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# Prenuptial Agreements and the Significance of Independent Counsel

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# PRENUPTIAL AGREEMENTS AND THE SIGNIFICANCE OF INDEPENDENT COUNSEL

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Although one may perceive prenuptial agreements as a phenomenon of the latter part of the 20th century, in fact they are not.[1] However, traditionally, prenuptial agreements, also known as "premarital agreements" or "antenuptial agreements,"[2] were met with much hostility by courts.[3] This negative response was based upon feelings that prenuptial agreements were against public policy because, supposedly, they fostered divorce.[4]

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[1] *See, e.g.*, *In re* Marriage of Dawley, 17 Cal. 3d 342, 346 (1976) (exploring validity of prenuptial agreement); DeMaggio v. DeMaggio, 317 So. 2d 848, 850 (Fla. Dist. Ct. App. 1975) (invalidating prenuptial agreement prior to 1980); Appleby v. Estates of Appleby, 100 Minn. 408, 424 (1907) (stating that individuals have right to enter into enforceable prenuptial agreement);) Baker v. Baker, 24 Tenn. App. 220, 225 (Tenn. Ct. App. 1940) (commenting on prenuptial agreements prior to 1950).

[2] *See In re* Marriage of Leathers, 309 Or. 625, 630 n.5 (1990) (explaining prenuptial is synonymous with premarital or antenuptial agreements); Friedlander v. Friedlander, 80 Wash. 2d 293, 298 (1972) (commenting that "prenuptial" and "antenuptial" agreements are synonymous); Suzanne D. Albert, *The Perils of Premarital Provisions*, 48 R.I. BAR. J. 5, 5 (2000) (stating that prenuptial, premarital and antenuptial agreements are synonymous).

[3] *See* Brooks v. Brooks, 733 P.2d 1044, 1048 (Alaska 1987) (noting prenuptial agreements were traditionally viewed as contrary to marriage); Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1038 (1993) (noting prenuptials were not always regarded favorably). *See generally* Stephen P. Stanczak, Note, *For Better or For Worse... But Just in Case, Are Antenuptial Agreements Enforceable?*, 1982 U. ILL. L. REV. 531, 534 (1982) (discussing how at common law prenuptial agreements were thought to be fostering divorce).

[4] *See* Janet L. Dolgin, *Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies: The Parent-Child Bond*, 26 CONN. L. REV. 1261, 1268 (1994) (noting in the past prenuptial agreements were thought to favor divorce); Peter Sevareid, *Increase In Value of Separate Property In Pennsylvania: A Change in What Women Want?*, 68 TEMPLE L. REV. 557, 596 (1995) (stating that in the past courts disfavored prenuptial agreements in cases of divorce); William F. Fraatz, Comment, *Enforcing Antenuptial Contracts In Minnesota: A Practice in Search of a Policy Basis in the Wake of McKee-Johnson v. Johnson*, 77 MINN. L. REV. 441, 444 (1992) (acknowledging prior decisions which disfavor prenuptial agreements).

This sentiment was clearly evident in many court decisions.[5] However, in recent years, the increase in divorce rates[6] has made prenuptial agreements a more realistic alternative to a "messy break-up."[7] Another reason for the rise in the number of prenuptial agreements might be that in recent years the elective share right of surviving spouses has been enlarged. Concurrent with prenuptial agreements gaining increased popular public support, is an increasing judicial recognition of their validity.[8] Perhaps one reason for the rise in popularity is the very purpose behind the agreement itself.[9] Unlike many other arm's-length contracts, prenuptial agreements are treated rather differently in the legal context.[10] Many courts have stated that the very nature of the relationship between an engaged couple, unlike that in

[5] *See Brooks*, 733 P.2d at 1048 (explaining that traditionally prenuptial agreements were disfavored); Rinvelt v. Rinvelt, 190 Mich. App. 372, 380 (1991) (noting traditional view that prenuptial agreements were "inconsistent" with ideals of marriage); Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 233 (2001) [hereinafter Bix, *Premarital Agreements*] (stating that prenuptial agreements were presumptively unenforceable because they were "considered contrary to public policy").

[6] *See* Harry M. Clor, *Forum on Public Morality: The Death of Public Morality?*, 45 AM. J. JURIS. 33, 42 (2000) (stating that divorce rate is "close to 50%"); Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997) (noting "prevalence" of divorce); Alex Shukman, Notes & Comments, *Show Her the Money: The California Court of Appeal's Mistake Concerning In Re Marriage of Bonds*, 20 LOY. L.A. ENT. L.J. 457, 457-58 (2000) (noting half of marriages end in divorce).

[7] *See* Bob Egelko, *Bonds' Pact with Ex-Wife Binding; Court Says Prenuptial Signing is Legal Even if She Had No Lawyer*, SAN FRANCISCO EXAMINER, Aug. 22, 2000, at A3 (stating that prenuptial agreements are means of protecting premarital assets); David E. Rovella, *More Couples Getting Prenuptial Agreements to Shield Assets*, N.Y.L.J., Sept. 2, 1999, at 1 (acknowledging that prenuptial agreements make divorce "less painful" for parties involved); Vivian Wagner, *Don't Wait Until the Last Minute to Work Out Agreement*, PLAIN DEALER, Sept. 2, 2000, at 1D (commenting that prenuptial agreements foster "peace of mind" with regard to protecting assets).

