MEDIATION LAW UPDATE

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Mediation law exists. At first glance, one may not think that it should exist. After all, the parties to a mediation arrive either at a mutually agreeable settlement or in the unlikely event that the mediation does not settle, the parties proceed to trial. Why would there be any law relating to mediation?

We have known for several years that the parties who attend a mediation will sometimes come to regret the terms of the settlement agreement, something we could call "buyer's remorse" or "seller's remorse" depending upon one's point of view. In other instances, there are disputes about a person's capacity at the mediation, or the court's authority to order parties to mediation. A WestlawNext search of Texas state cases in the last year, only using the search term "mediation," provided a search result of 122 cases. Many of these cases have little educational value to the practitioner because the decision describes mediation as part of the procedural posture or mentions that the parties attended a mediation. During the same period, 24 decisions mentioned "mediator."

This article culls through some of the more interesting and useful cases from 2019 where the courts examined mediation and mediators in some substantive manner, to help both the advocate and the mediator have an understanding of developments in this area. One thing is for sure: mediators ought not to take mediation for granted; that is, the dispute may not be settled when the parties leave the mediator's office.

I. TEXAS SUPREME COURT

LaLonde v. Gosnell, No. 16-0966, 2019 WL 2479172 (Tex. June 14, 2019), *reh'g denied* (Oct. 4, 2019)

This case is fundamentally about whether a professional waived dismissal rights under Chapter 150 of the Civil Practice and Remedies Code. Chapter 150 requires a sworn certificate of merit to be filed contemporaneously with a lawsuit when the lawsuit complains about a licensed professional engineer's services. If a certificate of merit is not filed, then the court may dismiss the petition. A certificate of merit was never filed, and the defendant-engineers participated in litigation-related activity, including mediation. Here, the court held that participating in mediation could be a factor to determine if the engineers intended to waive their

right to dismissal, but it was of little use to infer intent. The Supreme Court of Texas does provide a beautiful quote for mediators: "Consistent with the state's strong public policy favoring the peaceable resolution of disputes, mediation is an effective tool for resolving claims outside of litigation. We encourage it."

***Highsmith v. Highsmith*, No. 18-0262, 2019 WL 5482657 (Tex. Oct. 25, 2019)**

The Texas Supreme Court answered this question: may a mediated settlement agreement that resolves the parties' property-division and conservatorship issues satisfy all statutory requirements if it is executed before a divorce petition is filed? The answer: yes.

The parties attended a mediation without attorneys and entered into a mediated settlement agreement. The mediated settlement agreement settled custody issues and partitioned the marital estate. The MSA also specified that one of the parties would file a divorce action, that party would appear in court and would secure rendition of the judgment per the agreement. The MSA contained language in underlined and capitalized letters that it was not subject to revocation. One of the parties after that filed a divorce petition referencing the MSA, and the other spouse filed a general denial. The spouse filing the petition then appeared at an uncontested docket with his attorney and proved up the divorce. The trial court rendered judgment on the MSA. The other spouse did not receive notice of the prove-up hearing and did not attend. The non-appearing spouse then filed a motion to set aside the judgment and in the alternative, for a new trial, and to revoke the MSA. The non-appearing spouse argued that the MSA was unenforceable because it was signed before a suit for divorce was filed. The trial court denied the non-appearing spouse's motions. The court of appeals reversed, finding that a suit for divorce is a threshold requirement for a binding MSA.

The Texas Supreme Court held that there is no requirement in the Family Code that a suit must be filed before an MSA can be enforced. Section 6.602 of the Family Code allows a court to refer a family lawsuit to mediation but does not require a court to do so. Section 6.602(b) sets forth requirements for an MSA to be binding: prominent language that the agreement is not subject to revocation, the MSA is signed by each party, and is signed by the attorneys for each party, if any, who are present at the time the agreement is signed. Accordingly, there is no requirement that a pending suit is a prerequisite to enforcing an MSA that meets the statutory provisions. An MSA is binding on the parties if it meets the three requirements in Section 6.602(b) of the Family Code.

II. TEXAS COURTS OF APPEAL

A. Representatives with Authority *In re Vinson*, No. 08-18-00207-CV, 2019 WL 2417441 (Tex. App.—El Paso June 10, 2019, no pet.)

