NEGOTIATING A FAMILY LAW CASE

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CHAPTER 60.7

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present);
Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

One of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2010)
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2011); Appellate Law (2007-2011)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009 & 2011)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)

- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); *Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code* (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003);

SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); SBOT Handling Your First Appeal: The Role of Reasoning and Persuasion in the Legal Argumentation (2012) AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court (2012)

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Negotiating a Family Law Case

by

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I. INTRODUCTION. There is no right or wrong way to negotiate a family law case. There are just different ways. Each lawyer has his/her own negotiating style. Different clients needs different approaches to resolving their family law cases. Different issues in different cases require different approaches to settlement. This paper sets out some general perceptions garnered from 35 years of negotiating family law cases. They may apply, or might be adapted, to cases you handle in your family law practice.

II. THE DISADVANTAGES OF MAKING AN OFFER PRIOR TO MEDIATION. Some clients want to settle a case early on by making what they think is a generous offer that the client expects the other to readily accept. While attempting to settle a case through lawyer-to-lawyer negotiations might work in some cases, I have come to believe that, if a case is likely to end up in mediation, it is better not to make what your client thinks is a reasonable settlement offer in advance of mediation. No matter how reasonable the offer may be, no matter how fair you try to be, if such an offer is rejected without a similarly-reasonable counteroffer, then if you show up for mediation and try to back track on your pre-mediation offer, your opponent will react negatively. You may be accused of bad faith, there may be threats to end the mediation, etc. If you make a reasonable offer prior to mediation, and the case does not settle, and your opponent opens with a mediation offer that is unreasonably favorable to them, you may find yourself having to close the gap between your reasonable pre-mediation offer and their unreasonable first offer made during mediation. In other words, instead of moving from two extremes to the middle, you may end up having to find a compromise point between your middle ground and the opposing party's extreme. Not all cases work this way, but be very cautious if you are going to make a settlement offer before mediation.

III. THE IMPORTANCE OF HAVING UP-TO-DATE FINANCIAL INFORMATION FOR MEDIATION. It is unfortunate but true that many times lawyers and clients show up at mediation with out-of-date financial information. Without having very current account balances and net payoff figures for mortgages, and current credit card balances, and an idea of whether income taxes are current or overpaid or underpaid, settling the case is by necessity based on approximation, and sometimes it later turns out that there is an unpleasant surprise when the account balances and credit card balances become known. It is a time waster to have to spend the early part of the mediation going online to check account balances. This work can be done prior to mediation, so that the time spent together in the mediation is dedicated to settlement and not discovery.

IV. THE IMPORTANCE OF PREPARING YOUR FIRST AND SECOND OFFERS PRIOR TO ARRIVING AT MEDIATION. Another time waster for mediation is the lawyer-client team who shows up without a first offer in mind. The mediator must spend the early hours of the mediation trying to assess the parties' estate and to formulate a first offer. It is much better to arrive at mediation having already worked out with the client a first offer. This first offer can be, and perhaps should be, based on your best day in court. An offer that is better than your best day in court is a wasted offer, that will not be taken seriously by your opponent, once they understand it. If you have accurately identified the triable issues, and hypothesized the different outcomes based on how the court might rule on various claims, you should be able to identify your best day in court, and formulate an offer based on that outcome. You can then begin to trade away your weaker contentions as the mediation progresses, so that your offers approach an outcome that is more likely the result of a trial. I prefer to have a first and second offer worked out with the client before arriving at mediation. The mediators appreciate

that, since they can start the negotiation process that much earlier in the day. Many mediations begin with the mediator meeting with one side for several hours, which means that they haven't thought through their choices enough prior to mediation.

V. THE DISADVANTAGES OF DEVELOPING A RIGID BOTTOM LINE POSITION BEFORE MEDIATION STARTS. While there is a definite benefit to having an opening offer, and even a second offer, worked out between you and your client before mediation starts, by the same token there can be disadvantages to developing a hard "bottom line" settlement position that you will not abandon no matter what. The mediator may point up weaknesses in your case that you or your client did not give sufficient credence to in advance of mediation, or may point up strengths that the other side has in the law or the facts that you did not appreciate in advance of mediation. Whenever a client says "I will not settle for more than . . . ," or "I will not accept less than . . . ," it is appropriate to gently suggest that it is not always best to adopt a rigid position before you hear the full story from the other side, and have the advantage of hearing the mediator's take on the issues in the case. Having said that, it may be helpful to some clients to have a "soft" bottom line going into mediation. If this "soft" bottom line is developed from a thorough assessment of your best and worst days in court, and an assessment of likely outcomes of a trial and any follow-up enforcement difficulties, then such a bottom line can help the client to be more comfortable accepting a settlement offer that is better than this bottom line. If the bottom line is too extreme, however, it can create a blockage if a settlement better than or equal to this bottom line cannot be achieved.