[8] *See, e.g.*; Fleming v. Fleming, 474 So. 2d 1247, 1249 (Fla. Dist. Ct. App. 1985) (validating prenuptial agreement); McGuire v. McGuire, 385 So.2d 151, 152 (Fla. Dist. Ct. App. 1980) (upholding validity of prenuptial agreement); *In re* Estate of Serbus, 324 N.W.2d 381, 386 (Minn. 1982) (commenting that prenuptial is valid).

[9] *See* Joseph W. McKnight, *Family Law: Husband and Wife*, 50 SMU L. REV. 1189, 1212 (1997) (acknowledging that increasing premarital agreements allows for allotment of personal and community property); Twila L. Perry, *No-Fault Divorce: Liability Without Fault: Can Family Law Learn From Torts?*, 52 OHIO ST. L.J. 55, 72 (1991) (stating that increased "exploration" by parties allows to deal with possible concerns in advance); Marston, *supra*, note 6, at 916 (noting that prenuptial agreements allow for open communication and thus are "relationship-enhancing").

[10] *See* Tenneboe v. Tenneboe, 558 So.2d 470, 474 (Fla. Ct. App. 1990) (acknowledging that parties to prenuptial agreement do not deal at "arm's length"); Humphries v. Humphries, No. E1999-02694, 2000 Tenn. App. LEXIS 455, at *23 (Tenn. Ct. App. July 18, 2000) (stating that parties to antenuptial agreement do not deal at "arm's length"); *In re* Estate of Crawford, 107 Wash. 2d 493, 497 (1986) (noting that parties to prenuptial agreements do not deal at "arm's length").

many other contracts, is highly personal and confidential and fosters a finding of a fiduciary relationship.[11] Although unlike many contracts, they are nonetheless a contract and, as such, are given the same legal enforceability.[12] Due to the unique relationship of the parties involved in a prenuptial agreement, an attorney representing these parties has not only a different relationship but different responsibilities to the parties as well.[13]

In order to fully gain an understanding of this area of law, a clear definition is needed as to what a prenuptial agreement truly is. Many have attempted to define what is encompassed in the term prenuptial agreement.[14] A prenuptial agreement is "a contract entered into between a man and a woman in contemplation and consideration of their future marriage, whereby the property rights and economic interests of either the prospective husband or wife, or both, are determined as set forth."[15] It is also important to understand what is encompassed within the four-corners of a premarital agreement. Premarital contracts may address financial considerations, such as division

[11] *See* Del Vecchio v. Del Vecchio, 143 So.2d 17, 21 (Fla. 1962) (stating relationship between parties to prenuptial agreement is of trust); *In re* Estate of Benker, 416 Mich. 681, 688-89 (1982) (discussing relationship of parties to prenuptial agreement is of "extreme mutual confidence"); *In re* Marriage of Leathers, 309 Or. 625, 631 (1990) (commenting that nature of relationship between parties "imposes fiduciary duties in transactions between them").

[12] *See* Elgar v. Elgar, 238 Conn. 839, 852 (1996) (explaining that "duly executed antenuptial agreement is" presumed legal "as any other contract . . ."); *In re* of Garbade, 221 AD.2d 844, 845 (N.Y. App. Div. 1995) (noting prenuptial agreement are given same enforceability as "any other contract"); Panossian v. Panossian, 172 A.D.2d 811, 811 (N.Y. App. Div. 1991) (stating "a duly executed antenuptial agreement is given the same presumption of legality as any other contract. . .").

[13] *See* Andrew J. Kyreakakis, *Antenuptial Law in New Jersey*, 24 SETON HALL L. REV. 254, 254 (1993) (acknowledging that few areas of law are similar to prenuptial agreements in that they are "emotionally charged" and expose attorneys to risks); Franklin I. Miroff & Andrew C. Mallor, *When a Simple 'I do' Won't Do: How to Draft a Premarital Agreement – And Survive*, 13 FAM. ADVOC. 10, 14 (1991) (suggesting that prenuptial agreements often create litigation); Marston, *supra* note 6, at 893 (noting difficulty lawyers face in drafting prenuptial agreements).

[14] *See, e.g.*, McVicar v. McVicar, 128 Kan. 394, 395 (1929) (explaining what is encompassed in prenuptial agreement); *Crawford*, 107 Wash.2d at 493-94 (1986) (defining prenuptial agreement); Friedlander v. Friedlander, 80 Wash.2d 293, 298-99 (1972) (providing definition of prenuptial agreement).

[15] Rowland v. Rowland, 74 Ohio App.3d 415, 419 (1991) (providing that "antenuptial agreement is a contract entered into between a man and a woman in contemplation and consideration of their future marriage"); *see* Barbara Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. Legis. 127, 140 (1993) (suggesting that prenuptial agreements enforced in attempt to preserve freedom of contract "and the concomitant predictability in arranging one's future financial affairs"); Marston, *supra* note 6, at 901 (commenting that state implies contract into marriage without parties' involvement).

of property and support payments upon death or divorce, lifestyle considerations, as well as many other stipulations. One couple went as far as stipulating in their prenuptial agreement what type of gas they will buy and how often each week they will engage in sexual intercourse.[16] As one can see, prenuptial agreements can be tailored to the need of the engaged couple.