The trial court ordered the parties in a personal injury lawsuit to mediation. The court's order required all parties and representatives with full settlement authority to attend, along with their counsel of record. Mediation was conducted, where Vinson, an adjuster employed by Allstate, did not participate but another Allstate representative did. Soto, the injured party, filed a motion to compel, alleging that the parties were not successful at mediation and then went on to describe that the mediation lasted for two hours when it was scheduled for four hours, and the Allstate representative who had been negotiating throughout the case was not in attendance. The motion to compel sought the presence of Vinson at mediation, who had been handling the claim before the mediation, for the remaining two hours of the scheduled mediation. After a hearing, the trial court entered an order compelling Vinson to attend the mediation. Vinson filed a petition for mandamus, contending that the trial court abused its discretion when it ordered her to participate in a mediation. The court of appeals reaffirmed a trial court's authority to order parties and representatives to mediation under Section 154.021 of the Civil Practice and Remedies Code. In this instance, the trial court did not order Vinson to attend the mediation but ordered an Allstate representative with full settlement authority to attend the mediation. Soto did not allege or offer evidence that the Allstate representative in attendance did not have full settlement authority. There is no legal authority that a court is authorized to compel a particular representative to attend a mediation simply because one representative has more familiarity with a case than another. Because Soto was moving to seek to compel Vinson's attendance, Soto had the burden to demonstrate that the Allstate representative in attendance did not have full settlement authority.

B. Confidentiality *Pierce v. Stocks*, No. 01-18-00990-CV, 2019 WL 3418513 (Tex. App.—Houston [1st Dist.] July 30, 2019, no pet.)

The trial court denied Pierce's motion to dismiss a lawsuit brought by her former employer under the Texas Citizens Participation Act. Stocks, a doctor, had hired Pierce and after Pierce allegedly refused to provide financial information, she was fired, prompting Pierce to file a discrimination claim with the EEOC and a suit in federal court alleging discrimination, retaliation, and breach of contract. Stocks filed a lawsuit against Pierce for breach of fiduciary duty and fraud. Pierce then filed a motion to dismiss, alleging that Stock's suit was related to Pierce's right to petition in the federal court. Pierce included mediation-related declarations in support of her motion to dismiss. The motion to dismiss was denied by the trial court, including sustaining objections to the mediation-related statements contained in the declarations that outlined retaliatory statements in the mediation of the federal lawsuit. Pierce complained that the trial court did not take these statements into account, and should have because the statements were an exception to the mediation privilege. Specifically, the information at mediation would show whether Stocks' lawsuit was in response to the federal lawsuit and would otherwise be discoverable outside of the mediation.

The court of appeals held that the "cloak of confidentiality" that surrounds mediation should be breached only sparingly, recognizing that all mediation-related matters are confidential and may not be disclosed to anyone, including the court. In this case, the statements that were sought were hearsay, were not made by Stocks, and were made in another case (the federal case) during a mediation. According to the court of appeals, Pierce did not explain why the statements were relevant, admissible, or discoverable independent of the mediation process and upheld the court's determination that the mediation-related statements were not proper evidence.

***Parsons v. Parsons*, No. 01-18-00902-CV, 2019 WL 5382637 (Tex. App.—Houston [1st Dist.] Oct. 22, 2019, no pet. h.)**

In this divorce action, one spouse filed for a motion for a new trial in response to a post-answer default judgment. The trial court denied the motion for new trial. As part of the evidence before the court, the spouse moving for a new trial presented emails that showed an attempt to schedule mediation after mediation had taken place, and the mediator had not recessed the mediation. Both parties wanted to schedule another mediation date, but the non-appearing party did not appear, and the mediator filed an impasse letter. The appearing party also presented evidence contesting the motion for new trial. One piece of evidence was a letter from the mediator showing that the parties confirmed a date for the rescheduled mediation, and the mediator explained that neither the other spouse nor her attorney appeared despite receiving notice.

Here is an ethical question: Should the *mediator* have provided a letter outlining the date for the rescheduled mediation and explaining that a party (and the attorney) did not appear? Consider this provision of the Civil Practice and Remedies Code:

> Sec. 154.073. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS.
>
> (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not 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.

Or this provision:

> Sec. 154.053. STANDARDS AND DUTIES OF IMPARTIAL THIRD PARTIES.
>
> (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. (c) Unless the parties agree otherwise, 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 appointing court.

