

These are not traditional annuities, which are limited in payment options and from which earnings must be reported, but specifically designed for litigation purposes to comply with IRS codes. Specific language and description of payments must be outlined in the Agreement first and then in the Decree. It cannot be done after the Agreement itself is reached.

For these reasons, you cannot purchase this type of annuity from your usual sources. This product is available only through a select group of licensed Structured Settlement Annuity Specialists.

C. Must Be Done At Time Of Settlement

During negotiations, the needs of a spouse and children are converted to streams of income and lump sums. At the time of settlement, language is inserted into the Agreement, funds are allocated to purchase the stream of income, and the obligation is assigned to an insurance company in a separate document.

D. Examples of the Settlement Annuity

To better illustrate this, let’s look at some examples of settlement options using Structured Settlement Annuities.

This example illustrates a number of scenarios in which Mr. ZZ (age 53) owns a business with 2 partners valued around $10 million. Mrs. ZZ is 43 years of age and their children are ages 10, 8, and 5. Mr. ZZ’s appraiser has valued his portion of the business at $1 million; Mrs. ZZ’s appraiser has valued it at $3 million.

Scenario #1 illustrates how to “close the gap” and avoid a negative result from trial:

For Mrs. ZZ: $10,000 per month for 15 years, increasing at 3% compounded annual interest

Guaranteed Payments total $2,231,870

Cost $1,614,524

Scenario #2 illustrates the need for income for life:

For Mrs. ZZ: $5,000 per month for life, increasing at 3% compounded annual interest with 25 years guaranteed

Guaranteed payments total $2,187,556 (for children)

Expected Benefits, if live to life expectancy: $4,164,941

Cost: $1,804,558

Scenario #3 illustrates a serious medical condition for Mrs. ZZ. The underwriters have reduced the cost of monthly benefits to compensate for shorter life expectancy.

Mrs. ZZ: $5,000 per month for life, increasing at 3% compounded annual interest with 25 years guaranteed

Guaranteed Payments total $2,187,556 (for children)

Expected Benefits, if live to life expectancy: $4,164,941

Cost: $1,584,239 (savings $220,319)

Scenario #4 illustrates compensation for loss of Retirement Plan.

Mrs. ZZ: receives a single lump sum of $500,000 on Mr. ZZ’s 65th birthday

Guaranteed Payments total $500,000

Cost: $287,547

Scenario #5 illustrates college funding for the children, which could be paid directly to the children:

$10,000 semi-annually for 5 years, beginning at age 18 for child #1

$12,000 semi-annually for 5 years, beginning at age 18 for child #2

$15,000 semi-annually for 5 years, beginning at age 18 for child #3

Guaranteed payments total: $370,000

Cost: $198,884.

Scenario #6 illustrates income supplemented until Mrs. ZZ reaches Social Security age (67).

Mrs. ZZ: $15,000 per year for 24 years

Guaranteed payments total: $360,000

Cost: $225,392

Additional uses of Structured Settlement Annuities in Family Law:
The Psychology of Mediation

Chapter 2

Child support;
Paternity litigation;
College funding (after the divorce is final, parties may want to secure funding of college costs that ensure funds are available and have spendthrift protection);
Sale of real property (if there is a need to generate income after divorce is final, can provide same flexible payment options).

The advantages to using the Structured Settlement Annuities can be summarized as follows:

E. Advantages To The Receiver

Security (no fear of broken promises)
Payments are: (1) Contractually guaranteed by one of the largest insurance companies (no market risk); (2) No reporting of interest earnings; (3) Flexible and allow for long term pay outs; (4) The annuity is "creditor proof" by Texas law; and (5) Ability to plan the future.

F. Advantages To The Payor

(1) Potential for savings in discounted cost of payments; (2) Ends obligation and contact with ex-spouse; (3) No lien on assets from promissory notes; and (4) Ability to plan the future.

