FAMILY LAW SETTLEMENT AGREEMENTS: RULE 11s, ISAs, MSAs, COLLABORATIVE SETTLEMENT AGREEMENTS, AND ARBITRATION

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State Bar of Texas
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EDUCATION

Texas Tech University, B.B.A. in 1987, cum laude
Texas Tech School of Law, J.D., 1995, cum laude

PROFESSIONAL ASSOCIATIONS AND HONORS

Board Certified by Texas Board of Legal Specialization, Family Law, since 2000
Fellow, American Academy of Matrimonial Lawyers
Member, Texas Academy of Family Law Specialists
Named Texas Super Lawyers® - Rising Stars® Edition (Texas Monthly, 2004 and 2005) Named Best Lawyers' Austin Family Law Lawyer (2012 through the present)
Member, Collaborative Law Institute of Texas
Member, International Academy of Collaborative Professionals
Member, State Bar of Texas (Family Law Section)
Served on Family Law Council 2012-2017
Member, College of the State Bar of Texas
Member, Austin Bar Association (Family Law Section)
Member, Texas Bar Foundation, 2004 through the present
Member, Pro Bono College of the State Bar of Texas, 1999 through the present Recipient, 1998 and 1999 Pro Bono Award, Volunteer Legal Services of Central Texas Recipient, 2017 Lawyer of the Year (Family Law, Best Lawyers of America) Recipient, Travis County Women's Lawyer Association, Pro Bono Award, May 2018.

CAREER PROFILE

Practiced family law with Goranson Bain Ausley, PLLC, since December 2017.
Practiced family law with Ausley, Algert, Robertson & Flores, L.L.P. since August 1995 and became a partner in December 2001.
Trained in Collaborative Law and trained as a family law mediator.
Volunteer, Volunteer Legal Services of Central Texas since 1996 as a mentor and lawyer.
Volunteer, Texas Advocacy Project previously Women's Advocacy Project since 2004 as a lawyer.
Obtained certification as a specialist in the area of family law through the Texas Board of Legal Specialization (December 2000).

PERSONAL

Born February 23, 1965, in Lubbock, Texas and raised in Austin.
Married to Joe Flores - two children.
Member, First United Methodist Church, Austin.

AUTHOR and LECTURER

"Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 17, 2003.

"Post Trial Basics & Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 8, 2004.

"Effective Use of ADR in Family Law Cases," 2005 Poverty Law Conference, Texas Lawyers Care, March 30 - April 1, 2005.

"Closing the Friendly and Unfriendly File," Advanced Family Law Drafting Course, State Bar of Texas, December 8-9, 2005.

"Traveling Light: Collaborative Law Without Paralegals or Assistants," Collaborative Law Spring Conference 2008, State Bar of Texas, February 28-29, 2008.

"Collaborative Law," Alternative Dispute Resolution Course, University of Texas Law School, Professor Cynthia Bryant, March 6th, 2008.

"Child Support (What Do Judges Do in Various Counties) Above & Below the Guidelines, the High Income Earners (Death of the Obligor)," Marriage Dissolution Institute, State Bar of Texas and Family Law Section, April 17-18, 2008.

"Closing the File," Summer School - State Bar College, State Bar of Texas, July 17-19, 2008.

"Closing Documents Other than QDROs," Advanced Family Law Drafting Course, State Bar of Texas, December 4-5, 2008.

"Putting Agreements on Paper," Collaborative Law Course 2010, State Bar of Texas and Collaborative Law Institute of Texas, March 4-5, 2010.

"Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 9-10, 2010.

"We're Done! (Or are we?) - Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 5-6, 2013.

"Closing the File 101," Marriage Dissolution 101 Course, State Bar of Texas, April 23, 2014.

"Closing the File 101 – The Long Good-Bye," Marriage Dissolution 101 Course, State Bar of Texas, April 8, 2015.

"Proving Significant Impairment," Advanced Family Law Seminar, State Bar of Texas, August 1-4, 2016.

LECTURER

"Creative Discovery," Family Law Essentials, Family Law Council, Nacogdoches, Texas, June 4, 2004.

"Post Trial Basics & Closing a File," State Bar Convention - Boot Camp, June 25, 2004. "Closing Out Your File," Williamson County Family Law Seminar, October 29, 2004. "How to Study for and Pass the Board Certification Exam," Advanced Family Law Course, State Bar of Texas, August 10, 2005.

"Trends in Family Law," 2009 Statewide Assistant Attorneys General Conference, Austin, Texas, July 10, 2009.

"Changes in SAPCR Issues and Trends for the Future," 35th Annual Advanced Family Law Course, State Bar of Texas, August 3-6, 2009.

"Collaborative Law," Travis County Family Law Section Luncheon, January 6, 2010. "The Paradigm Shift," Nuts & Bolts of the Collaborative Process Course, State Bar of Texas and the Collaborative Law Institute of Texas, March 3, 2010.

"Characterization & Tracing: An Overview," Advanced Family Law Course, State Bar of Texas, August 4, 2011.

"Know When to Hold Them, Know When to Fold Them: Settlement Agreements, Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements," Author: Jimmy Vaught, Marriage Dissolution, State Bar of Texas, April 19, 2013.

"Know When to Hold 'Em, Know When to Fold 'Em, Accepting and Firing Clients," The Austin Bar Family Law Section Spring CLE, May 13, 2016.

"Parental Alienation – Analyzing/Reassessing the Problems and Solutions," Advanced Family Law Seminar, State Bar of Texas, August 7-10, 2017.

"Navigating Your Family Law Matter When Someone with a Personality Disorder Is Involved," Advanced Family Law Seminar, State Bar of Texas, August 13-16, 2018.

"Breaking the Log Jam in Your Case," 12th Annual Course Collaborative Law: Avoid Breaking Bad When Breaking Up, State Bar of Texas, March 7-8, 2019.

"Property Case Update," Marriage Dissolution, State Bar of Texas, April 25-26, 2019.