Or this provision from the Ethical Guidelines for Mediators promulgated by the Texas Supreme Court:

> 8. Confidentiality. A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.
>
> Comment (c). Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.

Or this provision:

> 9. Impartiality. A mediator should be impartial toward all parties.
>
> Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

C. Mediation as a Condition Precedent

***Rodriguez v. Texas Leaguer Brewing Co., LLC*, No. 18-0001, 2019 WL 2939056 (Tex. App.—Houston [14th Dist.] July 9, 2019, pet. filed)**

Rodriguez was an owner of Texas Leaguer Brewing Co., LLC. As part of the Amended and Restated Company Agreement, in the event of a dispute arising out of or relating to the agreement, the parties agreed to a dispute resolution process. According to the court of appeals, Rodriguez eventually refused to co-sign a Small Business Administration Loan, and the company then terminated Rodriguez's ownership. Rodriguez filed suit for securities fraud, conversion, and breach of agreements. The company filed to compel arbitration, which Rodriguez opposed. The trial court ordered the parties to arbitration and dismissed Rodriguez's suit without prejudice.

The issue, in this case, was whether the agreements required mediation before instituting arbitration. The agreement language was:

> If a dispute arises out of or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled through direct discussions within fourteen (14) days of first consideration, the Members and Manager agree to first endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association (the "AAA") under its Commercial Mediation Rules, before resorting to arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (except otherwise provided herein) by written notice to the other Members and Managers, as applicable. The Member or Manager electing arbitration shall by such notice to other Members or Manager name an arbitrator. The second arbitrator shall be chosen by the noticed Members or Manager, as applicable, within fourteen (14) days after such notice.

The court of appeals held that this clause was an arbitration clause, and if one party elected to arbitrate, then the dispute must be arbitrated if the parties were unable to resolve their dispute through mediation. The court of appeals also held that mediation was not a condition precedent to arbitration in this instance because Rodriguez filed suit without first seeking mediation, thus waiving the right to insist on mediation before arbitration.

D. The Role of the Mediator

***Star Elec., Inc. v. Northpark Office Tower, LP*, No. 01-17-00364-CV, 2019 WL 2094328 (Tex. App.—Houston [1st Dist.] May 14, 2019, no pet.)**

In this breach of contract suit, the parties attended mediation and entered into a "Confidential Binding Settlement Agreement." One of the terms of the settlement agreement was:

> If one or more disputes should arise with regard to the interpretation and/or performance of this agreement or any of its provisions, or the drafting or execution of further settlement documents, the parties agree to attempt to resolve any such dispute first by

> telephone conference with [Mediator], mediator herein, who facilitated this settlement. If the parties cannot resolve their differences by telephone conference, then each agrees to schedule one day of mediation with [Mediator], mediator herein, within thirty (30) days after the unsuccessful telephone conference to attempt to resolve the disputes. The parties shall equally share the costs of such mediation. If any party refuses to mediate, then that party hereby forfeits all right to recover attorney's fees and/or costs in any subsequent litigation brought to construe or enforce this agreement. Conversely, if the subsequent mediation is unsuccessful, then the prevailing party or parties in the subsequent litigation shall be entitled to recover, as allowed by law or contract, reasonable attorneys' fees and expenses, including the cost of the unsuccessful mediation. [Mediator] has the final decision on any ambiguity in the settlement agreement.

According to the court, the mediator then issued a series of six "orders" after it became apparent that there was a dispute about the value of the property that was used as collateral in the settlement agreement. The mediator identified himself as an "arbitrator" in the orders. One order included the mediator concluding that one of the parties breached the settlement agreement after the mediator conducted another mediation with the parties. In the final order by the mediator, the mediator concluded that one of the parties satisfied the collateral portion of an earlier order and recommended that the parties consider another mediation to resolve all outstanding matters. For issues involving mediators, the court clarified that the settlement agreement did not authorize an arbitration after mediation. The settlement agreement did not designate the mediator, or anyone else, as an arbitrator. The fact that the mediator identified himself as an arbitrator in the orders is not controlling upon the court. Additionally, Texas law allows a mediator to act as an arbitrator only with the parties' express consent. A mediated settlement conference that results in a settlement agreement is mediation, and not a final adjudication because when a court refers a dispute to mediation, the court does not lose jurisdiction over the case. The reason for this is that the mediator does not have the power to render a judgment; only a trial court can deliver a final judgment. Finally, a mediated settlement agreement is enforceable as a contract, not as a court order.