G. Disadvantages to Structured Settlement Annuities

(1) Because these are contractually guaranteed payments, they cannot be changed (accelerated or deferred or "cashed in"); and, (2) To comply with IRC 1041, these payments are tax-neutral, therefore there is no “deduction” credit.

XVI. FAILURE TO ATTEND MEDIATION: SANCTIONS

A. Sanctions

The Houston Court of Appeals for the Fourteenth District has upheld an order sanctioning a father and his attorney for failing to attend a court-ordered mediation. The attorney did not attend after her client, despite her urging, refused to participate in the mediation [In Interest of K.A.R., No. 14-03-00970-CV (Tex.App.–Houston [14th Dist.] 2005)].

B. Facts

A divorced father filed a petition to modify the conservatorship provisions of his 1993 divorce decree. The trial court ordered the parties and their counsel to mediation, and a mediation was scheduled for March 31. On March 20, the father faxed a letter to his attorney stating that he wished to drop his case. On March 28, a Friday, the mother filed a counter-petition. The father’s attorney contacted the father, who indicated that he was reluctant to attend the March 31 mediation. The attorney advised the father not to nonsuit his petition and to attend the mediation, and they agreed to talk about the issue again over the weekend. On March 30, a Sunday, the father and his attorney spoke again, and the father stated unequivocally that he would not attend the mediation. The father’s attorney immediately sent faxes to the mother’s attorney and the mediator, informing them that the father was nonsuiting his petition to modify and would not attend the mediation the next day. On March 31, the father filed a nonsuit. On April 1, the father’s attorney filed a motion to withdraw as the father’s counsel, attaching the father’s March 20 letter. On April 3, the mother filed a motion for sanctions against the father and his attorney, seeking attorney’s fees and expenses for attending the mediation. Neither the father nor his attorney appeared at the April 7 trial and sanctions hearing. The trial court granted the mother’s counter-petition and ordered sanctions against the father and his attorney. On April 27, the father committed suicide. His estate and his attorney appealed the sanctions award of $13,000 in fees and expenses, and the court of appeals affirmed.

C. Analysis

The court of appeals stated that, for the trial court to have exercised its inherent power to sanction the father and his attorney, their conduct must have significantly interfered with the trial court’s legitimate exercise of one of its core functions. Included within a trial court’s core functions is the management of its docket and the issuance and enforcement of its orders. Here, the father and his attorney interfered with a core function of the court by unilaterally cancelling and failing to attend a court-ordered mediation without adequate notice, stated the court of appeals. The attorney did not appear as ordered, nor did she offer any explanation or excuse for her failure to attend notwithstanding her client’s refusal to do so. At the point when the attorney elected not to attend the mediation as ordered by the court and instead chose to unilaterally cancel it, the trial court had not granted, and the attorney had not sought, relief from the order compelling her attendance, nor did she have the agreement of all other parties to postpone or reschedule the mediation. Although the attorney could not control the father’s behavior, she was accountable for her own conduct, and her unexcused failure to comply with the trial court’s order was legally sufficient evidence to support the sanctions, stated the court of appeals.

The court of appeals noted that the father and his attorney could not be sanctioned for failing to appear for trial. A defendant who fails to appear for trial may be subject to a judgment following trial in his absence, but the worst-case scenario for such a defendant should be an
adverse judgment for all relief sought in the plaintiff’s pleadings. The court of appeals also stated that there might be potential conflicts with the attorney-client privilege if an attorney were sanctioned for failure to promptly notify opposing counsel of her client’s desires regarding the case, even if those desires included dismissing the client’s claims. Nonetheless, under the applicable standard of review, there was legally sufficient evidence to support the trial court’s determination that the father and his attorney unilaterally canceled and failed to attend a court-ordered mediation without adequate notice.