Currently, prenuptial agreements are not only deemed valid,[17] but in some instances are considered favorable to public policy[18] and the institution of marriage as well.[19] In recent years the number of divorces in the United States has grown rapidly,[20] and, as indicated above, there has been an increase in the number of prenuptial agreements.[21] Since this is not a "typical"

[16] *See* Teresa Garpstas and Robert Rex LeGalley, *Unconditional Love Excerpt from Prenuptial Agreement*, HARPER'S MAGAZINE, Feb. 1996, at 24 (presenting excerpts from LeGalley's sixteen page prenuptial agreement); *see also* Gary Belsky, *Living by the Rules*, MONEY, May 1996, at 100 (commenting on sixteen page prenuptial agreement covering virtually every area of married life); Barbara Hetzer, *A Binding Agreement Before You Tie The Knot*, BUSINESS WEEK, Mar. 3, 1997, at 114 (noting terms of LeGalley prenuptial agreement).

[17] *See, e.g.*, Fleming v. Fleming, 474 So.2d 1247, 1249 (Fla. Dist. Ct. App. 1985) (validating a prenuptial agreement); McGuire v. McGuire, 385 So.2d 151, 151 (Fla. Dist. Ct. App. 1980) (upholding the validity of a prenuptial agreement); Serbus v. Serbus, 324 N.W.2d 381, 386 (Minn. 1982) (commenting that prenuptial is valid). *See generally* Christine Davis, Note & Comment, *'Til Debt Do Us Part: Premarital Contracting Around Community Property Law – An Evaluation of Schlaefer v. Financial Management Service, Inc.*, 32 ARIZ. ST. L.J. 1051, 1053 (2000) (noting however that in order for court to determine issue of prenuptial agreement's validity issue must be raised by the parties).

[18] *See* Craig C. Conley, Comment, *Family Law – Randolph v. Randolph: Tennessee Requires Full Disclosure or Independent Knowledge for Antenuptial Agreements to Be Valid*, 27 U. MEM. L. REV. 1021, 1023 (1997) (commenting that prenuptial agreements are favored in public policy); Carolyn Counce, Comment, *Family Law—Cary v. Cary: Antenuptial Agreements Waiving or Limiting Alimony in Tennessee*, 27 U. MEM. L. REV. 1041, 1056 (1997) (explaining prenuptial agreements are favored in public policy); Nora J. Lauerman, *Feminist, Moral, Social, and Legal Theory: A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and Divorce*, 56 U. CIN. L. REV. 493, 513-14 (1987) (noting prenuptial agreements are favored by public policy).

[19] *See* Brooks v. Brooks, 733 P.2d 1044, 1050 (Alaska 1987) (noting that thinking through marriage in preparation for a prenuptial agreement is positive to institution of marriage); Rinvelt v. Rinvelt, 190 Mich. App. 372, 381 (Ct. App. 1991) (explaining that "allowing couples to think through their marriage before can only foster strength and permanency in the relationship."); Friedlander v. Friedlander, 80 Wash.2d 293, 301 (1972) (stating that prenuptial agreements "freely and intelligently made" contribute to marital tranquility).

[20] *See* Cara L. Brown & Duncan V. Baddeley: *A Case Comment*, 37 ALBERTA L. REV. 772, 798 (1999) (finding increase in divorce rates since 1971); Allison Nicole DeGregorio, *Single and Bankrupt: What Right Does a Debtor Have To Marry?*, 15 BANK. DEV. J. 427, 427 (1999) (announcing increase in percentage of divorces); Lynne M. Kenney & Diana Vigil, *A Lawyer's Guide to Therapeutic Interventions in Domestic Relations Court*, 28 ARIZ. ST. L.J. 629, 642 (1996) (noting increase in divorce rate).

[21] *See* Marston, *supra* note 6, at 891 (commenting on increase of prenuptial agreements in recent years); *see also* James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 937 (2000) (commenting on popularity of prenuptial agreements); Bob

contract situation where the parties deal at "arm's length",[22] the obligations of the parties and attorneys involved are also not typical.[23] The rules adopted regarding prenuptial agreements differ according to each jurisdiction.[24]

## JOINT-REPRESENTATION AND ETHICS

### *The Model Rules*

The topic of joint-representation is encompassed in the broad category that is deemed ethics or professional responsibility.[25] The code of ethics is perhaps one of the most integral sources in governing an attorney's ethical behavior.[26] The larger question is who promulgates these rules. The resounding answer is in large

Egelko, *supra* note 7, at A-3 (discussing increase in prenuptial agreements popularity).

[22] *See* Atwood, *supra* note 15, at 132 (concluding that prenuptial agreements are not like other arm's length commercial contracts); Sanford N. Katz, *Propter Honoris Respectum: Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1261 n.34 (1998) (explaining that parties to prenuptial agreement deal with "mutual trust"); *see also* John A. Gromala, *Mediation in Estate Planning and Will or Trust Contests*, THE CPA JOURNAL, Sept. 1, 2001, at 54 (noting couples might not have discussed terms of prenuptial agreement at arm's length).