***Swoboda v. Ocwen Loan Servicing, LLC*, 579 S.W.3d 628 (Tex. App.—Houston [14th Dist.] 2019, no pet.)**

This decision involved a foreclosure action where the trial court granted the lender's motion for summary judgment. One of the factual questions related to whether the lender approved a short sale. In support of its position, the bank referred to a mediator's report as evidence of a short-sale agreement. The mediator's report, addressed to the trial court, stated:

> On September 14th I mediated the case with the parties and I am pleased to report that

> the parties were successful in resolving all claims in the lawsuit subject to and contingent upon terms which provide for the sale of the property that is the subject of the lawsuit. The parties either have or will file a motion asking the court for a trial continuance to facilitate their agreement that the property be sold. The parties worked hard to reach an agreement in the case and I would encourage the Court to grant them the continuance necessary to allow for the time that it will take to sell the property.

The court of appeals held that the mediator's statement did not establish that the lender had agreed to a short sale, or that the lender had abandoned its prior acceleration of the indebtedness.

Is there an ethical issue with the mediator's report? Should the *mediator* have provided a report to the trial court outlining not only that the matter settled or that it did not, but also set out several terms of the settlement, and that the parties "worked hard to reach an agreement"? Should the mediator have encouraged the court to grant a continuance to allow the sale of the property? Does the mediator's report sound more of an impartial report, or as evidence and testimony? Consider this provision of the Civil Practice and Remedies Code:

> Sec. 154.073.
> CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS.
>
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***Tolbert v. Kartye,* No. 12-18-00169-CV, 2019 WL 1272687 (Tex. App.—Tyler Mar. 20, 2019, pet. denied)**

In this summary judgment proceeding, the administrator of the decedent's estate filed suit against the decedent's wife to recover property belonging to the estate. The administrator later added her brother as a plaintiff. After a one- day mediation, the mediator sent a mediator's proposal with 11 items and asked the parties to agree or disagree, along with a notation that the proposal is not negotiable. Each side agreed and signed separate copies. The mediator then

notified the court that the matter settled. After that, the court signed an order approving the settlement and ordered the administrator to execute and deliver documents to carry out the agreement. The decedent's wife, a few weeks later, notified the court that she was not in agreement with the court's judgment, claiming she signed the mediator's proposal under duress and that her attorney was not looking out for her best interest. The trial court granted her request for a permissive interlocutory appeal, which was also granted by the court of appeals, to determine whether the settlement agreement was a valid contract.

The mediator's proposal originally suggested that the removal of personal property should be completed in five days or less. On the signature page signed by the administrator and her brother, the number 5 was stricken through and replaced by a 7, with the administrator's and her brother's initials. The decedent's wife argued that the change in the number of days shows that there was no meeting of the minds with the handwritten change as a counteroffer. The court of appeals disagreed, holding that allowing the decedent's wife two additional days to remove her personal property from a home that she agreed to relinquish was not a material change. The summary judgment evidence established that the settlement agreement met the parties' objective of dividing up the decedent's estate, contained material terms, was in writing, was signed by the parties, and filed with the court. The settlement agreement, originated as a mediator's proposal, was an enforceable Rule 11 agreement, and summary judgment was proper.

E. Modifying the Mediated Settlement Agreement *Jonjak v. Griffith*, No. 03-18-00118-CV, 2019 WL 1576157 (Tex. App.—Austin Apr. 12, 2019, no pet.)

In this divorce action, the parties entered into an MSA with a term that stated Griffith "will receive $ 962,000 from the Bog Farm Profit Sharing 401k, which is 53% of the value of the account as represented by [Jonjak] on the day of the mediation via QDRO prepared by [Jonjak]." The court pronounced a divorce, instructing Jonjak to prepare a decree consistent with the MSA. Jonjak did, as did Griffith. Griffith's proposed decree awarded her "53% of Jonjak's 401k account as of June 1, 2017, 'together with any interest, dividends, gains, or losses on that amount arising since that date' to be 'more particularly defined' in a QDRO." In addition to the amount of the 401k to be divided, there was a question as to whether the mediation date or the court's execution date of a QDRO was the effective date to implement the division. The trial court entered an order awarding Griffith $962,000 as of the mediation date, along with any interest, dividends, gains, or losses on that amount arising since the mediation date.