VI. WHETHER TO TELL THE MEDIATOR YOUR TRUE SETTLEMENT GOAL. Whether to let the mediator know your true settlement goal is a very tricky question. If the mediator knows the goal you are trying to reach, s/he can conduct the mediation in a way that may help you reach that target. On the other hand, if the opposing party would be willing to go farther than your offer requires, you may never find that out if the mediator is only pushing them to reach your target. Whether to tell the mediator your true settlement goal depends a lot on how the mediator operates. If you know the mediator well, and understand their mediation technique, then perhaps you can share your true settlement goal. If you are not sure of how the mediator operates, then it is probably better to keep your true settlement goal to yourself.

VII. WHEN TO HAVE A FORENSIC ACCOUNTANT AVAILABLE TO YOU IN MEDIATION. Not every divorce property division requires the assistance of a forensic accountant. If the moneymaker(s) is a W-2-wage earner, and owns no interest in a closely-held business, and has no tricky deferred compensation arrangements with the employer, and all assets can be readily valued using the Wall Street Journal or the Internet, then a forensic accountant is probably not necessary. If there is a community property interest in a closely-held business, a business valuator may be indispensible. If there are employee stock options that must be characterized on a time-allocation (*Taggart*) basis, or if there are more exotic deferred benefits like Performance Units, that need to be characterized or valued, then hiring a forensic CPA may be advisable. If one spouse has a pension plan and is still employed at the time of divorce, so that you have to do a *Berry* calculation of the value of the accrued pension benefit as of the date of divorce, a CPA may be needed unless you are very sure of how to perform the calculation yourself. If there are commingled funds and someone is doing a tracing or asserting a reimbursement claim, a CPA may be needed. A forensic accountant may also be needed if you are inclined to consider post-divorce alimony as a possible vehicle of settlement. Calculating net-after-tax present values of future cash flows is a complicated process, and unless you know how to calculate the present value of an annuity using a business calculator or internet-based financial calculator, and are familiar with the tax tables to calculate the tax due on an alimony stream, then you should have the assistance of a CPA. If the CPA will not be an integral part of the negotiations, you can have them standing by at their office to respond to your calls or emails, to make present-value after tax calculations, etc. I prefer to have a CPA involved in any case with substantial money at stake, to be sure that a numbers-related error does not occur in making calculations.

VIII. USING PRESENT VALUE DISCOUNTS AND TAX SHIFTING TO SETTLE CASES. Not all cases can be settled by dividing assets in kind. Some investments by necessity need to go to one spouse, and the other spouse will need to be cashed out of the asset. This could happen with a ranch, or a closely-held business, or commercial real estate, and the like. Some divorces include a high income earner, like a medical doctor, who may be more attracted to making payments over time rather than giving up a lot of assets at the time of divorce. If a settlement is going to involve

payments over time, there are several important things to consider:

1. What is the present value of the future stream of payments? If the deferred payment to be paid by one spouse to the other carries a market interest rate on the unpaid balance, then no present value discounting is required. The problem is how to fix an interest rate at the time of settlement that will remain fixed for a number of years, or whether to let the interest rate float according to some benchmark. The United States Prime Rate as listed in the Eastern print edition of the Wall Street Journal right now is 3.25%. See <http://www.fedprimerate.com>. This is the best interest rate the payor spouse would have to pay if s/he borrowed the money to pay off the other spouse over time. (In actuality, most spouses can only borrow at prime plus 1%.) The rate of interest on borrowed funds is a measure of the cost of money. However, you could instead measure the opportunity cost of deferred payments, which would be the earnings that the receiving party is giving up by taking payments over time instead of getting paid in full right now and then investing that money at current rates. The yield-to-maturity on U.S. Treasury 10-year bonds in July 2012 is 1.54%. This is the opportunity cost for not having the money to invest now. However, that is for a super safe investment. A loan from the ex-spouse is not a super safe investment, so a higher rate of return would be required due to the riskiness of the "investment." A more suitable comparison might be to a junk bond. A commonly-used indicator of junk bond yields is the Bank of America's Merrill Lynch High Yield Master II Index. See

   <http://en.wikipedia.org/wiki/Merrill_Lynch_High_Yield_Master_II>.

