EMOTIONS IN PROBATE MEDIATION[1]

by

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1.0 Introduction

Mediation is an effective means of resolving disputes. It is estimated that the vast majority of cases taken to mediation settle. A dispute need not be in litigation; mediation is an effective settlement tool for resolving claims without the expense of litigation. In Texas, the mediation process is governed by the ADR Statute, TEX. CIV. PRAC. & REM. CODE §§ 154.00 1, et seq. The statute describes this process and prescribes the qualifications of mediators. The primary goal of mediation is to settle claims. When reduced to writing, a settlement made in mediation is a binding contract. TEX. CIV. PRAC. & REM. CODE § 154.071(a). This contract would be enforceable even if the dispute has not yet become a lawsuit.

Probate cases, whether a dispute over which person should be the guardian of the proposed ward, a disagreement over the distributions or finding of a testamentary trust, or a will contest, are special candidates for a mediated result. From the first moment of engagement, an attorney involved in these types of disputes should prepare for a mediated settlement as well as trial. Among the reasons are: (1) cost; (2) continuing relationships of the parties; and (3) the ability to shape a result that would be unobtainable even after "winning" the law suit. A probate dispute that seems headed for trial does not have to become an internecine war in which no prisoners are taken. The authors have mediated many probate disputes, and the majority have resulted in a resolution acceptable to the parties involved.

These results are not because of any special skills, uncommon to other mediators, but rather the ability of the mediation process to force participants to focus on their actual needs and their risks. The interaction between desire and risk evokes a settlement. Every mediation is unique. Neither of us know why most mediations result in an agreement. As practicing mediators, one of whom mediates almost every working day, we have attempted to set forth both relevant case authority and anecdotal experience to assist attorneys representing persons or institutions faced with a dispute sounding in the Probate Code.

2.0 The Texas Alternative Dispute Resolution Statute

Authority for holding alternative dispute resolution is found in the Texas ADR Act, TEX. CIV. PRAC. & REM. CODE Chapter 154. Section 154.002 defines the public policy of the State:

> It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent/child relationship, including mediation of issues involving conservatorship, possession and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

The ADR statute mentions several types of dispute resolution procedures that may be employed such as mediation, arbitration, moderated settlement conferences, and mini trials. Mediation is a common, relatively inexpensive, and effective method of dispute resolution. This paper addresses only mediation.

2.1 Mediation Defined

Mediation is a forum where an impartial person facilitates communication between parties to promote reconciliation, settlement, or understanding. TEX. CIV. PRAC. & REM. CODE § 154.023(a). A mediator cannot impose his or her own judgment for that of the parties. TEX. CIV. PRAC. & REM. CODE § 154.023(b). A mediator cannot compel or coerce parties to settle their dispute. TEX CIV PRAC. & REM. CODE § 154.053(a); *AlIen v. Leal*, 27 F. Supp. 3d 948 (S. Dist. Tex.) *dismissed* 142 F.3d 1279 (5th Cir. 1998)(Conduct on the part of a mediator calculated to coerce or bully a party into settlement is clearly not acceptable); *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App. – Houston [1st Dist.] 1992, orig. proc.)(Court can compel parties to mediate but cannot require parties to negotiate in a good faith attempt to reach settlement); *Matter of the Marriage of Banks*, 887 S.W.2d 160, 163 (Tex. App. – Texarkana 1994, no writ)(No party can be forced to settle a dispute in mediation, but if a voluntary agreement is reached the parties should be required to honor it.).

2.2 Confidentiality

Mediation in Texas state courts is confidential. A mediator cannot disclose information to one's opponent without express authorization. Likewise a mediator cannot disclose information obtained in mediation to third parties. TEX. CIV. PRAC. & REM. CODE § 154.053(b). Unless the parties agree otherwise, all matters attendant to the mediation including the parties' conduct and demeanor are confidential. Such matters cannot be disclosed by the mediator, the parties, or their counsel. TEX. CIV. PRAC. & REM. CODE § 154.053(c). Generally, communications made during mediation are confidential and cannot be repeated outside the mediation or used as evidence. Effective September 1, 1999, the Texas Legislature has eroded mediation confidentiality in two specific instances. A mediator is now held to the same standard as other professionals in the duty to report child and elder abuse. TEX. CIV. PRAC. & REM. CODE § 154.053(d) incorporating TEX. FAM. CODE § 261.101 and TEX. HUM. RES. CODE § 48.051. In other words, in the unlikely event that a mediator witnesses an instance of abuse or if a party to mediation describes an instance of abuse, the mediator is required to make a report. Absent suspected child or elder abuse, neither a party nor the mediator can be forced to testify to statements made or materials provided during a mediation. However, if information obtained during mediation can be discovered and proved independently, it can be ultimately used by a party as evidence. TEX. CIV. PRAC. & REM. CODE § 154.073.