[23] *See* Kyreakakis, *supra* note 13, at 254 (acknowledging that few areas of law are similar to prenuptial agreements in that they are "emotionally charged" and expose attorneys to risks); Marston, *supra* note 6, at 893 (noting the difficulty lawyers face in drafting prenuptial agreements); Miroff & Mallor, *supra* note 13, at 14 (1991) (explaining that prenuptial agreements often create litigation).

[24] *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1880-81 (1995) (commenting on different enforcement of prenuptial agreements by states); P. Andre Katc and Amanda Clayman, *When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations*, 16 J. AM. ACAD. MATRIMONIAL LAW 445, 446 (2000) (discussing each state has laws that govern prenuptial agreements); Shukhman, *supra* note 6, at 457 (noting lack of uniformity in states regarding prenuptial agreements).

[25] *See* Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 192 (2000) (discussing joint-representation is governed by ethical codes); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 915 (1994) (noting joint representation is encompassed in ethics); Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2837 (1997) (finding joint representation conflicts are within bounds of ethics).

[26] *See* Lawrence H. Averill, Jr., *The Revised Lawyer Discipline Process in Arkansas: A Primer and Analysis*, 21 U. ARK. LITTLE ROCK L. REV. 13, 14-15 (1998) (explaining attorney's obligations under code of ethics); Frederic G. Corneel, *The Service and the Private Practitioner: Face to Face and Hand to hand – A Private Practitioner's View*, 11 AM. J. TAX POL'Y 343, 363 (1994) (noting attorneys are governed by code of ethics); Richard Lieb, *Bankruptcy Ethics: Article: The Section 327(a) "Disinterestedness" Requirement – Does a Pre-petition Claim Disqualify an Attorney for Employment by a Debtor in Possession?*, 5 AM. BANKR. INST. L. REV. 101, 121 (1997) (commenting that state code of ethics imposes ethical responsibilities upon attorneys).

part the American Bar Association (ABA).[27] The first attempt by the American Bar Association to promulgate a code of ethics was in 1908 in creating the Canons of Professional Ethics.[28] Later, in 1970, the American Bar Association proposed the Model Code of Professional Responsibility,[29] which has been adopted in some fashion in all of the states.[30] The Model Code of Professional Responsibility has three main components: the Canons,[31] Ethical Considerations[32] and Disciplinary Rules.[33] After the adoption of

[27] *See* Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials and Attorney Responsibility as Governing Precept*, 47 FLA. L. REV. 159, 179 (1995) (noting ABA promulgates rules); John P. Sahl, *The Public Hazard of Lawyers Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 67 (1999) (examining ABA's promulgation of rules); Matthew Garner Mercer, Note, *Lawyer Advertising on the Internet: the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel*, 39 BRANDEIS L.J. 713, 714 (2001) (commenting that ABA promulgates rules).

[28] *See* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C.L. REV. 923, 952 (1996) (stating the Canons of Professional Ethics was enacted in 1908); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 741 (1997) (announcing the Canons of Professional Ethics was promulgated in 1908); Marston, *supra* note 6, at 505 (concluding in 1908 the Canons of Professional ethics were enacted).

[29] *See* Flowers, *supra* note 28, at 952 (noting 1970 passing of the Model Code of Professional Responsibility); Bruce A. Green, *Special Issue Institutional Choices in the Regulation of Lawyers: Article and Response: Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 77 (1996) (commenting on the 1970 passing of the Model Code of Professional Responsibility); Randy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J. LAW & ECON. 549, 552 (2001) (explaining that Canon was replaced in 1970 by Model Code of Professional Responsibility).

[30] *See* Flowers, *supra* note 28, at 952 (noting that Model Code has been adopted in some form by every state); David J. Hrina, Comment, *The Future of IOLTA: Has the Death Knell Been Sounded for Mandatory IOLTA Programs*, 32 AKRON L. REV. 301, 304 n.23 (1999) (stating that Model Code has been adopted by almost every state supreme court); Joseph D. Vaccaro & Marc R. Milano, Note, *Section 327 (a): A Statute in Conflict: A proposed Solution to Conflicts of Interest in Bankruptcy*, 5 AM. BANKR. INST. L. REV. 237, 242-43 (1997) (commenting on majority of states adopting some form of the Model Code).

[31] *See* Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations of Attorneys' Fees in Criminal Cases*, 41 B.C.L. REV. 1, 14 n.60 (1999) (noting Canon is general standard for attorneys relating to public); Nancy B. Rapoport, *Turning & Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 941 (1994) (explaining that Canons define what conduct is expected of attorneys); Alexander G. Benisatto & Alyson M. Fiedler, Note, *The Disinterested Standard of Section 327(a): Applying an Equitable Solution for Potential Conflicts on Small Bankruptcies*, 7 AM. BANKR. INST. L. REV. 363, 365 (1999) (commenting Canons are suggestive guidelines for courts to use).

[32] *See* Chin & Wells, *supra* note 31, at 14 n.60 (noting that attorneys should aspire to follow the Ethical Considerations); Rapoport, *supra* note 31, at 941(explaining that Ethical Considerations are guidelines for attorneys to act ethically); Benisatto & Fiedler, *supra* note 31, at 365 (commenting that Ethical Considerations are what attorneys should strive to be).

the 1970 Model Code the ABA again in 1977 attempted, under Kutak Commission,[34] to create a new set of Model Rules that were adopted by the House of Delegates in 1983.[35] The ABA continues its quest to perfect the Model Rules and as a result the Ethics 2000 Committee was appointed to again propose changes to the existing rules. The Model Rules of Professional Conduct, as they are now called, have two important aspects to keep in mind. First, they are only "model" rules, they are not statutes.[36] Second, these rules were promulgated by the ABA not the legislature,[37] and therefore the ABA has no legal authority or power to enforce them.[38] Accordingly, one might wonder what is the effect if any of these Model Rules? As stated earlier different jurisdictions chose to adopt some form of the rules, and as such there is a degree of

[33] *See* Chin & Wells, *supra* note 31, at 14 n.60 (noting disciplinary rules are mandatory ethical rules for lawyers); Rapoport, *supra* note 31, at 941(explaining that Disciplinary Rules are minimum standard required of attorneys); Benisatto & Fiedler, *supra* note 31, at 365 (commenting that Disciplinary Rules are a mandatory standard to be followed by lawyers).

[34] *See* George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 308 (1997/1998) (stating ABA in 1977 under Kutak Commission reexamined Model Code); Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1370 (1993) (discussing Kutak Commission's role in examination and replacing Model Code); Michael M. Nelter, *Government Scapegoating, Duty to Disclose, and the S&L Crisis: Can Lawyers and Accountants Avoid Liability in the Savings and Loan Wilderness?*, 62 U. CIN. L. REV. 655, 674 (1993) (explaining 1977 Kutak Commission drafted a replacement for Model Code).

[35] *See* Chin & Wells, *supra* note 31, at 14 n.61 (discussing House of Delegates adopted the Model Rules in 1983); John M. A. DiPippa, *Lawyers, Clients, and Money*, 18 U. ARK. LITTLE ROCK L. REV. 95, 100 n.43 (1995) (stating in 1983 House of Delegates passed Model Rules); Edward J. Imwinkelried, Article, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 BYU L. REV. 793, 795 n.10 (1993) (noting House of Delegates passed Model Rules in 1983).

[36] *See* Stephen E. Kalish, *How to Encourage Lawyer to be Ethical: Do Not Use the Ethics Codes as a Basis for Regular Law Decisions*, 13 GEO. J. LEGAL ETHICS 649, 669 n.86 (2000) (arguing that Model Rules are not "analogous" to statutes because they are not passed by representative body); Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345, 357 n.45 (2001) (explaining that Model Rules can be adopted by states in statutes); N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 LA. L. REV. 1, 32 (2000) (discussing statutes may circumscribe Model Rules).

[37] *Supra* note 27 and accompanying text.

[38] *See* Marion L. Ferry, Note, *Estate of Younger: Violation of an Ethical Consideration Equal a Legal Presumption*, 45 U. PITT. L. REV. 719, 738 (1984) (discussing that Model Rules should be passed by legislature of states); Brooke Parker, Comment, *Dangers of the "Revolving Door:" Disqualification of Attorneys because of Prior Government Public Service*, 22 J. LEGAL PROF. 317, 329 (1997/1998) (explaining that it is not mandatory for states to follow Model Rules); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3443 n.20 (1999) (stating Model Rules have no legal effect until adopted by states).

deference to the weight of authority that the jurisdiction will afford the rule.[39] In *People v. Herr*,[40] the court stated that it will view the rules as "guidelines to be applied with due regard for the broad range of interest at stake."[41] In federal court, however, the decision of whether to adopt the rules is a question of federal law.[42] Basically the interpretation and weight of the rules is dependent upon the jurisdiction.[43]

In our discussion of prenuptial agreements the Model Rules are a pivotal point in the discussion. How can an attorney represent both parties to a prenuptial? One might think that there has to be some rule against this type of joint representation and lack of independent counsel. It appears that there are many rules that speak to these issues. One such rule is Model Rule 1.7 of the Model Rules of Professional Conduct.[44] Model Rule 1.7 provides for the following:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> 1. The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

[39] *See* G. Ellis Duncan, Comment, *The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following Arthur Andersen v. Netherlands Bar Ass'n*, 9 TUL. J. INT'L & COMP. L. 537, 555 (2001) (announcing that Model Rules are not binding on states until adopted); Michael W. Price, Comment, *A New Millennium's Resolution: The ABA Continues Its Regrettable Ban on Multidisciplinary Practice*, 37 HOUS. L. REV. 1495, 1501 (2000) (explaining Model Rules are not binding authority until state adopts them); Nina Keilin, Note, *Client Outreach 101: Solicitation of Elderly Clients by Seminar Under Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1547, 1548 n.9 (1994) (clarifying that each state adopts its own standard of Model Rules).

[40] People v. Herr, 86 N.Y.2d 638 (1995).