   On July 5, 2012, the yield on the fund was 7.283%. If the loan from the ex-spouse will be collateralized, arguably the investment may be safer than a junk bond.

   If the settlement proposal is just a payment stream, with no interest being added to the underlying obligation, then the payment stream must be discounted to present value in order to determine its true worth. This discount can be calculated using a business calculator, or on the internet at a financial web site. A stream of recurrent payments of fixed amount is called an "annuity." Therefore, you would want to find a web site that will permit you to input the total number of payments, the amount of each payment, and the discount rate (i.e., interest rate) for each payment period. By inputting those numbers, you can calculate the present value of the stream of payments. For example, using the Investopedia.com web site, I calculated the present value of 120 monthly payments (i.e., ten years), of $1,000 per payment, at a monthly interest rate of 0.25% (which is a projected annual interest rate of 3% divided by 12). The present value of the $120,000 in payments is $103,820.66. This particular calculator assumed that the payments were made at the first of each month, which technically is called an "annuity due." A web site that will allow you to calculate the present value of an annuity (not an "annuity due") for payments made on a monthly, quarterly, semi-annual, or annual basis, is:

   <http://financialmentor.com/calculator/present-valu7<1.e-of-annuity-calculator>.

   By experimenting around a little with the second web site, you can see that at 3% annual interest rate the present value of $120,000 paid over ten years varies little regardless of whether the payments are 120 monthly payments of $1,000 each, or ten annual payments of $12,000 each. At today's low interest rates, the frequency of the payments is more a question of convenience than present value.

2. Is there a risk of default, and if so what collateral can be taken? What enforcement remedies (like contempt for spousal maintenance payments) can be brought to bear? What is the impact of a possible bankruptcy?

3. Are the payments to be tax deductible to the payor and taxable to the payee? If so, there may be a tax saving available to use in the negotiations, that results from a higher tax rate for the payor and a lower tax rate for the payee–so-called "bracket arbitrage." For example, if a payment of $1,000 is tax deductible to the payor who is in the highest incremental tax bracket of 35%, there will be a tax deduction of 35% of the $1,000, or $350. So, after taking the deduction for alimony paid, the payor saves $350 worth of income tax on the $1,000 of income used to make the alimony payment. If the

payee is at a lower incremental tax bracket, say 25% (between $35,350 and $85,650 in taxable income), then the tax to be paid on the $1,000 alimony payment would be 25%, or $250. So, for each $1,000 alimony payment, there is $100 in tax savings. That tax saving can be split or awarded to one party or the other, and you will be using the tax savings to help settle the case. Here are the tax brackets for a single tax payer in 2012:

Income between $0 and $8,700 is taxed at 10%.
Income between $8,700 and $35,350 is taxed at 15%.
Income between $35,350 and $85,650 is taxed at 25%.
Income between $85,650 and $178,650 is taxed at 28%.
Income between $178,650 and $388,350 is taxed at 33%.
Income over $388,350 is taxed at 35%.

These rates will change on July 1, 2013, if the "Bush tax cuts" are allowed to expire.

Because of the foregoing table, once alimony payments reach $2,945.83 per month, any additional alimony will push the recipient from the 15% tax bracket to the 25% tax bracket on that excess alimony, up to $7,137.50 per month (assuming that the recipient has no other taxable income). If the alimony payments exceed $7,137.50 per month, the alimony over that amount will be taxed at 28%, up to the level of $14,887.50 per month, at which point the 33% tax bracket kicks in. At 33%, the bracket arbitrage is not large enough to be very meaningful. Above $32,362.50 per month in alimony, both parties are at the 35% tax bracket, and there is no bracket differential to be exploited by tax shifting.

The foregoing analysis assumes that the payee has no other taxable income during the year. If s/he does, then the alimony is "added to the top" of that income, and the incremental tax bracket on the recipient's alimony income will start higher than the foregoing table indicates.

The payor does have to pay Social Security and Medicare tax on the income that is used to make alimony payments. The payee does not have to pay Social Security or Medicare tax on the alimony received.