"40-Hour Mediation Training," AAML, June 23-26, 2019.

COURSE DIRECTOR/PLANNING COMMITTEES:

Planning Committee – Collaborative Law Course 2010
Planning Committee – Advanced Family Law Course
2010 Course Director – Family Law Boot Camp 2010
Planning Committee and Course Director – Marriage Dissolution 101 Seminar,
April 2013 Planning Committee – Advanced Drafting Course 2013
Planning Committee – Marriage Dissolution (2017, 2018, 2019)
Mediation Committee – AAML 2019

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EDUCATION
Texas Tech University School of Law, J.D., magna cum laude, 2013
Columbia University Graduate School of Journalism, M.S., 2006
Texas Christian University, B.S., magna cum laude, 2005

ADMITTED
State Bar of Texas 2013

AREA OF PRACTICE
Family Law

AWARDS AND PROFESSIONAL RECOGNITION
Recognized as a Rising Star by Super Lawyers – 2017, 2018, 2019, and 2020
Named to 2020 Top Attorneys in Austin Monthly
Recognized as Best Lawyers: Ones to Watch – 2020

PROFESSIONAL ACTIVITIES AND PUBLICATIONS
-CLE Speaker, "Temporary Orders" – Volunteer Legal Services Divorce Basics Seminar, 2019
-CLE Speaker, "Social Media, Discovery, and Ethics" – Texas Advanced Paralegals Seminar, 2019
-CLE Speaker, "Modifications" – Victoria Family Law Essentials Seminar, 2019
-CLE Speaker, "Divorce 101" – Williamson County/WLS Presentation Series, 2018
-Co-Author, "Professionalism: Lessons Learned" – Advanced Family Law, 2019
-Co-Author, "Drafting Enforceable Orders" – Family Law 101, 2019
-Co-Author, "Which Way Do We Go? Drafting Considerations in Jurisdiction" – Advanced Drafting 2017
-Contributor, Texas Family Law Foundation's *Annotated Texas Family Code 2017*
-Director, Mother Attorneys Mentoring Association of Austin
-Past Vice President, Women Lawyers Section, Williamson County Bar Association,
-Member, State Bar of Texas, Family Law Section
-Member, College of the State Bar of Texas
-Member, Austin Bar Association, Family Law Section
-Member, Travis County Women Lawyers Association
-Member, Austin Young Lawyers Association/Austin Bar Association Leadership Academy 2020

SPECIALTY TRAINING
30-hour Family Law Mediation Training, 2020
Basic Interdisciplinary Training, Collaborative Divorce Texas, 2019
40-hour Basic Mediation training, 2012

COMMUNITY INVOLVEMENT
-Girl Scouts Troop Leader
-Member, The Junior League of Austin

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LEGAL EXPERIENCE

Mary Evelyn McNamara is Board Certified in Family Law by the Texas Board of Legal Specialization and a Fellow in the American Academy of Matrimonial Lawyers. Her practice focuses on divorces and other family law cases involving complex property and children's issues, child custody modifications, and enforcement of court orders. Having experience as a former briefing attorney for the Third Court of Appeals, Ms. McNamara also handles family law appeals.

EDUCATION

- University of Texas School of Law (J.D., 2002)
  Texas Law Review, Notes Editor
- Duke University (B.A., English and History, 1986)

PROFESSIONAL LICENSE AND CERTIFICATION

- Board Certified in Family Law, Texas Board of Legal Specialization (2009, recertified in 2014, 2019)
- Attorney at Law, Texas (2002)

PROFESSIONAL EXPERIENCE

- Rivers ♦ McNamara, PLLC, Partner (founded March 2011)
- Brown McCarroll, LLP, Partner, Associate (September 2004 – February 2011)
- Third Court of Appeals, Austin, Briefing Attorney (August 2002 – August 2004)
- Law Offices of Dicky Grigg/Spivey, Grigg, Kelly & Knisely, Paralegal (November 1989 – August 1999)

PROFESSIONAL RECOGNITION

- Fellow, American Academy of Matrimonial Lawyers, 2017 to present
- Best Lawyers in America – Family Law, 2018 - 2021
- Super Lawyers – Family Law, 2017 - 2020
- AV Preeminent Rating, Martindale Hubbell (Peer-Rated for Highest Level of Professional Excellence), 2017 to the present
- 2019, 2020 Top Attorneys – Family Law, *Austin Monthly* magazine
- Super Lawyers – Rising Star in Family Law, 2011, 2012
  Pro Bono Award, Travis County Women Lawyers Association, 2010

PROFESSIONAL MEMBERSHIPS AND ACTIVITIES

Family Law

- American Academy of Matrimonial Lawyers
- State Bar of Texas, Family Law Section
  - Member, Family Law Council (2019-2021)
    - Chair, Appellate Committee (2020-2021)
    - Member, CLE and Publications Committees (2020-2021)
- State Bar of Texas, Appellate and Civil Litigation Sections
- Austin Bar Association, Family Law and Appellate Sections
- Texas Academy of Family Law Specialists (2010 – present)
- Texas Family Law Foundation (2015 – present)
  - Legislative Bill Review Committee, January 2017 to present
- Travis County Family Law Advocates (2010 – present)

Professional Responsibility

- District 9 Grievance Committee of the State Bar of Texas, July 2020 to June 2023

Access to Justice

- Volunteer Legal Services of Central Texas
  - Volunteer attorney and Family Law mentor (2004 to present)
  - Board of Directors (2010 – 2015)
    - Immediate Past President (2015), Board President (2014), President-Elect (2013), Secretary (2012), Treasurer (2011)
    - Executive Committee (2011 – 2015)
- Pro Bono Committee for the Third Court of Appeals, Austin (2016 – 2019)