The court of appeals stated that the attorney could have pursued other alternatives that would not have involved the usurpation of the court’s duties or a violation of the court’s order. For example, the attorney could have filed a motion asking the trial court to cancel or postpone the mediation. Likewise, the attorney could have attended the mediation as ordered and attempted to resolve the remaining issues. Since the father was willing to agree to the relief sought in the mother’s counter-petition, presumably the attorney had the authority to settle on that basis. But even without settlement authority, the attorney could have attended the mediation and worked toward a resolution of the matters in dispute. By pursuing this option, the attorney would have been in compliance with the court’s order even if her client was not, stated the court of appeals.

In upholding the sanctions award, the court of appeals stated that, although the mother sought to have the father held in contempt as part of the relief she requested in her motion for sanctions, the fact that the sanctions motion was not personally served on the father was not a basis for denying the motion because the trial court did not abuse its discretion by giving the father four days’ notice. Nor did the mother’s motion for sanctions have to be verified or supported by an affidavit, stated the court of appeals.

D. Dissent

A dissenting Justice would have held that the trial court abused its discretion by sanctioning the attorney because there was no evidence in the record that, by failing to attend the mediation, she engaged in bad faith litigation practices, or that this conduct significantly interfered with the court’s exercise of its core functions. The dissent noted that, as soon as the attorney was aware of the father’s unequivocal refusal to attend, she attempted to notify those involved with the mediation. Since her emotionally fragile client refused to attend the mediation despite her advice about the importance of attending, she could do nothing more than withdraw from the representation, which she did the day after the scheduled mediation. Nor was there evidence that the attorney’s and the father’s failure to attend the mediation significantly interfered with the court’s core functions, since the trial went ahead as scheduled and no changes to the court’s docket were required. The attorney was under an ethical obligation not to disclose her client’s initial reluctance to attend the mediation, since such a disclosure could have been used offensively against the father at the trial. And, her attendance at the mediation without the father would have been futile, since she could not agree to any settlement without her client’s authorization, stated the dissent.

XVII. CONCLUSION

I sincerely hope that this article proves to be helpful for you and is of assistance to you in your vital role as a mediator or litigant. You, at this point, have the overall view of mediation from beginning to the end of the process.

Attached as Appendixes are forms for your review and use in the mediation process.
APPENDIX A

“ENNEAGRAM”

THE PEACEMAKER
Patient, stable, comforting, may tune out reality with alcohol, food or TV

THE BOSS
Authoritarian, combative, take charge, loves a good fight

THE ADVENTURER
Sensual, cheery, childlike, reluctant to commit

THE QUESTIONER
Plagued by doubt, loyal, fearful, always watching for signs of danger

THE OBSERVER
Emotionally remote, detached from people and feelings, private, wise

THE PERFECTIONIST
Conscientious, rational, critical and rigid

THE HELPER
Empathic, demonstrative, can be intrusive and manipulative

THE ACHIEVER
Competitive, efficient, Type A, obsessed with image

THE ROMANTIC
Creative, melancholic, attracted to the unavailable.
APPENDIX B

“WHAT IS MEDIATION AND WHY ARE YOU GOING?”

Mediation is:
- an assisted settlement conference
- privileged and confidential
- a process
- time consuming

Mediation is not:
- a trial
- like a trial
- a quick fix
- the first time to ask for documents
- a good time to prioritize your needs and life goals

The mediator is:
- a lawyer experienced in family law
- trained in mediation techniques
- neutral
- impartial
- the guide in the process of mediation
- an advocate for settlement

The mediator is not:
- available for testimony at your trial
- a judge
- an arbiter or decision maker
- infallible
- a therapist
- your lawyer
- your opponent’s (spouse, mother-in-law, former spouse) lawyer
APPENDIX C

“CLIENT HOMEWORK FOR MEDIATION”

1. Inventory & Appraisement

2. Income and expense statement

3. Documents for real life
   A. Report cards
   B. Attendance records
   C. Children’s health records
   D. Tax returns and last three current pay stubs
   E. Insurance policies (health, life, car, boat, homeowners, etc.)
   F. Deeds, other documents of title
   G. Tax appraisal district statements on real property
   H. Expert appraisals on real property
   I. Drug test results
   J. Employee benefits information including retirement, etc.