Mediation in the federal courts does not enjoy the level of confidentiality accorded in state courts. Two recent cases have eroded the veil of confidentiality previously accorded communications made during mediations involving federal cases. *In re: Grand jury Subpoena Dated December 17, 1996*, the Fifth Circuit Court of Appeals allowed a mediation file to be produced to a grand jury despite the protection of both state and federal statutes mandating

confidentiality of mediation proceedings. The case involved a mediation under the federal Agricultural Credit Act in which a party was also the subject of a federal criminal investigation. Subsequent to the mediation of a civil dispute, the mediation file was the subject of a subpoena to a federal grand jury. The Fifth Circuit weighed the confidentiality provisions contained in TEX. CIV. PRAC. & REM. CODE § 154.053(c) and the federal Administrative Dispute Resolutions Act, 5 U S C §574(a)(4)(B) against the public interest in the administration of criminal justice, and ordered the file produced to the grand jury. Ironically, the Court noted that should the grand jury fail to hand down an indictment, the defendant's confidentiality rights would be protected by the secrecy of grand jury proceedings; however, should the defendant be indicted, portions of his mediation file would be subject to public disclosure. *In re: Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 489 (5th Cir. 1998). In *Allen v. Leal*, federal judge David Hittner waived the confidentiality rules and required Houston mediator Micky Mills to testify regarding the propriety of mediation proceedings after a plaintiff accused the mediator of using coercion and bullying tactics to force a settlement. *Allen v. Leal*, 27 F. Supp. 2d 945 (S. Dist. Tex.) *dismissed* 142 F.3d 1279 (5th Cir. 1998). To date, Texas state courts have not shown any inclination to erode the confidentiality afforded mediations. However, a prudent attorney will use discretion in disclosing facts to an opponent during mediation to prevent the unintentional disclosure of work product.

Mediation remains an effective means of resolving disputes that provides your client the safety of confidentiality and power of self-determination. Because no party can be forced to settle a dispute, mediation poses little risk to the client with great potential benefit in reduced liability and minimized litigation expenses.

2.3 Procedure at Mediation

In Texas, most attorney mediators follow the model advocated and taught by the late Steve Brutsché. Brutsché's mission was to demonstrate the benefits of mediation. He taught legions of mediators, advocates, and jurists to use mediation. Brutsché's actions in Dallas proved mediation a valuable tool to conclude cases earlier with a concomitant reduction of time and cost.

In the common model, the parties assemble for an "opening session" which provides a forum for any participant to air personal views. The mediator uses the opening session to set forth the day's procedure and agenda. Subsequently, the mediator holds caucuses with each party or disputing group carrying proposals and information back and forth until settlement is reached. Because this model is familiar, attorneys expect to see it used in probate cases, just as they have encountered it in commercial or personal injury litigation. Although widely used, the Brutsché model is not the only way to conduct a mediation.

In the "open" mediation model, the disputants remain in the same room for an extended period. First participants discuss all the issues they can identify without regard to feasibility of resolution. After the identification of both personal and legal issues, the participants are asked to list possible solutions. Undesirable solutions are discarded, and participants focus on potentially viable solutions. Through the brainstorming process, participants invariably realize they agree on

more issues than they first realized. This procedure is well-suited to probate and guardianship matters that tend to be dominated by the personal needs and emotions of the litigants.

In a car wreck case, the ultimate issue is how much money, if any, will be offered to the plaintiff. A guardianship dispute usually involves more than a shuffling of money. It may involve the choice of guardian of the person and of the estate. It also may seek the repayment of money to the estate for alleged abuse of a power of attorney, a friendship, or trust given from one sibling to another. Genuine concern over access to a proposed ward may be misconstrued by another family member as a wish to "unduly influence" the ward. The injection of familial relationships, emotional entanglements, or fiduciary relationships in a case may warrant the use of the open mediation model. Such situations appear to produce favorable results when the participants are able to brainstorm together rather than operate in a vacuum. However, mediators who use the open model will hold a private caucus at the request of a party or when the mediator believes it beneficial. Further, in a typical mediation do not hesitate to ask that the participants convene together if you believe it would aid settlement.

No matter what model is used, most mediators have an opening session in which both attorneys and clients are encouraged to speak directly to the mediator and to the other parties present. This session is often lengthy. Many attorneys resist the opening session, choosing to speak for their clients and preventing their clients from talking directly to the other people involved in the dispute. By doing so, the attorney misses a golden opportunity to lay the first stone in the settlement foundation. An attorney who allows a carefully prepared client to air grievances and ask questions demonstrates confidence in the client, reveals a goal to settle the client's concerns, and dispels notions that the attorney is advancing his or her own agenda.

Early questions in almost every probate mediation's initial private caucus are: "Is the attorney going to decide this or is my brother?" or "Has my sister said anything to you yet?" These questions indicate a lack of client preparation, a mistrust of the process, or a misunderstanding of the participants' roles in mediation. It is much easier to demonize the other side if the demon is an attorney. Mediation may be your client's only opportunity to look her opponent in the eye and say, "Why did you do this to me?" By allowing your client to participate in the opening session, you open the door for a free flow of information. Contrary to most attorneys' fears, in encouraging an open exchange you invariably gain helpful information. Additionally, you shorten the time it takes for the participants to realize that a resolution is possible.

Discuss how the mediation will be conducted in advance. Should you have questions or concerns about a proposed mediation model, thoroughly discuss your concerns with your mediator beforehand. Be open to departures from mediation procedures with which you are familiar. Avoid ruling out an "open" model mediation or an extended opening session until you have thoroughly discussed the matter with your mediator. Prepare your client so that surprise is minimal once the session begins. A carefully prepared client who is an active participant is empowered by the mediation process even if the case does not settle.

2.4 Time

Probate cases, especially if they involve a sizable estate with several different kinds of properties and several family members, take more time than other mediations. Scheduling the mediation to begin on Friday with the understanding that everyone will be available to come back on Saturday, if necessary, works very well. This is especially true if your client is anxious about missing work or if emotions are so highly charged that the parties have stopped communicating with each other.

Remember, most of the people involved in probate matters have usually never been involved in anything like it before. Even if they have been involved in other litigation, seldom does it carry the emotional baggage common to probate disputes. Parties in these matters must have an adequate opportunity to vent their personal emotions before concentrating on the terms of an acceptable settlement. It sometimes takes a long time for a party to simply articulate his or her goals and objectives. Rushing is not beneficial. Parties may not be able to reach an agreement in two days of mediation, but will sometimes come back at their own volition several months later and then reach a settlement.

Most of our longest mediations involve probate matters. For example, one author conducted a mediation of a will contest that first met all day one Saturday, re-convened the next day for 7 hours, and did not settle. The same mediation reconvened six months later at 7:30 p.m., and the parties reached a settlement at 5:00 a.m. the next morning. This scenario is not uncommon.

If a mediator asks you to allow more than one day for mediation, try to remain flexible. Freely discuss any reservations that you may have in the proposed scheduling. Know that most mediators are amenable to scheduling multiple days of mediation, and that multiple days do not need to be consecutive. If your case does not settle by the end of a one-day mediation, do not give up. Ask the mediator to keep the proceeding open. This gives you the option of scheduling another session several weeks or months later when parties have had a chance to cool off or when discovery yields information necessary to settlement.

3.0 Rule 11 Agreements as Memoranda of Agreement

When a mediation results in full or partial settlement, the parties should prepare and sign a memorandum outlining the agreement reached. If the case is in litigation, most mediators will refer to a memorandum of settlement as a “Rule 11 agreement.” Agreements made in mediation are governed by both Texas Rule of Civil Procedure 11 and Texas Civil Practice & Remedies Code § 154.071(a). Rule 11 is written in the negative and requires agreements between parties to be in writing, signed, and filed with the Court or be entered in the record in open court. Agreements complying with Rule 11 are enforceable. Section 154.071(a) states, “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.” Unlike Rule 11, settlement agreements made during mediation need not be filed with the Court to be enforced.

It cannot be stressed enough that your client will be bound by a written agreement reached in mediation. Discuss this fact with your client before the mediation, during the mediation, and when you go over the final written document. The failure of a plaintiff's attorney to adequately counsel his client regarding the seriousness and finality of a mediation agreement was chastised as an abuse of the trial process and resulted in a stay of proceedings in *Allen v. Leal*, 27 F. Supp. 2d 945 (S. Dist. Tex.) *dismissed* (5th Cir. 1998). Similarly, the failure of an attorney to adequately counsel his client regarding the terms and finality of a settlement agreement resulted in a grievance against the attorney in *Infante v. Bridgestone Firestone Co*., 6 F. Supp. 2d 608 (E. Dist. Tex. 1998). Before signing a settlement agreement, make sure your client understands the terms of the agreement and that the agreement itself may be enforced like any other contract.

Do not expect the mediator to remind you of terms that may have been omitted; the mediator is neutral. Ask the mediator to go over the terms of the agreement as last reported to you. Closely compare these terms with the contents of the settlement document. A mediator should not knowingly allow a term to be deliberately left out of a proposed settlement agreement in the hope that the other party will not catch its absence. Such a proposal, if presented to the mediator, will be squelched. However, the mediator may not have read the draft document before handing it to you for inspection, so the draft should be closely reviewed for accuracy. If the signed agreement omits a material provision, adding to the agreement after the close of mediation is problematic without consent of all signatories.

3.1 The Settlement Memorandum

Once an agreement is reached during mediation, memorialize the agreement in writing. Any of the parties or their attorneys may draft the written agreement. Many mediators have a fill-in-the-blank form to aid settling parties in drafting a Memorandum of Agreement. *See* Appendix of Forms. The litigants may bring a diskette containing their settlement form that can be adapted for a particular case. Some mediators refuse to draft settlement agreements because they believe it breaches the statutory admonition to remain impartial. Others will act as a scrivener in drafting an agreement. Still others approach the authorship of a settlement memorandum as a group activity in which the mediator participates as a group member. Parties should be aware that many mediators' malpractice insurance excludes drafting errors from coverage. These mediators should act only as a scrivener and eschew authorship of settlement terms.