American Inns of Court and Mentoring

- Barbara Jordan American Inn of Court (2016 – present)
  - Founding Master
  - President Elect (2020-2021)
  - Membership Committee Co-Chair (2019-2020)
  - Membership Committee Chair (2018-2019)
  - Mentorship Chair (2017-2018)
- Robert W. Calvert American Inn of Court (2001 – 2016)
  - Barrister, 2012-2016; Associate, 2002-2012; Pupil, 2001-2002
- Mentor for Family Lawyers, State Bar of Texas (2016 – present)

Women and the Law

- Texas Women Lawyers Association (2000 – 2001, 2003 – 2011)
  - Board of Directors (2003 – 2011)
    - Immediate Past President (2010 – 2011), President (2009 – 2010), President-Elect (2009 – 2010), Vice-President (2008 – 2009), Secretary (2007 – 2008), Treasurer (2006 – 2007)
  - Law Student Representative (2000 – 2001)
- Council, Women and the Law Section of the State Bar of Texas (2009 – 2012)

- Travis County Women Lawyers Association

COMMUNITY INVOLVEMENT

- Impact Austin collective giving organization (2017 – present)
  - Grant Finance Committee (2018, 2019, 2020)
  - Grant Review Committee – Catalyst (2019, 2020)
  - Grant Review Committee – Family (2017)

SPEECHES AND PUBLICATIONS

- *Settlement Agreements*, panel member of State Bar of Texas webinar with Kelly Ausley-Flores and Kristiana Butler (October 2020)
- *In re C.J.C.: The Fit-Parent Presumption in Non-Parent Custody Disputes*, panel member of State Bar of Texas webinar (September 2020)
- *Stand by Me: Effective Use of Paralegals*, Advanced Family Law 2020, co-authored and co-presented with Kay Redburn, Paralegal (August 2020)
- *Receiverships and Drafting Requirements*, Advanced Family Law Drafting 2019, co-authored and co-presented with Jonathan Bates and Michael Bernstein (December 2019)
- *Attorney's Fees Evidence after* Rohrmoos Venture *and* Nath, State Bar of Texas Family Law Section Report (September 2019)
- Monthly Case Updates, Family Law Section of the Austin Bar Association (September 2019 – March 2020; May 2005 – September 2009)
- *Non-Parent Standing*, Family Law Essentials: Victoria, State Bar of Texas Family Law Section (May 2019)
- *HIPAA*, Family Law Essentials: Corpus Christi, State Bar of Texas Family Law Section (May 2018)
- *Family Law Appeals*, Family Law Section of the Austin Bar Association, co-authored and co-presented with Richel Rivers (November 2017)
- *Family Law Appeals*, University of Texas School of Law 27th Annual Conference on State and Federal Appeals, co-authored with Richel Rivers (June 2017)
- *How to Deal with Difficult People*, Panel member, combined Austin, Texas American Inns of Court mentoring lunch (February 2017)
- *Temporary Orders Procedures*, Divorce Basics Seminar, Volunteer Legal Services of Central Texas (December 2014, 2015, 2016, 2017, 2018, 2019)
- *Property Division/Spousal Maintenance Mock Trial Demonstration*, Brown Bag Seminar, Volunteer Legal Services of Central Texas, co-presented with Eric Robertson (February 2013, February 2014, June 2016, June 2017)
- *Ethical Considerations in Mediation*, Panel member, Ethics CLE, Travis County Women Lawyers Association (April 2016)
- *Trying A Family Law Case on a Shoestring*, Brown Bag Seminar, Volunteer Legal Services of Central Texas (August 2015)
- *Interventions in Suits Affecting the Parent-Child Relationship*, State Bar of Texas 40th Annual Advanced Family Law Course, co-authored and presented with Karen Langsley (August 2014)
- *Conducting the Client Interview*, How to Do a Pro Bono Divorce, Texas Young Lawyers Association (May 2014)
- *2013 Family Law Legislative Update*, Texas Advanced Paralegal Seminar (October 2013)
- *Hot Legal Issues Roundtable Discussion: Family Law*, Texas Women Lawyers Annual CLE, co-presented with Lauren Waddell (March 2011)
- *Discovery in Family Law Cases*, Texas Advanced Paralegal Seminar (September 2010)

- Quarterly Evidence and Discovery case updates for State Bar of Texas Litigation Section *News for the Bar* (Fall 2007 to Summer 2010)
- Moderator of "The Art of Law Practice" Panel, Texas Women Lawyers Annual CLE (February 2010)
- Moderator of Judicial Panel, with Hon. Nancy Atlas, Hon. Jan Patterson, and Hon. Suzanne Covington, Texas Women Lawyers Annual CLE (February 2009)
- *2009 Family Law Legislative Update*, Texas Women Lawyers Fall 2009 Newsletter
- *Fiduciary Duties in Family Law*, State Bar of Texas Fiduciary Litigation Course, co-authored with Richel Rivers (April 2008)
- *Case Update: Sheshunoff v. Strunk*, Brown McCarroll, LLP Litigation Section CLE (December 2006)
- *Parenting Plans/Protective Orders*, Texas Association of Legal Professionals (February 2006)
- *Evidence and Discovery in ADR: Issues in Mediation and Arbitration*, State Bar of Texas Annual Advanced Evidence and Discovery Course, co-authored with Richel Rivers and Blake Bailey (2005)

A special thanks to Jimmy Vaught and Leigh de la Reza for their permission to use portions of a prior article.

Family Law Settlement Agreements: Rule 11 Agreements, ISAs, and MSAs

This program covers the benefits and pitfalls of Rule 11 Agreements, Informal Settlement Agreements, Mediated Settlement Agreements, Arbitration, Collaborative Law Agreements, and Agreements Incident to Divorce.

Learning Objectives:

- Identify the right settlement agreement for your case.
- Learn real-world practice tips related to settlement agreements.
- Know how to protect your client and yourself as you reach agreements.