[41] *Herr*, 86 N.Y.2d at 642 (quoting Niesig v. Team I, 76 N.Y.2d 363, 369-70 (1990)); *see In re* Estate of Weinstock, 40 N.Y.2d 1, 6 (1976) (explaining treatment of Model Rules by courts); People v. Hobson, 39 N.Y.2d 479, 484-85 (1976) (noting that courts give Model Rules of Professional Conduct great weight).

[42] *See* Cole v. Ruidoso Mun. Schs., 43 F.3d 1373, 1383 (10th Cir. 1994) (stating adoption of Model Rules by federal court is matter of federal law); *In re* Dresser Indus., 972 F.2d 540, 545 n.12 (5th Cir. 1992) (announcing that Texas law is inapplicable in federal courts and adoption of Model Rules is for federal court to decide); *In re* American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992) (noting that in federal court whether to adopt Model Rules is a question of federal law).

[43] *Supra* note 39 and accompanying text.

[44] MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983) (amend. 1987); *see Cole*, 43 F.3d at 1383-84 (stating New Mexico's Rules of Professional Conduct and noting similarity with ABA's Model Rules); *Dresser*, 972 F.2d at 545 n.7 (restating Rule 1.7 of Model Rules).

> 2. Each client consents after consultation;
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
>
> 1. the lawyer reasonably believes the representation will not be adversely affected; and
>
> 2. the client consents to the consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Clearly, the representation of two adverse parties is not allowed under Model Rule 1.7. Comment two suggests that, if such a conflict arises, an attorney should withdraw from the representation.[45] Furthermore, Comment eleven suggests relevant factors in determining whether there is a potential adverse effect as a result of joint representation.[46] These factors include: the length and quality of closeness of the relationship between the attorney and client, the duties of the lawyer in the representation, the possibility that conflict will arise and the amount of prejudice to the client if the conflict does arise.[47] In a situation involving a premarital agreement, a lawyer should not, under the Model Rules, represent both parties if their interests

[45] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (explaining when lawyer should withdraw representation); *see also* Nancy J. Moore, *What Doctors Can Learn from Lawyers about Conflicts of Interest*, 81 B.U.L. REV. 445, 456 n.65 (2001) (explaining lawyer should withdraw if conflicts arise); Susan Randall, *Redefining the Insurer's Duty to Defend*, 3 CONN. INS. L.J. 221, 236 n.44 (1996/1997) (stating that a lawyer should immediately withdraw when consent is withheld from clients).

[46] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 11 (describing situations in which conflict may occur); *see also* Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE U. L. REV. 57, 86 (1998) (quoting Model Rule 1.7, Comment eleven standard); Peter Jarvis and Bradley F. Tellam, *When Waiver Should Not be Good Enough: An Analysis of Current Client Conflicts Law*, 33 WILLAMETTE L. REV. 145, 154 (1997) (noting Model Rule 1.7 and comment eleven standard).

[47] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 11 (stating factors to consider in order to determine if a conflict exists); *see also* Hobbs, *supra* note 46, at 86 (quoting Model Rule 1.7, Comment 11); Gretchen L. Jankowski, *The Ethics Involved in Representing Multiple Parties in a Business Transaction: How to Avoid Being Caught Between Scylla and Charybdis*, 23 U. BALT. L. REV. 179, 189 (1993) (quoting factors from Rule 1.7).

are adverse; however, the decision whether the representation is "directly adverse" to the parties is largely left up to the attorney's "reasonable belief".[48] Although the Model Rules appear to give much deference to the attorney's "reasonable belief," another basic premise behind these rules in that a lawyer should avoid the "appearance of impropriety."[49]

*Other Ethical Codes*

Prior to the adoption of the Model Rules, the ABA Model Code of Professional Responsibility also attempted to deal with joint-representation and conflicts of interest in Ethical Consideration 5-15.[50] Ethical Consideration 5-15 provides that before a lawyer accepts multiple clients having "potentially different interests" he or she must examine the possibility of divided loyalty or impaired judgment.[51] The Consideration further provides that a lawyer should not accept the representation if there is any doubt as to whether the lawyer may maintain his or her loyalty and undivided judgment.[52] Furthermore, if the lawyer accepts the

[48] MODEL RULES OF PROF'L CONDUCT R. 1.7 (giving lawyer ability to judge affects of conflict); *see* Melissa M. Eckhuase, Note, *A Chastity Belt for Lawyers: Proposed MRPC 1.8(k) and The Regulation of Attorney Client Sexual Relationship*, 75 U. DET. MERCY. L. REV. 115, 136 (1997) (commenting that Model Rule 1.7's "adversely affect" standard is based upon attorney's reasonableness); Burkhart R. Lindahl, Note, *Ohio's New Ethical Screening Procedure*, 31 U. TOL. L. REV. 145, 150 n.41 (1999) (noting that it is reasonable belief of attorney whether client's interest are directly adverse).

[49] *See* MODEL CODE OF PROF'L RESPONSIBILITY, Canon 9 (1983) (stating "A lawyer should avoid even the appearance of professional impropriety."); *see also* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 549 (1994) (discussing that attorneys should avoid "the appearance of impropriety"); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 791 (1993) (stating lawyers should avoid the "appearance of impropriety").