The written agreement should be clear and concise. All material terms of the parties' agreement must be contained in the written settlement memorandum. *Martin v. Black*, 909 S.W.2d 192, 196 (Tex. App. – Houston[14th Dist.] 1995, err. den.)(Ambiguity in terms of mediation settlement agreement presented a fact issue that should have been presented to fact finder). Ambiguities in a settlement agreement are resolved under the same guidelines as those for resolving ambiguity in any written contract, and case law governing the interpretation of contracts is authoritative in settlement agreement disputes. *Id., Stevens v. Snyder,* 874 S.W.2d 241, 243 (Tex. App. - Dallas 1994, *err den.).*

It is unnecessary to draft full and complete settlement documents including mutual releases at the mediation. Doing so takes a very long time, and disagreements between the lawyers regarding language may be escalated by fatigue and the presence of clients. Clients do not appreciate sitting around for two or three hours while their attorneys bicker over the wording of releases when an enforceable memorandum of agreement containing all the key elements of the settlement can be drafted, negotiated, and signed in thirty minutes or less.

Once written and approved by all settling parties, the memorandum may be signed either by the parties or by their attorneys or both. It is a good practice to have each signatory indicate in writing his authority to make the settlement, in what capacity she is signing, and for whom he or she has authority to settle. Although obtaining signatures of both the parties and their attorneys prior to leaving the mediation is the best and safest course of action, courts have upheld unsigned agreements. Settlement agreements inferred by attorney correspondence are enforceable. *Padilla v. LaFrance,* 907 S.W.2d 454 (Tex. 1995); *but see Antonini v. Harris County Appraisal Dist.,* No. 14-96-01483-CV, 1999 36 Tex. Op. Serv. 555 (Tex. App. - Houston [14th Dist.] August 26, 1999)(letters between counsel did not form an enforceable settlement agreement because each letter proposed a change in settlement terms; therefore, no offer and acceptance were made.). An unsigned agreement accompanied by written notes has been enforced in keeping with the spirit of Rule 11. *Kosowska v. Khan,* 929 S.W.2d 505 (Tex. App. – San Antonio 1996, *err den.).* A mediation agreement need not be filed with the Court in order to be enforced under Section 154.071(a); however, filing the agreement ensures enforcement under both Section 154.071(a) and Rule 11.

Once a settlement agreement has been memorialized and signed, it is enforceable. Once the written settlement agreement is signed, the client cannot change his or her mind. Numerous cases have enforced written settlement agreements both under Rule 11 and under Section 154.071(a). *See, e.g., Padilla v. LaFrance,* 907 S.W.2d 454 (Tex. 1995); *Matter of the Marriage of Banks,* 887 S.W.2d 160 (Tex. App. - Texarkana 1994, *no writ); Arriaga v. Cavazos* 880 S.W.2d 830 (Tex. App. - San Antonio 1994, *no writ); Matter of the Marriage of Ames,* 860 S.W.2d 590 (Tex. App. - Amarillo 1993, *no writ); Darden v. Kitz Corp.,* 997 S W 2d 388 (Tex. App. - Beaumont 1999, *no writ); Becker v. Becker*, 997 S.W.2d 394 (Tex. App. - Beaumont 1999, *no writ); Dehnert v. Dehnert,* 705 S.W.2d 849 (Tex. App. - Beaumont 1986, *no writ); see also Ayre v. J.D. "Bucky" Alshouse,* 942 S.W.2d 42 (Tex. App. - Houston [14th Dist.] 1996, *no writ*)(Attorney sued by former client for failing to timely repudiate settlement agreement).

3.2 Procedure to Enforce a Written Settlement Agreement

Having participated in a hearing held by a probate court to enforce a settlement agreement reached after two days of mediation in a protracted trust dispute, the authors have learned from personal experience that the courts try to enforce mediated agreements. The vast majority of the reported cases failing to uphold a written settlement agreement turn on a failure to follow the appropriate procedure for enforcement. *See, e.g., Stevens v. Snyder,* 874 S.W.2d 241, 244 (Tex. App. - Dallas 1994, *err. den.*)(trial court could not enter agreed judgment based on settlement agreement, proper procedure is motion to enforce); *Leland Entertainment, Inc. v. Castaneda,* 882 S.W.2d 2 (Tex. App. - Houston [1st Dist.] 1994, *no writ*)(settlement agreement

not enforceable by Rule 13 or Rule 215 sanctions); *Cary v. Cary*, 894 S.W.2d 111 (Tex. App. - Houston [1st Dist.] 1995, *no writ)(court* can enforce settlement agreement without consent of party but cannot enter a consent judgment); *(Cadle Co. v. Castle*, 913 S.W.2d 627 (Tex. App. - Dallas 1995, *err den.*)(court cannot enter consent judgment when consent has been withdrawn; party seeking enforcement must support agreement with pleadings and proof).

Many parties and trial courts have attempted to shortcut the enforcement procedure by entering an agreed judgment or a consent judgment based on a Rule 11 agreement or a Section 154.071(a) agreement. To do so flies in the face of the well-settled rule that no consent judgment can be entered without the concurrent consent of all affected parties. *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288, 291 (1951); *Stevens v. Snyder*, 874 S.W.2d 241, 244 (Tex. App. Dallas 1994, *err den.); see cases cited supra.* If a party withdraws consent to a settlement agreement before a judgment is entered by the trial court, an agreed judgment cannot be entered.