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FAMILY LAW SETTLEMENT AGREEMENTS: RULE 11s, ISAs, MSAs, COLLABORATIVE SETTLEMENT AGREEMENTS, AND ARBITRATION

LETS MAKE A DEAL

I. INTRODUCTION

There is a saying around our office: "If you're trying a lawsuit, it's because you have a bad lawyer or a bad client." Of course, there are those rare cases that involve the safety of children that require court intervention. The majority of family law cases have no business being tried to the bench or a jury. Instead, as attorneys and counselors, it is our job to help clients by facilitating reasonable settlement whenever possible and appropriate. With dockets growing increasingly crowded and litigation costs skyrocketing, it is our responsibility to educate clients on settlement options and the upsides and pitfalls associated with each. The purpose of this paper is to assist the practitioner in deciding which form of settlement is the most appropriate for his or her case, to encourage proper use of settlement methods, and to update readers with recent development in the areas of settlement agreements.

II. RULE 11 AGREEMENTS

Rule 11 Agreements are often used as a catch-all way for attorneys to handle agreements – from basic agreements to extend discovery requests and reset hearings all the way to temporary or even final orders. While Rule 11 Agreements are handy, they do not provide the protection many practitioners and parties assume they provide.

A. What is a Rule 11 Agreement?

A Rule 11 agreement is governed by the Texas Rules of Civil Procedure, which generally states that parties or attorneys to a pending lawsuit can create an enforceable agreement if it meets a few basic criteria: (1) the agreement must be in writing; (2) the writing must be signed; and (3) the agreement must be filed with the Court, unless it is made in open court and entered on the record. These elements seem simple, but there is more than meets the eye.

1. Must be in Writing

This requirement sounds straightforward. Not so fast! Many practitioners will be surprised to know that the writing requirement may be satisfied by way of a series of emails back and forth between counsel. In *Green v. Midland Mortgage Co.*, the 14th Court of Appeals in Houston held that the series of emails exchanged between attorneys for the parties were sufficient to satisfy the "in writing" requirement for enforceability. *Green v. Midland Mortgage Co.*, 342 S.W.3d 686, 691-92 (Tex. App.—Houston [14th Dist.] 2011, no pet). While the written Rule 11 agreement must contain the essential elements of the agreement and be complete enough that the contract can be ascertained from looking at the document, the agreement does not have to be contained in one document. *Id*. It is best practice to ensure that all emails regarding settlement include language demonstrating that there is a potential settlement that needs approval from your client. Statements like "we've got a deal" or "that will work" need to be qualified, or they could become part of a chain of emails used as a Rule 11 agreement and used as evidence that you agreed to settlement on your client's behalf.

The email exchange aspect of Rule 11 agreements is a rapidly changing area of the law, and we encourage you to review cases on the subject as decisions are rendered. The Texas Supreme Court delivered an opinion on January 31, 2020 that deals with email agreements and the essential terms that must be present in settlement agreements. *See Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721 (Tex. 2020). In *Copano*, a series of emails were exchanged regarding the details of an anticipated formal written agreement. The plaintiffs claimed the emails exchanged between the parties, taken together, satisfied the elements of an enforceable contract. The Supreme Court concluded that there was no way to "piece together with certainty and clarity a collection of writings showing the essential terms of [a] contract and the parties' agreement to be bound by those terms." *Id.* at 731-32. While the *Copano* case is viewed through the lens of the Texas Business and Commerce Code, it is about the enforceability of a contract with regard to the statute of frauds, which is the rubric Rule 11 agreements are evaluated against. In *Padilla v. La France*, the court analogized Rule 11 agreements to the statute of frauds within Texas Business and Commerce Code §26.01. *See Padilla v. LaFrance*, 907 S.W. 2d 454, 460 (Tex. 1995). To satisfy the statute of frauds, an agreement must be reduced to "a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony. The written memorandum, however, need not be contained in one document." *See id.* (internal citations omitted).

2. Must be Signed

a. May be Signed by an Attorney, but Best to Include Client Signature

Texas Rule of Civil Procedure 11 says the agreement must be "signed," but it does not say by whom or in what format. It is common for a Rule 11 agreement to bear the signatures of the attorneys only, which is statutorily sufficient but could be a recipe for disaster. There is agreement among the courts that an attorney's agreement is enough to satisfy Rule 11 requirements, and that Rule 11s signed by attorneys alone are enough to bind the parties to an agreement. *See Williams v. Nolan*, 58 Tex. 108, 713-14 (1883).

In *Williams v. Nolan*, the court found that, while the Petitioners claimed their attorney entered into an agreement without their permission, "allegations [were] also found there which bear strong evidence that the attorney was authorized to make the agreement, or at least that such conversation had passed between the attorney and the appellants as authorized him to believe that he was so authorized. . . . Every reasonable presumption is to be indulged in favor of a settlement made by an attorney duly employed, and especially so after a court has recognized such an agreement and entered a solemn judgment on it." *Id.*

We use this example to remind you that people have been complaining that their attorneys entered into an agreement without permission since at least 1883. The best way to prevent this issue is to have your clients sign the Rule 11 agreements themselves.

b. "Signed" Does Not Necessarily Mean with a Pen

Courts have considered whether communications are "signed" when an email a signature block is present. The Fort Worth Court of Appeals said no (*Cunningham v. Zurich American Ins. Co.*, 359 S.W.3d 519 (Tex. App.—Fort Worth 2011, pet. denied)), but the 1st District Court of Appeals in Houston later disagreed with that opinion and deemed the name or email address in the "from" field of an email to be satisfactory for a contract formation, and a signature block in the email also serves as a signature (*See Khoury v. Tomlinson*, 518 S.W.3d 568, 576-77 (Tex. App.—Houston [1st Dist.] 2017)).

3. Must be Filed with the Court or Read on the Record

Rule 11 agreements need to be filed with the court, but they do not have to be filed prior to a party revoking consent in order to be enforceable as a contract. *See Padilla*, 907 S.W. 2d at 460. A party cannot enforce a Rule 11 agreement until after the agreement is filed. *Id.*

When signing and filing a written agreement is not practical, or if parties want to render judgment simultaneously with entering a Rule 11 agreement at the courthouse, the Rule 11 agreement allows an exception to filing the agreement if it is made in open court and on the record. As you will read below, requesting judgment be rendered when an agreement still exists is key. In order to have a binding agreement in conformity with Rule 11, the parties "must dictate into the record all material terms of the agreement and their assent thereto." *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.—Corpus Christi 1994, writ denied).

It is worth noting that a Rule 11 agreement requires a pending lawsuit; a lawsuit on a pre-suit agreement is merely a suit on contract, not a Rule 11 agreement. "Rule 11, however, applies only to agreements concerning a pending suit; it does not apply to a pre-existing agreement asserted as a defense to a suit." *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 393 (Tex. 1993). On the other hand, the rules regarding entering mediated settlement agreements before filing suit have changed recently, as you will read below.

B. Pitfalls of Rule 11 Agreements

1. Revocation is a Risk

It does not matter how many times you say "THIS AGREEMENT IS NOT SUBJECT TO REVOCATION" on a Rule 11 agreement; a party can revoke the agreement any time before judgment is rendered on the agreement. That's not to say there are no consequences for a revocation, but practically speaking, the remedies to a pre-judgment revocation of a Rule 11 agreement are limited.

2. How Do I Enforce a Rule 11 Agreement?

While it is great to get an agreement, clients will inevitably ask "what's next?" before the ink is dry. Agreements are not worth much if you do not know what to do with them.

a. Request that Judgment be Rendered While the Parties Agree

Take the Rule 11 agreement to court and ask that judgment be rendered as soon as possible. Rendition does not require a signature from a judge; instead, oral pronouncement that judgment has been rendered (preferably accompanied by a docket entry) is sufficient. When entering a Rule 11 agreement or reading an agreement into the

record, be sure to request the judge render immediately on the agreement.

One scary scenario played out in *San Antonio Restaurant Corp. v. Leal*, where the trial court said "…once this judgment is signed and I approve it, … it's full, final and complete … I'll approve the settlement." *San Antonio Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995). While the trial court "approved" the settlement, he did not clearly state that he intended to render judgment, instead waiting until the signing of the judgment. *See id*. at 858. In *San Antonio Rest. Corp*., the Texas Supreme Court quoted the *Reese v. Piperi* case (534 S.W.2d 329, 330 (Tex.1976)):

> The judge's intention to render judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made. The opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination. Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words, not in mere cognition, and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment. The words used by the trial court must clearly indicate the intent to render judgment at the time the words are expressed.

San Antonio Rest. Corp., 892 S.W.2d at 858.

The question of when judgment is rendered is settled by *In re Joyner*; the Court of Appeals found the judge's statement needs to indicate a "clear, present intent" to "rule immediately" and then do so. *In re Joyner*, 196 S.W.3d 883, 888 (Tex. App.—Texarkana 2006, pet. denied). In *Joyner*, the parties entered a partially mediated settlement agreement before trying the few remaining issues at final hearing. *Id.* at 886. The same day, the trial court ruled on the final issues and told the parties the divorce was granted. *Id.* at 887. The day following the oral pronouncement, the newly minted ex-husband purchased a lottery ticket and won $2 million. Ex-wife was out of luck, and the lottery ticket serves as a reminder to all of us that oral pronouncements are effective immediately. When a judgment is rendered by oral announcement in open court, the entry of a written judgment is merely a ministerial act. *See Cook v. Cook*, 888 S.W.2d 130, 131 (Tex. App.—Corpus Christi 1994, no writ).

Important Note: Associate judges do not have the power to render judgment on an oral recitation of a Rule 11 agreement. Instead, an associate judge is authorized to *render and sign* a final order that is *agreed to in writing*. *See* Texas Family Code § 201.007 (emphasis added); *see also Tidwell v. Tidwell*, No. 08-17-00120-CV, 2019 WL 4743685, at *2 (Tex. App.—El Paso Sept. 30, 2019, no pet.).

b. After Judgment Rendered, File a Motion to Enforce the Rule 11

Once judgment is rendered on a Rule 11, it becomes enforceable as an order of the court. To be enforceable, the Court must be able to look at the face of the document and ascertain the essential elements of the agreement. If the Rule 11 agreement is not thorough, you will face enforceability problems.

c. Breach of Contract if Party Revokes Prior to Judgment being Rendered

A trial court cannot enter judgment on a Rule 11 if it is repudiated before judgment. *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App. —Houston [1st Dist.] 1996, no writ). Instead, the agreement may be enforced as a contract. "Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract." *Padilla*, 907 S.W.2d at 461.

A breach of contract claim should be asserted by amended pleadings or a counterclaim for breach of contract, and parties have the right to conduct discovery, assert defenses, and submit contested fact issues to the trier of fact. *See Staley v. Herblin*, 188 S.W. 3d 334, 336 (Tex. App.—Dallas 2006, pet. denied). While a Rule 11 agreement that complies with statutory requirements may be enforced as a binding contract after consent is withdrawn, it is preferable to enforce the agreement after judgment is rendered because more remedies are available. Unlike the remedies available in an enforcement action—including contempt—a breach of contract action is limited to civil breach of contract remedies.

Another concerning aspect of the breach of contract remedy is that a party cannot sue to enforce a contract on child-related issues of conservatorship, possession and access, and child support. *See* Texas Family Code § 153.007(c).

3. Rule 11 Agreements are Subject to Best-Interest Determination

Unlike a mediated settlement agreement, the child-related provisions of a Rule 11 agreement are still subject to a best interest determination by the Court. *See Tidwell v. Tidwell*, No. 08-17-00120-CV, 2019 WL 4743685, at *3 (Tex.

App.—El Paso Sept. 30, 2019, no pet.). A court has the discretion to refuse to enforce a Rule 11 agreement as to conservatorship issues, possession and access, and child support. *See id.* at *3-4.

C. When Should a Rule 11 be Used?

If you are at the courthouse and agree to pass a hearing based on a Rule 11 agreement, do so if you are able to quickly get the agreement read into the record or get judgment rendered on the written agreement. Time between agreement and rendition is your enemy. Get your client's signature on the agreement and explain the risks of a Rule 11 agreement. If you need to extend a discovery deadline via Rule 11 agreement, it may be reasonable to do so, but do not enter into a Rule 11 agreement on child-related issues.

III. INFORMAL SETTLEMENT AGREEMENTS

Parties who intend to reach a final settlement without mediation but want something with more binding than a Rule 11 agreement often look to informal settlement agreements (ISAs).

A. What is an Informal Settlement Agreement?

Informal settlement agreements are governed by Texas Family Code § 6.604, which provides:

> (a) The parties to a suit for dissolution of a marriage may agree to one or more informal settlement conferences and may agree that the settlement conferences may be conducted with or without the presence of the parties' attorneys, if any.
> (b) A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement:
> (1) provides, in a prominently displayed statement that is in boldfaced type or in capital letters or underlined, that the agreement is not subject to revocation;
> (2) is signed by each party to the agreement; and
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
> (c) If a written settlement agreement meets the requirements of Subsection (b), a party is entitled to judgment on the settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
> (d) If the court finds that the terms of the written informal settlement agreement are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
> (e) If the court finds that the terms of the written informal settlement agreement are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing.

Informal settlement agreements should contain bold and/or capitalized and underlined text: "THIS AGREEMENT IS NOT SUBJECT TO REVOCATION." Once signed by the parties, an agreement that meets the requirements of 6.604 is binding on the parties; however, as outlined below, it is not necessarily binding on the court. If the court finds that the agreement's terms are just and right, the parties are entitled to judgment on that agreement.

B. Pitfalls of Informal Settlement Agreements

While the parties cannot revoke the property-related and divorce aspects of an informal settlement agreement as they can revoke pre-judgment Rule 11 agreements, an agreement that does not withstand the court's scrutiny is not binding on the court.

1. Informal Settlement Agreements are Subject to a Just and Right Analysis Regarding Property Division

The Court has the authority to review the informal settlement agreement and make a determination as to whether the terms of the agreement are "just and right." Texas Family Code § 6.604(d). If the court does not agree with the division, parties may have to submit a revised agreement or put the issues before the court in trial. If one party revokes consent but the court finds the terms of the property division and divorce are just and right, the other party is still entitled to judgment. *See In re M.A.H.*, 365 S.W.3d 814, 819-20 (Tex. App.—Dallas 2012, no pet.).

2. Informal Settlement Agreements are Subject to a Best Interest Determination for Child-Related Issues

Technically, child-related provisions are not covered by informal settlement agreements in Texas Family Code § 6.604, but by Texas Family Code § 153.007(a), (b) and Texas Family Code § 154.12 (a), (b). *See id.* at 820. Child-related issues of conservatorship, possession and access, and child support are revocable in agreements reached outside mediation. *See id.* In *M.A.H.*, the informal settlement agreement contained terms regarding the divorce as well as child-

related issues; the wife revoked her consent before the trial court rendered judgment, so the court was unable to render orders on child-related issues in accordance with Rule 11 based solely on the underlying agreement. *See id.*

Given the general rule of property division in Texas Family Code § 7.001, which requires the court to divide the estate of the parties in a just and right manner and "have due regard for the rights of each party and any children of the marriage," the Dallas Court of Appeals in *M.A.H.* determined a court-mandated change in child-related issues could justify re-examination of the property division. *See In re M.A.H.*, 365 S.W.3d at 822. "If the trial court determines the agreement is just and right, then the court will be bound by the agreement and no change to the property division will be necessary. If the trial court concludes the agreement is not just and right, then the trial court must either request the parties submit a revised agreement or set the case for a contested hearing. The court may take into consideration appellant's earlier receipt of community property in any new property division." *See id.* (internal citations omitted).

C. Enforcement

Unlike the Rule 11 agreement, the property division and divorce aspects of an ISA are not revocable if the court finds the agreement just and right. A party seeking to uphold an ISA on property issues should file a Motion to Enter seeking judgment on the agreement. If there are child-related provisions and a party has revoked consent, the court will not be able to enter judgment on the child-related issues based solely on the informal settlement agreement. *See In re M.A.H.*, 365 S.W.3d at 820.

D. Drafting Considerations

The terms of the informal settlement agreement must fully and accurately detail the terms of the parties' agreement. When drafting a decree, the terms of the decree should be in conformity with the terms of the underlying settlement agreement. While most of us use a traditional merger clause that the decree will control in the case of any inconsistency between the decree and the informal settlement agreement, the merger clause may not always control.

In *Ramirez v. Ramirez*, an Austin Court of Appeals case from 2019, the underlying ISA provided that wife would receive about $30,000 from husband's 401(k). In the decree, husband's attorney drafted the clause to read that husband will receive the $30,000 instead of wife. Husband later filed a nunc pro tunc, citing a clerical error. Wife claimed that it was not a mistake. On appeal, the court found the docket entry where judgment was rendered on the informal settlement agreement was sufficient evidence to establish the variance in the decree was the result of a drafting error. *See Ramirez v. Ramirez*, No. 03-18-00200-CV, 2019 WL 1561812 (Tex. App.—Austin April 11, 2019, no pet.).

E. When Should an Informal Settlement Agreement be Used?

Informal settlement agreements can be an effective tool when the parties are close enough to an agreement that neither side needs the assistance of a mediator to get the agreement finalized. Informal settlement conferences do not require the presence of an attorney; informal settlement agreements are similar to kitchen-table type agreements but need to have detail and represent a complete agreement in order to be enforceable. It is best practice to only use an informal settlement agreement when there are no children in order to avoid the potential revocation of the child-related terms and possible subsequent property division review. If you have no choice and need an agreement, take the ISA to the courthouse as soon as possible for rendition.