IX. PLUSES AND MINUSES OF USING YOUR MEDIATOR AS AN ARBITRATOR. Many lawyers will agree that drafting disputes will be arbitrated by the mediator. One justification is that the mediator may remember the parties' intent, based on having been in both rooms during the mediation, while a judge will not have that information. On the other hand, if the drafting dispute surfaces many weeks after the mediation, the mediator's memory may have grown cold. A disadvantage of using the mediator as an arbitrator over drafting disputes is that the "drafting dispute" may in fact involve interpreting the mediated settlement agreement (MSA) on a point that is substantive, not just a matter of drafting. A district judge has no authority to deviate from the MSA in rendering a final judgment. If s/he does, the decree can be reformed in the appellate court. *McLendon v. McLendon*, 847 S.W.2d 601 (Tex. App.–Dallas 1992, writ denied). If a substantive dispute is resolved by an arbitrator under the guise of resolving a drafting dispute, the arbitration award can only be modified or vacated by the trial court for grounds set out in Tex. Civ. Prac. & Rem. § 171.091 (modifying or correcting award for evident miscalculation, etc.) or § 171.088 (vacating award for corruption, exceeding authority, etc.). In most instances, deviating from the MSA may not be a basis for a trial court setting aside an arbitration award. Under the case of *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011), *cert. denied*, 211 U.L. Lexis 7489 (October 17, 2011), the parties may be able to reserve the right to appellate review, but probably not trial court review, of the mediator/arbitrator's decision. Also, it can sometime be more difficult to schedule an arbitration than to get a court hearing, so that, if one party is delaying resolution of the dispute, in arbitration it may be harder to force a speedy resolution. Also, if the MSA does provide for the mediator to engage in binding arbitration, be sure that the MSA is clear that this arbitration provision does not apply after the judgment is signed by the court. Otherwise, future litigation between the parties might end up before the arbitrator, where the arbitration clause appears to include all post-mediation disputes.

X. MEDIATED SETTLEMENT AGREEMENTS VS. INFORMAL SETTLEMENT AGREEMENTS VS. PARTITION AGREEMENTS VS. AGREEMENTS INCIDENT TO DIVORCE. In *Milner v. Milner*, 361 S.W.3d 615, 618 n. 2 (Tex. 2012), the Texas Supreme Court said: "As a general rule, a party may revoke its consent to a settlement agreement before the court renders judgment on the agreement. *Padilla v. LaFrance*, 907 S.W.2d 454, 461

(Tex.1995)." The Texas Legislature has enacted various statutes relating to family law settlement agreements and the standards are not uniform. The Legislature has enacted statutes at different times dealing with marital property agreements (MPAs), mediated settlement agreements (MSAs), and informal settlement agreements (ISAs). However, trial courts and courts of appeals have made inroads on the enforceability of such agreements. In *Boyd v. Boyd*, 67 S.W.3d 398, 403 (Tex. App.--Fort Worth 2002, no pet.), the trial court was affirmed in refusing to enforce a MSA, even absent fraud, when the husband failed to make full disclosure of property in the face of a recital of full disclosure in the MSA. In *In re Kasschau*, 11 S.W.3d 305 (Tex. App.—Houston [14th Dist.] 1999, no pet.), the appellate court upheld the trial court's refusal to honor an MSA which contained a single provision it said was illegal–to wit, a provision that illegally-recorded tape recordings be destroyed. In *In re Lee*, 2011 WL 4036610 (Tex. App.--Houston [14th Dist.] 2011) (Memorandum Opinion) (mandamus review granted by the Texas Supreme Court), the trial court refused to render a judgment based on an MSA that the trial court did not believe was in the child's best interest. The Court of Appeals found no abuse of discretion. The Supreme Court granted mandamus review, and the case was argued to the Supreme Court on Feb. 28, 2012. A decision is pending.

A. HUSBAND-WIFE SETTLEMENTS. Divorce settlements touching on the property division, alimony, and other interspousal issues are governed by Title 1 of the Family Code.

1. Agreement Incident to Divorce. The Texas Family Code provides for Agreements Incident to Divorce (AIDs). Section 7.006 provides:

> Section 7.006. Agreement Incident to Divorce or Annulment.
>
> (a) To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under another rule of law.
>
> (b) If the court finds that the terms of the written agreement in a divorce or annulment are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
>
> (c) If the court finds that the terms of the written agreement in a divorce or annulment are not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing.

Note that an Agreement Incident to Divorce can be repudiated by just one party unless binding under another rule of law. The "unless" clause has not been definitively interpreted by appellate courts.

Note also that a trial court can reject an Agreement Incident to Divorce for not being just and right. This contrasts with the rule for MSAs. See below.

2. Mediated Settlement Agreement. Section 6.602 of the Texas Family Code provides for agreements reached in mediation (MSAs) to be readily enforced. Section 6.602 provides:

> § 6.602. Mediation Procedures.
>
> (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.
>
> (b) A mediated settlement agreement is binding on the parties if the agreement:
>
> (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.
>
> (c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (d) A party may at any time prior to the final mediation order file a written objection to the

> referral of a suit for dissolution of a marriage to mediation on the basis of family violence having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.