4. Light mediation reading

5. Client statement of goals and concerns.
APPENDIX D

“CHECKLIST FOR CLIENT MEDIATION PREPARATION”

1. Remind client what mediation is—attorney assisted settlement conference.

2. Educate client as to the format used by the mediator, the possibility of a joint session, private caucuses, and shuttle diplomacy. Make sure that your client understands that a joint session will include face time with their opponent. Make sure your client understands that a joint session can be an important moment in the mediation and that the mediator will control the levels of hostility and saber-rattling. Some of both might be beneficial to the process under controlled circumstances.


4. Review benefits of mediation, e.g. agreements can be reached in mediation that are not available in court (manage tax consequences, alimony).

5. Personalize the mediator including qualifications, experience, and favored techniques.

6. Review the mediator’s commitment to neutrality and confidentiality.

7. Remind the client that mediation is a non-binding process.

8. Make sure your client knows where to go and insist on punctuality.

9. Let the client know that the process works only if given sufficient time. Encourage babysitting arrangements and the like to be made in advance.

10. Discuss the 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. Let the client know that an accompanying individual will probably not be asked to participate in the joint session.

11. Advise your client that they will not only be encouraged to participate in private caucuses but expected to do so. Another reminder of the confidentiality issue may be necessary here.

12. Review the issues in the case. This discussion should be comprehensive so that you are certain that your file is mediation-ready.

13. 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.

14. 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.

15. Be fair with the client about attorneys fees, expenses and time to trial when making the strength/weakness analysis and discussing outcomes.

16. Discuss with your client what their secret expectations, fears, and needs are. This problem often comes up the first time in the mediation.

17. Ask your client to evaluate for you what the other side expects, fears, and needs.

18. Prepare the client for some of the more obvious negotiating techniques:
The “pie-in-the-sky” first offer. This is not really a waste of time. It sets parameters for the mediator. The client must be prepared for the dreaded first offer.

“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.

The “no offer” offer. Let the client know that you can recognize an offer that is the same as the one before only “rearranged.”

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.

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.

19. Discuss the dynamics of reaching settlement and the nature and enforcement of a Mediated Settlement Agreement.

20. Advise your client that they will be called upon to carefully read the Mediated Settlement Agreement because this agreement, if signed, is binding.

21. 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.
APPENDIX E

“ATTORNEY’S CONFIDENTIAL INFORMATION SHEET”

YOU CAN HELP TO BETTER MEDIATE YOUR CASE IF YOU WILL SPEND A FEW MINUTES COMPLETING AND RETURNING THIS QUESTIONNAIRE

Date:

I. Style of Case:

II. Parties of the Case and Their Respective Attorneys:

III. Type of Case:

A. Divorce with children -
   Number of Children:
   Ages of Children:
   Date of Marriage:
   Date of Separation:
   Date of Divorce:
B. Divorce without children
C. Modification of
D. Suit Affecting
E. Termination
F. Enforcement
G. Other

IV. Please State the Contested Issues of this Case:
   A. Issues regarding property to be mediated:
   B. Issues regarding custody of children to be mediated:
      1. Access or possession
      2. Support
      3. Other
   C. Other issues to be mediated:
V. Position of Parties
   A. Position of Party No. 1 regarding each of the above issues (use additional pages if needed):
   B. Position of Party No. 2 regarding each of the above issues (use additional pages if needed):
   C. Other Parties’ Positions regarding each of the above issues (use additional pages if needed):

VI. Please Indicate all Unnamed Parties (and Their Attorneys) for Conflict Purposes, Who Have an Interest in the Outcome of this Case:

VII. Please Identify all Persons you Anticipate Will Be Present at the Mediation and Their Relationship/Position with the Party or Parties you Represent.

VIII. Please State the Status of Settlement Negotiations as of this Date (Attach all Necessary Documents Pertaining to Settlement):

IX. If this Case is Set for Trial, Indicate the Date: