During this entire time period, I also don't believe you ever even came close to finishing the drink that was sitting on the table in front of you. By the end, from my observation, it was more than half full and was a mixture of Scotch and melted ice, as was Mike's.

Ultimately, the parties reviewed the agreement that Trey had prepared, added certain terms and made changes to certain language, and then signed the Mediated Settlement Agreement.

LEGAL PRINCIPLES

For the past week since the agreement was executed, you given "additive" reasons why you do not want to conclude the settlement. The last email you sent to Michelle raised concerning medical issues, and in your follow-up phone conversation with her you claimed you were not able to appreciate the consequences of your action, lacking the mental capacity necessary to enter into a contract on October 30. Your defense is that you did not have the mental capacity to enter into the agreement that evening, whether as a result of being exhausted, not having eaten, having consumed alcohol or having medical issues.

In terms of the legal defense of intoxication, the rule in Texas is that if a person is so intoxicated as to be non compos mentis, does not know what he is doing, and is deprived of his reason, there may be grounds for rescission. To afford grounds for avoiding a contract, however, the intoxication must be so excessive as to render the person incapable of exercising his judgment or understanding the nature of the agreement and the consequences of its execution. Equity will not interfere in behalf of one who is intoxicated to a less degree, though sufficiently so as to materially affect and interfere with his reasoning, judgment and will, his intoxication not having been procured or taken advantage of unfairly by the other party. *Portwood v. Portwood*, 109 S.W.2d 515, 524 (Tex. Civ. App. 1937, writ dism'd). It has been held that a less degree of intoxication than that required to absolutely invalidate a contract may serve as a basis for avoiding the same if the drunkenness was caused by the other party, or if he takes unfair advantage of it. This would involve questions of fraud and undue influence, however, and not those of capacity to execute the contract. *Dewitt v. Bowers*, 138 S.W. 1147, 1149 (Tex. Civ. App. 1911, no writ). We are not aware of any facts that support that Mike was "taking unfair advantage." Do you have a problem with alcohol that was known to Mike? If so, would Mike have known that you would accept alcohol if offered? Without this type of evidence, I do not believe an intoxication defense would prevail, and even with this evidence, there is no doubt in my mind that you were not intoxicated from alcohol. Also, if you do have a drinking problem and elect to raise it, that type of sworn testimony could be harmful in your divorce and in any issue with your pharmacy license.

Insofar as showing a lack of mental capacity, the principles may be summarized as follows. To establish mental capacity to contract, the evidence must show that, at the time of contracting, the person appreciated the effect of what the person was doing and understood the nature and consequences of his or her acts and the business he or she was transacting. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969). Mere mental weakness is not in itself sufficient to incapacitate a person; and mere nervous tension, anxiety, or personal problems do not amount to mental incapacity to enter into contracts. 14 Tex. Jur. 3d Contracts § 41. Mental capacity, or lack thereof, may be shown by circumstantial evidence, including: (1) a person's outward conduct, "manifesting an inward and causing condition," (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred. *See Bach*, 596 S.W.2d at 676. As a general rule, the question of whether a person, at the time of contracting, knows or understands the nature and consequences of her actions is a question of fact for the jury. *See Fox v. Lewis*, 344 S.W.2d 731, 739 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

MY OPINIONS

I personally believe it would be risky for you to repudiate the Mediated Settlement Agreement, and that it ultimately would prove to be a bad decision.

If you do repudiate, Mike's and Asyntria's legal remedy is to amend their pleadings to add a counterclaim for breach of the Mediated Settlement Agreement, and then file a motion for summary judgment seeking to enforce it, and ultimately have a trial on the issues if the Court does not grant summary judgment. I believe you ultimately will lose that fight, and in the process you will incur additional attorney's fees and you will also owe Johnston and Asyntria the attorney's fees they incur in connection with enforcing the agreement.

The evidence, circumstantial and direct, to be considered includes the following:

1. You were, in fact, tired around 3:00 and had your head in your hands on the table, and if you say you were exhausted, I take this at face value. From my observation, however, you were coherent and did not seem punch drunk. Just tired. I thought you were tired because we had been going at it since 10:00 a.m. That is not unusual at mediations.

2. Todd Frankfort, counsel for Johnston procured the alcohol, but you and Mike requested it. He told me he was getting cocktails for our clients, which I thought was a joke, and when I saw him and Allen with drinks in their hands, I did not know you and Mike were actually drinking.

3. While our communications regarding the substance of the agreement and mediation are privileged, my observations are not and if forced to testify, from my observations, you did not consume enough alcohol to become drunk, and that is based on both observing your glasses of Scotch, the level of Scotch remaining in the bottle when we left the mediation, the time period involved, and your demeanor during this time. If you were also drinking vodka, this might be different. I don't recall seeing the level of vodka in the bottle.

4. You did not mention any medical issues to me at the time, and you did not mention lack of food at any time.

5. Neither Trey nor I perceived you to be impaired at any point during the mediation.

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