In *Milner v. Milner*, 361 S.W.3d 615, 618 (Tex. 2012), the Texas Supreme Court recently said:

> Unlike other settlement agreements in family law, the trial court is not required to determine if the property division is "just and right" before approving an MSA. . . . And once signed, an MSA cannot be revoked like other settlement agreements.

The Court neither approved nor disapproved earlier court of appeals decisions saying that a court need not enforce "an MSA that is illegal in nature or procured by fraud, duress, coercion, or other dishonest means." *Id.* at 619. The Supreme Court held that issue to another day. The Supreme Court did, however, overturn the court of appeals decision in that case, which ruled that the MSA failed because there was no "meeting of the minds" between the spouses at the time the MSA was signed. *Id.*

3. Informal Settlement Agreement. The Legislature adopted Texas Family Code Section 6.604, which permits the parties to sign agreements as a result of negotiations and not mediation. In this Article such an agreement is called an "Informal Settlement Agreement" (ISA).The Section reads:

> § 6.604. Informal Settlement Conference.
>
> (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.

4. Recap of Husband-Wife Settlement Agreements. Thus, AID's can be unilaterally repudiated by one party, (subject to the "unless the agreement is binding under another rule of law" proviso) and they are subject to being rejected if the trial court finds that the agreement is not just and right. MSAs cannot be repudited by one party, and cannot be rejected by the trial court even if the MSA is not, in the court's opinion, just and right. ISAs cannot be unilaterally repudiated by one party. However, ISAs are subject to being rejected by the trial court if the court determines that the agreement is not just and right.

B. PARENT-CHILD SETTLEMENTS. Settlement agreements pertaining to children are covered in Title 5 of the Family Code.

Agreed Parenting Plan. Texas Family Code Section 153.007 provides for the partiest to submit to the court an "agreed parenting plan." Section § 153.007 provides:

> Section § 153.007, Agreed Parenting Plan
>
> (a) To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreed parenting plan containing provisions for conservatorship and possession of the child and for modification of the parenting plan, including variations from the standard possession order.
>
> (b) If the court finds that the agreed parenting plan is in the child's best interest, the court shall render an order in accordance with the parenting plan.
>
> (c) . . . .
>
> (d) If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan. If the parties do not submit a revised parenting plan satisfactory to the court, the court may, after notice and hearing, order a parenting plan that the court finds to be in the best interest of the child.

Thus, the Family Code makes it clear that an agreement that is an agreed parenting plan, but not an MSA, is subject to being rejected by the trial court based on best interest. The statutory language suggests that an agreed parenting plan cannot be unilaterally rescinded.

Agreements Concerning Support. The Texas Family Code Section 154.124 provides for the parties to agree on the terms for support of a child. Seciton 154.124 provides:

> § 154.124. Agreement Concerning Support
>
> (a) To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for support of the child and for modification of the agreement, including variations from the child support guidelines provided by Subchapter C.
>
> (b) If the court finds that the agreement is in the child's best interest, the court shall render an order in accordance with the agreement.
>
> (c) Terms of the agreement pertaining to child support in the order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract.
>
> (d) If the court finds the agreement is not in the child's best interest, the court may request the parties to submit a revised agreement or the court may render an order for the support of the child.

An agreement concerning support appears not to be revocable by one party, but is subject to a best interest determination.

Mediated Settlement Agreements. The Texas Family Code Section 153.0071 provides for mediated settlement agreements pertaining to children's issues. Section 153.0071 provides:

> § 153.0071. Alternate Dispute Resolution Procedures.
>
> (a) [pertaining to arbitration]
>
> (b) [pertaining to arbitration]
>
> (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
>
> (d) A mediated settlement agreement is binding on the parties if the agreement:
>
> > (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.
>
> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement

notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

(1) a party to the agreement 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.

(f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

(g) [pertaining to confidentiality]

The Family Code appears to require the court to render judgment on a parent-child MSA without an opportunity for the court to evaluate best interest. However, that issue is pending decision in *In re Lee*, 2011 WL 4036610 (Tex. App.–Houston [14th Dist.] 2011) (mandamus review granted). The Family Code appears to rule out one party's ability to unilaterally repudiate an MSA on parent-child issues.

Informal Settlement Agreements. The Texas Family Code does not provide for ISAs for parent-child issues. When an ISA contains a settlement of both husband and wife terms and parent and child terms, one wonders if the husband-wife part of the agreement is enforceable when the parent-child part is not.