The Austin Court of Appeals held that trial courts have no discretion to modify an MSA and must render a judgment in strict or literal compliance with the MSA. Because the MSA in this instance met the statutory requirements and did not include interest, dividends, gains, or losses, the trial court committed error when it added those terms to the decree. As the Austin Court of Appeals noted, the "divorce decree divides the 401k differently than the MSA." The court distinguished the *Vaughn v. Vaughn* opinion (2005 WL 1115965, Tex. App.—Austin May

12, 2005, no pet.) because the parties there allowed a QDRO to define the distribution of a retirement plan. Unlike *Vaughn*, the MSA did not contain similar language, and there was nothing for a future QDRO to clarify. The Court of Appeals affirmed the divorce decree after modifying it to remove the provisions that were not agreed to by the parties.

***C.I. v. Texas Dep't of Family & Protective Services*, No. 03-19-00309-CV, 2019 WL 5406326 (Tex. App.—Austin, Oct. 23, 2019, no pet. h.)**

This is a case involving a suit affecting the parent-child relationship. C.I. challenged the trial court's order that was entered into based upon a mediated settlement agreement. As part of the mediated settlement agreement, C.I. agreed to be the possessory conservator of her children, along with arrangements for visitation. The MSA included language that the terms of the MSA were intended to be incorporated into a final order. After the trial court signed its order, C.I. moved for a new trial because the MSA was no longer in the children's best interests because one of the permanent managing conservators died shortly after the court's order. The other permanent managing conservator was not related to the children (he was married to a relative of the children).

Noting that Texas has a policy of encouraging the peaceful resolution of disputes, especially those in the parent- child relationship, a SAPCR-related mediation is binding if it has prominent type that it is not subject to revocation, that it is signed by each party, and is signed by the parties' attorneys if any, who are present when the agreement is signed. The court of appeals held that the MSA was enforceable because it met the requirements of Section 153.0071 of the Civil Practice and Remedies Code. A court is not authorized to refuse judgment on best interest grounds on a statutorily-compliant MSA unless the court finds that a party to the MSA was a victim of family violence, family violence impaired a party's ability to make decisions, and the agreement is not in the child's best interest. Thus a court can only consider best interest in cases involving family violence when the court is considering whether to enter a judgment on an otherwise statutorily-valid MSA.

***Sprague v. Kroger Texas, LP,* 4:17-CV-00874-O, 2019 WL 885236 (N.D. Tex. Feb. 5, 2019), report and recommendation adopted, 4:17-CV-00874-O, 2019 WL 859686 (N.D. Tex. Feb. 22, 2019)**

One of the parties signed a mediated settlement agreement as "Under Duress by my attorney, husband, & mediator." After signing the MSA, the party informed her attorney that she would not fulfill her obligations under the MSA. The party claimed that her attorney bullied and pressured her to sign the agreement and that the mediator also pressured her to sign the agreement. The party alleged that her breast cancer and medical treatment prevented her from understanding the mediation and what she was signing, and also caused her to be tired after 6 or

7 hours. The party further alleged that the mediator used concerns about the party's husband's health problems against her.

The mediator was the subject of Kroger's motion to compel testimony. The mediator objected, and the District Judge overruled her objections. The mediator testified that she explained her standard mediation instructions to the complaining party, that the complaining party appeared to understand what was happening during the mediation, that the complaining party was unhappy during the mediation, and that the complaining party was able to negotiate during the mediation. The mediator also testified that it did not appear that the complaining party was under duress or coerced during the mediation.

The court held that the complaining party's signature and notation constituted a grumbling acceptance and was not evidence of a lack of acceptance of an agreement or that the agreement was signed under duress. The court also held that the complaining party was not coerced into signing the agreement nor did she sign the agreement under duress.

Gene Roberts is an attorney and mediator, and the Director of the Office of Student Legal & Mediation Services at Sam Houston State University. He has over 15 years' experience as counsel representing clients in litigated cases. Gene's philosophy—as a private attorney and as the full-time Director of SLMS—is to help individuals understand their rights and responsibilities, comprehend the complexities of the legal system, and develop a proactive and productive strategy for the situation they face.