The appropriate course of action to enforce a settlement agreement is to amend one's pleadings to include a claim for breach of contract or specific performance, file a motion for summary judgment attaching the signed agreement as an exhibit, and set a hearing to obtain judgment on the contract. *Stevens v. Snyder*, 874 S.W.2d 241, 244 (Tex. App. - Dallas 1994, *err. den.); Infante v. Bridgestone Firestone Co.*, 6 F. Supp. 2d 608 (F. Dist. Tex. 1998). Should the opposing party raise a fact issue, then an evidentiary hearing is necessary to obtain enforcement of the agreement. *Cadle Co. v. Castle*, 913 S.W.2d 627 (Tex. App. - Dallas 1995, *err den.)* If a fact issue exists regarding execution of the settlement agreement and a jury is timely requested, then the requesting party is entitled to a jury trial. *Martin v. Black*, 909 S.W.2d 192, 196 (Tex. App. - Houston [14th Dist.] 1995, *err den.)*

The proponent of the agreement has the burden of proving the existence and execution of the settlement agreement. *Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995); *Stevens v. Snyder*, 874 S.W.2d 241, 243 (Tex. App. - Dallas 1994, *err den.).* Reported cases indicate the courts give great credence to agreements reached in mediation. More often than not, mediation agreements stand up to attack. For instance, in *Banda v. Garcia*, the Texas Supreme Court upheld a settlement agreement based on the unsworn statements of the proponent's attorney. 955 S.W.2d 270 (Tex. 1997). The only evidence presented in support of the proponent's motion to enforce was attorney correspondence and the unsworn testimony of proponent's counsel that an agreement was made and she acted in reliance on the agreement. It should be noted that no objections were made to the attorney's unsworn testimony and no controverting evidence was presented at the enforcement hearing. *Id.*

Courts typically have not invalidated Rule 11 or Section 154.071(a) agreements based on substantive defenses lodged by the repudiating party. For example, in *Matter of the Marriage of Banks*, the parties settled their divorce case in mediation. The wife changed her mind. Presumably having been informed of the binding nature of her agreement, the wife hired new counsel and filed a written repudiation of the settlement agreement. The husband/proponent of the agreement amended his pleadings to include a claim of specific performance, filed a motion for summary judgment, and set the motion for hearing. At this point, the wife was required to respond to the motion for summary judgment with a substantive defense to the contract

formation. She alleged the contract was the result of undue influence and duress produced by her former legal counsel. Generally, to nullify a contract undue influence must have been exerted by a party to the contract or his agent. The court granted the husband's motion and was affirmed on appeal. Influence by one's own legal counsel is not grounds to void a settlement agreement. *Matter of the Marriage of Banks,* 887 S.W.2d 160 (Tex. App. - Amarillo 1994, *no writ); see also Kosowska v. Klian,* 929 S.W.2d 505 (Tex. App. - San Antonio 1996, *err. den.)(*Statements of party's attorney do not invalidate settlement agreement on grounds of duress, fraud, or undue influence); *Montanaro v. Montanaro,* 946 S.W.2d 428 (Tex. App. - Corpus Christi 1997, *no* writ)(Failure of parties to agree to form of promissory note that was a basis of settlement agreement does not invalidate the settlement agreement. Motion to enforce should have been granted.); *Hardman v. Dault,* No. 04-98-0016-CV (Tex. App. - San Antonio, March 10, 1999)(Written settlement agreement entered in mediation enforced despite party's refusal to sign final documents because settlement agreement contained all essential terms of the settlement.).

While one cannot be forced to settle in mediation, once a settlement is reached in mediation public policy demands that it be honored. *Matter of the Marriage of Banks,* 887 S.W.2d 160, 163 (Tex. App. - Amarillo 1994, *no writ*).

4.0 Ethical Dilemmas for the Mediator

Because the mediator is charged with impartiality and because the mediator does not have authority to resolve a dispute, ethical dilemmas for the mediator arise when parties ask for legal advice or interpretation of cases or contract language. It is important to remember that the mediator's task is to facilitate communication between the parties not to act as a judge or jury. Therefore, it is wise to avoid asking a mediator for clarification of a statute, case, or rule relied on by your opponent or for interpretation of language drafted by opposing counsel. Those types of questions are more appropriately directed to opposing counsel or to the court.

The following situations cause ethical dilemmas for your mediator and should be avoided.

a. The Dessert Before Dinner Ploy

This party tells the mediator in the first caucus that there is no point in continuing the mediation unless the other side will agree to "X" beforehand. The mediator knows confidentially that "X" is not a big issue with the opposing party but cannot divulge that fact. The ethical dilemma created for the mediator is how to maintain the momentum of negotiations without divulging confidential information. The party who causes an impasse at this point has shot himself in the foot. Giving the opposing party time to feel comfortable with disclosure would result in certain settlement under these circumstances. You and your client must trust the mediator that a settlement is possible. You should not cause an impasse because the opposition has not agreed to "X" yet.

b. The "Gotcha" Mentality

Often an attorney will seize on a perceived mistake made by opposing counsel to prevent settlement rather than encourage it. For instance, opposing counsel is a brilliant jury advocate but failed to timely pay the jury fee. In such a situation, the parties must pay close attention to not just the message but the medium of communication. By all means, use your opponent's mistake to your client's advantage. However, tread softly. Angering your opponent or withholding key information in this situation may prevent settlement. The mediator is neutral and should not express any opinion regarding the case. Again, you should openly discuss information with your mediator and encourage the neutral exchange of information.

c. The Highway Robber

In Medieval times, thieves would hide behind the underbrush near a major road laying in wait for travelers. When a horse or carriage came by, the thieves would ambush their victims. Similarly, a party will sometimes come to mediation with the intent of lulling his opponent into thinking he is on the verge of settlement. The misleading party hopes to continue negotiations until less than 30 days before trial, then declare an impasse to use the tactical advantage gained. A mediator faced with this type of strategy is put in the dilemma whether to remain silent because of confidentiality. Destructive gamesmanship cannot be entirely prevented. If in the midst of a mediation you feel this is the case, inform the mediator. The mediator may have information that cannot be divulged to you, but can return to your opponent and defuse the situation based on what you have figured out. Additionally, if a mediation has been continued and is not subject to a Rule 11 agreement extending discovery deadlines, continue your trial preparation.

d. Buyer's Remorse

The day after mediation of a will contest both parties realize a term was omitted from the written settlement memorandum. The proponent suggests adding the term and signing an addendum to the agreement. The contestants, having had a good night's sleep, seize on this as an opportunity to change their minds and want the provision left out. The proponent calls the mediator and requests she not destroy her notes prior to being served with the subpoena he has requested. Mediators and their notes are not generally subject to subpoena because the confidentiality of mediation proceedings cannot be breached absent agreement of all participants. TEX. CIV. PRAC. & REM. CODE § 154.053. The ethical dilemma created for the mediator is the threatened breach of confidentiality. What can be done to resurrect a threatened settlement is request the mediation be reconvened either by agreement of the parties or by motion to the court if necessary.

e. The Hamlet Maneuver

To produce or not to produce, that is the question. A settlement was reached and a written memorandum signed after a lengthy mediation. The mediator has been left with the original, and each attorney has been provided a copy. The next day one of the parties threatens to withdraw consent to the settlement. His attorney calls the mediator and instructs her to keep the original agreement in the mediation file. Opposing counsel calls the mediator informing her that his

runner has been dispatched to pick up the original so that it may be filed with the court immediately. This scenario poses an obvious and unnecessary threat to the impartiality of the mediator. The original need not be produced to prove its existence in a motion to enforce hearing. TEX. R. EVID. 1003.

f. The Best Seat on the Titanic

The mediation went smoothly, and a settlement was reached. The parties have drafted and approved a memorandum, and insist that the mediator be the first to sign it. After all, there would not be an agreement without their new best friend Monty Mediator who is now in the boat with the parties and their attorneys. If the mediator capitulates, he has approved the settlement of a case to which he is not a party. Then, should a party withdraw consent, the mediator has become a witness to the agreement with a concomitant loss of confidentiality and neutrality. If this ship sinks, everyone loses.

g. You Can Lead a Horse to Water...

The parties have been ordered by the Court to mediate a case; however, unique circumstances will require a trial of at least one issue that will prevent one of the parties from being able to settle the case. This party cannot attend the mediation with a good faith intent to settle. Proceeding with the mediation without informing both the Court and the mediator of the certain impasse thwarts the process and results in inconvenience and unnecessary expense to everyone involved. If faced with such a situation, the appropriate action is to file a written objection to mediation with the Court before the mediation takes place. While your client cannot be forced to mediate in good faith, the costs of mediation including attorneys' fees can be assessed against a party who failed to file an objection and did not participate in a mediation in good faith. *Texas Dept of Transportation v. Pirtle, 977* S.W.2d 657 (Tex. App. – Ft. Worth 1998, *err den.) See also, Texas Parks & Wildlife Department v. Davis,* 988 S.W.2d 370, 375 (Tex. App. – Austin 1999, *err.den.)(Trial* court erred in awarding mediation attorneys fees against Parks Department because the department had timely filed an objection to court-ordered mediation; however, mediator’s fees were appropriately taxed against the department as costs of suit pursuant to Tex. Civ. Prac. & Rem. Code § 154.054(b).)

4.1 Questions that Make Mediators Uncomfortable

Because a mediator is not a judge or jury and because a mediator is charged with remaining impartial, the following questions should be avoided:

What should we do next?
How do you think the court will rule?
What are our chances?
You know this judge, what does she do in these situations?
Is this a good deal for me?
Does my lawyer know what he is doing?
Does their lawyer know what she is doing?

You've heard all the arguments. Don't you think my father wanted me to have this property?
Based on what you've heard today, don't you think he is incapacitated?

A mediator's goal is to facilitate communications between the parties so that a dispute may be resolved. A mediator should not disclose his or her opinions about a case, nor should a mediator attempt to predict the outcome of a case. If a mediator does so, he could be accused of coercion or bullying a settlement, and your settlement agreement could be threatened.

This was the case in *Allen v. Leal*, 27 F. Supp. 2d 945 (S. Dist. Tex.) *dismissed* (5th Cir. 1998). In *Allen*, the parents of a shooting victim sued police officers and the police department in a civil rights claim. A settlement was reached during mediation. The plaintiffs attempted to revoke the settlement agreement, and the defendants filed a counterclaim to enforce the settlement agreement. At a hearing, the plaintiffs testified that the mediator coerced them by saying that they would be responsible for paying the other side's attorneys fees and costs if they did not agree to settle and that they would be financially ruined. Under these circumstances involving an allegation of mediator misconduct, the Court compelled the mediator to testify regarding the mediation. While the mediator testified that he did not coerce a settlement, the president of a mediators' association in Houston was quoted in the opinion as stating to the press that "what some people might consider a little bullying is really just a part of how mediation works." *Id.* at 947. The authors agree with the Court that the statement is deplorable and describes conduct clearly unacceptable under Section 154.053(a) of the Texas Civil Practice & Remedies Code. It is unclear from the opinion whether the mediator actually made the statements attributed to him by the plaintiffs in the *Allen* case. However, the case underscores the need for litigants to refrain from requesting legal advice from their mediator.

4.2 Information You Should Transmit to the Mediator

The effectiveness of mediation depends largely on the parties' willingness to trust their mediator. A mediator can better serve you and your client when he or she is fully informed of all material issues in the case. Many mediators will send each attorney involved in a mediation a standard form requesting information, do not hesitate to augment this form with whatever information you think would be helpful. See Appendix of Forms. Always err on the side of too much, rather than too little when deciding what the mediator should know. At a minimum, transmit the following information to the mediator well in advance of the mediation date: a description of your relationship to the client, a description of your relationship to the opposing attorney, your client's relationship to the opposing parties, a clear and concise statement of your case including a description of all facts and issues that have an impact on settlement, any settlement offers or demands that have been previously made. Transmit any other information that you feel will be of assistance to the mediator.

Probate cases are often emotionally charged. Information about the emotionality of the case is helpful to a mediator both in terms of the mediation model used and the time needed for effective negotiations. Let the mediator know in advance if a party will likely need to vent his or her emotions before meaningful settlement discussions can proceed. If necessary, prepare the

client by allowing an emotional release in the privacy of your office before the mediation. If the client wants and needs to confront another party, mediation gives him a forum for doing so. Consider having a practice session so that the client can prepare an effective colloquy. Steel yourself so that you do not get caught up in the client's emotions. Often in cases where anger and hurt are running high, a client will look to the attorney for a reality check. If the attorney is unprepared or caught up in the emotions of the case, the client will look to the mediator for advice. This places the mediator in an ethical dilemma since the mediator cannot express opinions about the case. In the authors' opinions, such situations may be minimized through adequate attorney-client preparation. The mediator's job is complicated when he must play the role of "manners police." If necessary, allow some time for clients to voice their strong feelings in advance of the mediation so that the parties may communicate their negative feelings without being overtly offensive. Careful client preparation helps avoid negative emotional outbursts that may hamper effective negotiations and an ultimate resolution. A mediator armed with knowledge is better able to facilitate settlement.

A mediator is not a judge. You have a confidential relationship with your mediator, and you can communicate with her or him outside the presence of opposing counsel. Do not hesitate to communicate any special concerns you have or that your client has regarding either the case itself or the mediation process. Do not hesitate to designate information as confidential. Mediators have a statutory duty to honor confidentiality and will do so. TEX. CIV. PRAC. & REM. CODE § 154.053.

Plan on allowing a realistic time for the mediation. Some cases can reasonably be resolved in a half-day or less. Others need more time. If you believe a party needs time to vent emotions before effective negotiations can proceed, inform the mediator and plan your time accordingly. Do not allow negotiations to be short-changed for a lack of time. Inform the mediator of your realistic expectations. For instance, if you believe a case needs a two-day mediation, advise the mediator and plan accordingly.

4.3 Avoiding Common Pitfalls in Mediation

It is the authors' opinion that, if a probate dispute is in litigation, the attorneys should have an order signed regarding the mediation, even when the parties have agreed to mediate. A court order allows the mediator to play the heavy who requires parties to be present and to stay until agreement or a real impasse, not one caused by momentary frustration, is reached. If the dispute is not yet in litigation, ask the mediator for a standard set of rules that the parties can sign which, by agreement, confers upon the mediator the right to determine when the session should end. See Appendix of Forms.

Many cases could be resolved but for minor complications that should have been anticipated by counsel. If a guardian or attorney ad litem has been appointed in the case, arrangements should be made in advance to include the ad litem in the mediation or have the ad litem available by telephone to approve a settlement if one is reached. If facts and circumstances have changed such that information provided to the opposition or to the mediator is stale, update it as soon as possible. Keep facts in perspective, and remain flexible. For example, if you settle a

multi-million dollar case favorably in mediation but get hung up on a $1000.00 mediation fee, your client may suffer more harm than good.

It is astonishing how many attorneys fail to finalize their client's travel plans until it is too late. Only the smallest of cases can be settled in a half-day mediation. Large cases, cases involving fiduciaries, and emotionally charged disputes require more time to reach a meaningful settlement. Almost no real dispute filed in probate court can be settled in a half day. Avoid allowing your client to buy a nonrefundable plane ticket for 4:00 p.m. when the mediation is to start at 9:30 a.m. Have your office make travel arrangements if necessary. If your client is insistent that he or she cannot "waste more time than this," let the mediator help you. Inform the mediator of the problem and let him author a letter informing all parties, not just your client, that they are expected to remain at the mediation until dismissed.