IV. MEDIATED SETTLEMENT AGREEMENTS

Mediated settlement agreements (MSAs) are an incredibly useful tool in the practitioner's toolkit. It is safe to say that more than 90 percent of the cases at our firm settle in mediation.

A. What is a Mediated Settlement Agreement?

An MSA is a signed agreement reached in mediation in accordance with Texas Family Code § 6.602(b) in a divorce and/or § 153.0071 (d), (e), and (e-1) regarding child-related provisions. Under these provisions, a mediated settlement agreement is binding in a suit if it:

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

The court may decline to enter a judgment on a mediated settlement agreement if the court finds: (1) the party was a victim of family violence, and that circumstance impaired the party's ability to make decisions; **and** (2) the agreement is not in the child's best interest. *Id.* § 153.0071(e-1) (emphasis added). If there is no finding under § 153.0071 (e-1), a party is entitled to judgment on the mediated settlement agreement even if the other party wishes to revoke consent.

If a trial court refuses to enter judgment on a mediated settlement agreement, a party may seek mandamus relief. *In re Lee*, 411 S.W.3d 445, 447 (Tex. 2013).

B. How is a Mediated Settlement Agreement Different than Other Agreements?

Unlike Rule 11 agreements and informal settlement agreements, the court has no discretion to consider a just and right analysis of the divorce terms or apply a best interest standard with child-related provisions. A court may not set aside an MSA in compliance with § 153.0071 solely on the basis of a "best interest" analysis. *See id.* at 459-60. The general lack of judicial input (absent limited and extreme factors) makes the MSA the ultimate tool for family practitioners, but it is a tool that should be used carefully.

C. Recent Changes to the Timing Requirements of an MSA

In 2019, the Supreme Court of Texas addressed the validity of pre-suit mediated settlement agreements in the *Highsmith* case. *Highsmith v. Highsmith*, 587 S.W.3d 771, 776 (Tex. 2019) (per curiam). In *Highsmith*, the parties signed a mediated settlement agreement before filing for divorce. *Id.* at 773. The terms of the MSA provided that Wife would file for divorce within 10 days and finalize the divorce as soon as possible. *Id.* Husband filed nine days after signing the MSA. *Id.* Wife filed a general denial in response to Husband's petition. *Id.* at 774. Husband and his attorney proved up the MSA at the uncontested docket without notice to Wife and the court rendered judgment on the MSA. *Id.* Wife filed a motion to set aside and, in the alternative, a motion for new trial and a motion to revoke the MSA. *Id.* Wife claimed the MSA should not be enforce because it was entered into before a suit was filed; she also contested judgment on the MSA based on a violation of due process because she did not receive 45 days' notice of the final trial after filing a general denial. *Id.* The Supreme Court held that an underlying suit is not required for a statutorily binding MSA, but Wife's filing a general denial after the MSA was signed made the suit contested and she was entitled to 45 days' notice. *Id.* at 778-79.

As a practical tip, it might be helpful to include a waiver of notice of entry in the mediated settlement agreement.

D. Pitfalls of Mediated Settlement Agreements

Mediated settlement agreements are very difficult to set aside, and the court lacks the authority to modify its terms.

1. What if I Forgot Something?

The phrase "speak now or forever hold your peace" applies at the beginning of a marriage and—if the parties are settling a divorce via MSA—at the end of a marriage. The trial court has no authority to modify the terms of the parties' contract. *See Jonjak v. Griffith*, No. 03-18-00118-CV, 2019 WL 1576157 (Tex. App.—Austin April 12, 2019, no pet.). At the end of a long day of mediation, with hours of negotiating and several iterations of agreements, it is hard to make sure everything is covered in the MSA. We have all been there. *Jonjak v. Griffith*, regarding the seemingly small issue of inadvertently omitting gains and losses on the portion of the 401(k) awarded to a spouse, shows that small details can haunt you. *See id.* at *3-4. The trial court approved the decree with the language added, but ultimately the Austin Court of Appeals modified the terms of the decree to comply with the MSA and struck the addition of gains and losses. *See id.* at *4. The decree must conform to the terms of the mediated settlement agreement.

2. What if I Change my Mind?

As the kids say in playground parlance: "no take-backs." Outside of the family violence provisions of Texas Family Code § 153.0071 (e-1) and short of allegations that the agreement was illegal or procured by fraud, duress, or coercion, a trial court is required to enter judgment based on the mediated settlement agreement. *See In re Marriage of Joyner*, 196 S.W.3d 883, 891 (Tex. App.—Texarkana 2006, pet. denied).

a. An MSA is Binding on the Parties

A recent interesting case regarding the binding nature of at mediated settlement agreement is the San Antonio Court of Appeals case of *Briscoe v. Briscoe*, where Wife had a child prior to marriage and Husband intended to adopt the child, as was outlined in the mediated settlement agreement. *Briscoe v. Briscoe*, No. 04-18-00437-CV, 2019 WL 1049272 (Tex. App.—San Antonio March 6, 2019, no pet.) (mem. op.). Though the trial court lacked jurisdiction over the child because the child was not of the marriage and the husband had not yet adopted the child, Wife was bound by the terms of the MSA where she agreed to support Husband's adoption of the child, and the court's order had to reflect that agreement. *See id.* at *3.

b. Parties Cannot Agree to Set Aside an MSA

A mediated settlement agreement that complies with the Texas Family Code may not be set aside by the agreement of the parties. *In re Minix*, 543 S.W.3d 446, 454 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In *Minix*, the parties signed an MSA in a Suit Affecting Parent-Child Relationship and evidence indicated the parties subsequently agreed to set aside the MSA. *See id.* at 449-50. There was disagreement between the trial court, the parties, and the attorneys regarding whether or not the MSA was set aside. *See id.* Mom's former attorney later testified that the parties agreed on the record to set aside the MSA, at which point the parties were sent to an associate judge for a temporary orders hearing; however, no record or judge's notes reflected the trial court set aside the MSA. *See id.* This case has created a stir among family law attorneys because it seems reasonable that parties could agree to set aside an MSA; that said, in this case, the "agreement" to set aside the MSA may or may not have been read into the record, and it was not in writing. The best way to avoid this situation is to have the parties execute another mediated settlement agreement expressly setting aside the prior MSA and outlining the terms of the new agreement, then presenting the MSA to the court and requesting judgment be rendered.