[50] *See* MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-15 (1980) (stating lawyer's responsibility to consider if conflicting interests will hamper duties); *see also* Susan Randell, *Managing Litigation and the Professional Obligations Of Insurance Defense Lawyers*, 51 SYRACUSE L. REV. 1, 33 n.107 (2001) (comparing EC 5-15 to MODEL CODE OF PROF'L RESPONSIBILITY); Rapoport, *supra* note 31, at 944 (discussing fact that lawyer's conflict must not interfere with client's needs).

[51] *See* Lisa A. Dolak, *Conflicts of Interest: Guidance for the Intellectual Property Practitioner*, 39 J.L. & TECH. 267, 271 n.19 (1999) (noting that EC 5-15 requires attorneys to weigh possibility of impaired loyalty or judgment if he or she continues or accepts employment of multiple clients); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 760 (quoting EC 5-15); Thomas D. Morgan, *Suing A Current Client*, 1 J. INT. STUD. LEG. ETH. 87, 98 n.38 (1996) (quoting EC 5-15).

[52] *See* MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-15 (discussing need for lawyer to alleviate all questionable scenarios before accepting employment); *see also* Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private "Clients" Under Fair Housing Act*, 65 GEO. WASH. L. REV. 329, 369 n.246 (1997) (quoting EC 5-15); David

multiple representation and there is a conflict of interest the lawyer should withdraw.[53] Since the withdrawal by the attorney might adversely affect the client, EC-5-15 suggests that the lawyer never accept the employment in the first place.[54]

Ethical Consideration 5-16 of the Code of Professional Responsibility further attempts to deal with concerns associated with joint representation.[55] This Consideration promulgates that before an attorney may represent clients with "differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for the representation free of any potential conflict and to obtain other counsel if he so desires."[56] Also, EC 5-16 states that before the lawyer can represent multiple clients he or she should "explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."[57]

I. Gold, Article, *I Know You're the Government's Lawyer, but You Are My Lawyer Too? An Exploration of the Federal-Native American Trust Relationship: Conflicts of Interest*, 19 BUFF. PUB. INTEREST L.J. 1, 14 n.67 (2000/2001) (quoting EC 5-15); Rapoport, *supra* note 31, at 955 n.156 (quoting EC 5-15).

[53] *See* MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-15 (stating need to end employment if conflict does arise); *see also* Gaetke & Schwemm, *supra* note 52, at 369 n.246 (quoting EC 5-15); Gold, *supra* note 52, at 14 n.67 (quoting EC 5-15); Rapoport, *supra* note 31, at 955 n.156 (quoting EC 5-15).

[54] MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-15 states:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided . . .If a lawyer accepted such employment and the interests did become actually differing he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.")

See MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-15; *see also* Gaetke & Schwemm, *supra* note 52, at 369 n.246 (quoting EC 5-15); Gold, *supra* note 52, at 14 n.67 (quoting EC 5-15); Rapoport, *supra* note 31, at 955 n.156 (quoting EC 5-15).

[55] *See* Dolak, *supra* note 51, at 271 n.19 (explaining EC 5-16 involves multiple representations); Lori Gallagher & Andrew S. Hanen, *Attorney Client Conflicts of Interest and Disqualification in Texas Litigation*, 24 TEX. TECH. L. REV. 1039, 1047 (1993) (commenting that EC 5-16 involves multiple representation); Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflict of Interest Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH. L. REV. 139, 150 (1996) (discussing EC 5-16 involves discussion of multiple representation).

[56] MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-16 (1980) (granting client voice in representation conflicts by requiring attorney disclosure) *see* Bruce A. Green, *"Through A Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1214 n.61 (1989) (discussing need of attorney to disclose conflict under EC 5-16). *See generally* Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973) (mentioning EC 5-16 in application of duty).

[57] MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-16 (leaving final determination of representation to client); *see* Dolak, *supra* note 51, at 289 (stating attorney may need to obtain client consent before proceeding if conflict exists); Hobbs, *supra* note 46, at 66 (noting client may agree to continue after informed of conflict).

Generally, ethical rules prohibit attorneys from joint-representation of clients where there is adverse interest.[58] Independent counsel is routinely recommended by the courts when drafting a prenuptial agreement because the parties' interests are often adverse.[59]

The concerns regarding joint representation are further addressed in the disciplinary rules of the Model Code of Professional Responsibility. DR 5-105(a) provides that a lawyer "shall decline proffered employment . . .if it would be likely to involve him in representing differing interests."[60] However, an exception is provided in DR 5-105 (c) whereby, "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."[61]

Many states have adopted some form of a Model Rule or a Code of Professional Responsibility. Each state attempts to deal with

[58] *See* Nora J. Pasman, *The Conflict of "Conflict of Interest" The Michigan Example*, 1995 DET. C.L. REV. 133, 165 (1995) (noting attorney representing clients with adverse interest is ethically prohibited); Rapoport, *supra* note 31, at 952 (stating representing multiple clients with adverse interests is not allowed); Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403, 455 (2000) (discussing prohibition of multiple representation of adverse clients by single attorney).

[59] *See In re* Marriage of Leathers, 309 Ore. 625, 631 (1990) (stating absent full disclosure joint-representation of adverse parties is prohibited); *see also* Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RIGHTS L. REP. 147, 196 (1996) (noting there are adverse parties to prenuptial agreements). *See generally* Michael Cohen, *Trying Second Marriage? Prenuptial is Crucial*, BOSTON GLOBE, Aug. 20, 2000, at G7 (discussing that parties to prenuptial agreement are opposing each other).