5.0 Special Considerations Regarding the Dynamic Tension Placed Upon Attorneys Representing Clients in Guardianships, Will Contests and Trust Disputes

We are attorneys and counselors at law. Quite often, probate litigation centers on a deeply rooted family dispute that threatens to destroy the family relationship. Lawyers are conditioned to ignore the personal emotional struggles presented in a dispute in favor of the law and legal arguments necessary to protect our client's interest. During mediation, attorney and client must spend more time together than either may have wanted. It is an excellent opportunity for a client to become fully informed about his or her case. It is also an excellent opportunity for an attorney to become fully informed about his or her client.

As advocates, we are charged with representing our clients zealously. There is tension between zealous advocacy as perceived by the lawyer and the best result as defined by the client – especially when the client's chosen result may not be the best financial or legal outcome but one that preserves the family relationship. Advocates must be mindful that the best possible settlement is one defined by the client.

Clients typically feel a loss of power and control during litigation. Mediation is the one forum in which your clients can exert control over the outcome of their cases. Use mediation to explore your clients' personal issues in their cases. Find out how deeply they care about preserving the relationship with other family members. If a thoroughly informed client chooses to accept less in return for the hope of family peace, let him or her do so.

Probate, guardianship and trust matters are emotional. Anger, guilt, frustration, and jealousy, may appear during mediation. Some emotional venting may be necessary before a party is able to meaningfully discuss settlement. Be watchful of becoming caught up in the emotional rip tide and fanning the fire yourself. In a hypothetical will contest involving a multi-million dollar estate, an agreement has been reached after many hours near midnight. Only incidental matters remain to be negotiated. The entire agreement is threatened when one party wants a few bales of three-year-old hay that the party maintains have been left for them by their father. Rather than exploring a solution to this very emotional issue, the party's attorney seized it as an opportunity to question the sincerity of the opposing sibling. At that point attitudes of both

clients and attorneys deteriorate over a few dollars worth of hay. The voice of reason comes from the widowed mother, not from any of the attorneys. This mediation was unnecessarily prolonged. Had the attorneys remained detached and focused on major issues, the details could have been resolved quickly.

5.1 The Incapacity Standard

Texas Probate Code §§ 3(p) and 601(13) define an incapacitated person as being a minor, a missing person, a person who must have a guardian appointed to receive funds from a government source, and an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or to care for his own physical health or to manage his own financial affairs. A guardian may be appointed only when incapacity is proved by clear and convincing evidence. TEX. PROB. CODE § 684. Cases involving incapacitated persons inspire a heightened sense of responsibility for those representing the interests of the incapacitated person. A mediator who is mindful of the heightened responsibility of a guardian will act accordingly.

Be aware that 1999 amendments to the Civil Practice and Remedies Code have strengthened the duty to report abuse of children, the elderly, and the disabled. These amendments are specifically applicable to mediators. TEX. CIV. PRAC. & REM. CODE § 154.053(d) incorporating TEX. FAM. CODE § 261.101 and TEX. HUM. RES. CODE § 48.051. Mediators have an affirmative duty to report abuse notwithstanding the confidentiality of the mediation process. Although neither author has encountered a situation that would trigger the affirmative duty to report abuse, such issues could conceivably arise during probate mediations. An attorney involved in a case wherein the duty to report might arise should be prepared to counsel his client and appropriately inform the mediator.

In guardianship disputes, mediation provides an opportunity for family members to battle over issues, peripheral to the guardianship, that are the real reason for disagreements over who should or should not be the guardian. Examples of issues which probably would not be resolved in the guardianship, but which can be resolved in a mediation are:

a. the effectiveness of additional codicils to a will;
b. an agreement regarding the most recent codicil;
c. an agreement regarding disposition of the guardianship estate upon the ward's death, which may or may not be in accordance with a will;
d. management of a family business owned in whole or in part by the proposed ward;
e. disposition of a business upon the ward's death; and
f. an agreement as to alleged past wrong doings regarding the ward's estate, eliminating the need to bring a claim for restitution.

6.0 Conclusion

Mediation is highly effective in achieving the amicable resolution of disputes. Additionally, mediation is cost effective and far less likely to deplete an estate than prolonged

litigation. In probate and guardianship litigation, where family relationships are likely to be a factor, mediation provides a safe, private and confidential forum for the airing of grievances and settlement of problems. The safety, privacy and cost of mediations are distinct advantages for the probate client.

Additionally, the success rate of mediation is quite good. An attorney in probate litigation or contemplating such litigation should plan for a mediated settlement from the outset. There are specific issues that present themselves to an advocate in a probate mediation that do not commonly appear in other types of litigation. We have tried to make you aware of some of these issues. Each case and situation is unique. Good luck.

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Appendices

Exhibit a	mediation information sheet
Exhibit b	memorandum of agreement-blank
Exhibit c	settlement agreement-blank
Exhibit d	settlement agreement-blank
Exhibit e	voluntary rules for mediation
Exhibit f	agreement in guardianship
Exhibit g	agreement in will contest
Exhibit h	agreement in estate wind down
Exhibit i	agreement in guardianship