c. The Court Cannot Add to or Modify the Terms of the MSA

Much like the *Ramirez v. Ramirez* case in the Informal Settlement Agreement section above, Houston's 14th District Court of Appeals recently held that a decree must be consistent with the terms of the underlying MSA. In *Woodward v. Woodward*, the parties agreed to a mediated settlement agreement and the court rendered judgment on the MSA. *Woodward v. Woodward*, No.14-18-00039-CV, 2019 WL 3943020 at *2 (Tex. App.—Houston [14th Dist.] Aug. 20, 2019, no pet.) (mem. op.). The decree contained a traditional merger clause that said the decree would control if any inconsistencies existed between the MSA and the decree. *Id.* at *1. The decree awarded Husband twice the retirement assets awarded in the MSA. *Id.* at *1-2. Wife filed a nunc pro tunc to correct the decree. *Id.* at *2. The Court of Appeals found that there was an implied finding in the trial court that judgment was rendered on the MSA, and only needed to look to "some" probative evidence that there was a clerical error. *Id.* at *3-4. This ruling is concerning in some ways because it is unclear what would happen in a scenario where there was no rendition on the MSA; one would assume that the "typo" in that scenario would fall under the protection of the merger clause in the decree, but time will tell.

V. ARBITRATION

Parties may agree in writing to submit a divorce suit to arbitration; the agreement must explicitly state whether the arbitration is binding. *See* Texas Family Code § 6.601. If the parties' agreement is for binding arbitration, the court shall render an order that reflects the arbitrator's award. *Id.* at § 6.601(b). However, Texas Family Code § 153.0071(b) authorizes the trial court to decline to enter an arbitrator's award when it is not in the best interest of the child.

Arbitration often comes into play by way of the language in a mediator's agreement to mediate. In *Milner v. Milner*, the parties signed a mediated settlement agreement that included terms that the parties would submit to arbitration with the mediator if there was a dispute regarding the terms of the decree. *Milner v. Milner*, 361 S.W.3d 615, 622 (Tex. 2012). The Supreme Court held that this provision applied to ambiguities in the mediated settlement agreement itself, and the appropriate authority to resolve the fact issue was the mediator. *Id.* The arbitrator usually decides disputes regarding the interpretation or performance of the mediated settlement agreement as well as disputes regarding the form of the decree.

Given the arbitration clauses in many mediation agreements, it is worth examining a recent case regarding disclosures in arbitration. *In re Piske*, a 2019 case from Houston's 14th District Court of Appeals, centered upon an arbitrator who failed to disclose his friendship with the attorney for husband. *In re Piske*, 578 S.W.3d 624 (Tex. App. —Houston [14th Dist.] May 7, 2019, pet. extension filed). The arbitrator sent the parties rules of arbitration, which stated in relevant part that the arbitrator "shall disclose to the parties any circumstance likely to affect impartiality, including any bias or financial or personal interest in the result of the arbitration, *or any past or present relationship with the parties or their counsel*." *Id.* at 627 (emphasis added). After informing the parties that he had no material relationship with counsel, a new attorney filed an appearance in the case and the arbitrator did not supplement his initial disclosures. *Id.* Wife was unhappy with the arbitration award and filed an emergency motion to vacate the arbitration award based on partiality arising from the arbitrator's failure to disclose a close friendship with Husband's attorney. *See id.* Arbitrator and attorney had been friends for more than 30 years, were in State Bar activities and CLEs together, attended cookouts together and spent the weekend as guests at a mutual friend's ranch. *See id.* Under the terms of the Texas Arbitration Act, the failure to disclose a potential conflict establishes "evident partiality." *See id.* at 628.

To prevent any issues with the disclosure aspect of arbitration, practitioners whose mediation agreements contain arbitration clauses may want to include a blanket disclosure of non-trivial involvement with the attorneys involved in

mediation.

When drafting an arbitration provision, include language that the mediator will serve as the sole arbitrator of disputes; that at the arbitrator has the sole discretion to determine whether the arbitration will be by written submission without a hearing, whether the arbitration will take place informally by telephone, or whether there will be a formal arbitration in person; and that the arbitration shall be binding.

VI. COLLABORATIVE FAMILY LAW SETTLEMENT AGREEMENTS

Parties in the collaborative process may enter a binding settlement agreement if the document provides (1) a prominently displayed statement that is in boldfaced type, capitalized, or underlined, that the agreement is not subject to revocation, (2) is signed by each party to the agreement, and (3) is signed by each party's collaborative attorney. Texas Family Code § 15.105(b). The parties' agreement is enforceable as a written settlement agreement under Texas Civil Practice and Remedies Code § 154.071 and a party is entitled to judgment even if the other party withdraws consent after signing the agreement. *See* Texas Family Code § 15.105(b). Alternatively, the parties may enter an agreement under Texas Family Code §6.604 (b) (informal settlement conferences) or Texas Family Code § 6.602 (mediation).

The question of whether a court will render judgment on a collaborative settlement agreement is an important factor to consider. While Texas Civil Practice and Remedies Code § 154.071 (a) indicates that a party is entitled to judgment on the agreement, (b) says "the court in its discretion *may* incorporate the terms of the agreement in the court's final decree disposing of the case" (emphasis added). If you anticipate there may be difficulty attaining court approval on the terms of the collaborative settlement agreement, a mediated settlement agreement may be the wisest option.

VII. CONCLUSION

The right type of settlement agreement can provide protection for your client—protection against the other party changing his or her mind and protection with regard to the discretion of the court. Ultimately, a working knowledge of the strengths and weaknesses of each settlement type will provide practitioners with the confidence to quickly choose the right method of settlement for each case.