[60] NEW YORK CODE OF PROF'L RESPONSIBILITY, DR 5-105(a) (1998) (amended 1999) (requiring attorney to refuse to represent client if conflicting interests are present); *see* John D. Ayer et al., *Ethics: Is Disinterestedness Still a Viable Option? A Discussion*, 5 AM. BANKR. INST. L. REV. 201, 232 n.112 (1997) (quoting DR 5-105); Theresa M. Mady, *Surrogate Mothers: The Legal Issues*, 7 AM. J. L. & MED. 323, 341 n.95 (1981) (observing that DR 5-105 restricts representation).

[61] MODEL CODE OF PROF'L CONDUCT, DR 5-105 (c) (1998) (amended 1999) (outlining in DR 5-105 when lawyer should remove himself because of conflict of interest, if her "independent professional judgment" may be "adversely affected"); *see*, Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. REV. 1115, 1120-1 (indicating lawyer's interest has been overvalued, especially with respect to informed consent doctrine, and further that client's interests should be controlling, because protection of the client is primary consideration); Douglas R. Richmond, *Accommodation Clients*, 35 AKRON L. REV. 59, 64 (2001) (concluding language of DR 5-105, creates balancing of lawyer's interest and presumptively opposes dual representation).

conflicts of interest in representing adverse clients. New York State, in DR 5-105, deals with a lawyer's possible conflict of interest in much the same way as the Model Code, but also encompasses some language from the ABA Model Rule 1.7 and its comments. Section 1200.24 of the New York Code of Professional Responsibility, more commonly referred to as DR 5-105, deals with the conflict of interest caused by concurrent representation.[62] New York's DR 5-105 provides that a lawyer shall not represent multiple clients if the lawyer's decision making for that client would be negatively impacted by the representation of another client.[63] New York, like the Model Code, provides an exception within the rule itself. A lawyer, under DR 5-105 (c), would be allowed to represent both clients, if a "disinterested lawyer" would after full disclosure to the clients "competently represent the interests of each."[64] This "disinterested lawyer" standard is different from the standard in the Model Code because in the Model Code the decision was left up to the lawyer's personal judgment.[65] Here it appears that the lawyer involved would have to be more objective by trying to view the situation as if she or he was disinterested in the situation.

Perhaps one of the more strict requirements on simultaneous representation arises from Alaska. Rule 1.7(a), which clearly restricts an attorney from accepting adverse representation "in

[62] *See* Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Reexamining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2142 n.87 (1999) (noting NY's DR 5-105 speaks to conflicts of interest); Ze'-ev Eigerand and Brandy Rutan, *Conflicts of Interest: Attorneys Representing Parties with Adverse Interests in the Same Commercial Transaction*, 14 GEO. J. LEGAL ETHICS 945, 951 (2001) (discussing NY's DR 5-105 with regard to conflicts of interest); Abraham C. Reich, Scott L. Vernick & Joshua Horn, *Post-Conference Reflections Screening Mechanism: A Broader Application? Balancing Economic Realities and Ethical Obligations*, 72 TEMPLE L. REV. 1023, 1025 (1999) (stating NY's DR 5-105 involves conflicts of interest)..

[63] *See* 22 N.Y. COMP. CODES R. & REGS. 1200.24, (1998) (amended 1999) (stating: "A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of the client will be or is likely to be adversely affected"); *see also* Patrick M. Connors, *Professional Responsibility*, 50 SYRACUSE L. REV. 827, 857-58 (noting representation of multiple clients is permissible if "disinterested lawyer" could view representation as competent). *See generally* Vincent M. Bonventre, *Professional Responsibility*, 46 SYRACUSE L. REV. 765, 780 n.106 (1995) (discussing case that violated DR 5-105 when conflict of interest existed by representing multiple clients).

[64] 22 N.Y. COMP. CODES R. & REGS. 1200.24 (differing from the Model Rules, by introduction of explicitly objective standard); *see* Dzienkowski, *supra* note 51, at 760 (contending drafters of the Model Rules intended to encourage more objective standard); Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. REV. 29, n.88 (1989) (claiming objective standard is implicit in DR 5-105).

[65] *Supra* note 48 and accompanying text.

the same or substantially related matters."[66] The comment to this rule suggests that a conflict of interest due to simultaneous representation may result in a delay in the case, and because of the possibility of delay an attorney should use "due diligence" to "take all reasonable measures to determine whether or not a conflict of interest exists. . ."[67]

It is clear that the topic of simultaneous representation of adverse parties and the representation of multiple clients is an issue prevalent in many ethical codes. An attorney representing both parties to a prenuptial agreement faces a significant ethical dilemma. This multiple representation may become a conflict of adverse interests. Due to the nature of the relationship between the parties involved in a premarital agreement, there may be certain situations in which independent counsel may be especially important such as when one of the future spouses is considerably more wealthy than the other, or when only one spouse waives his or her rights to an elective share.[68] Another example is when one spouse has a preexisting relationship with the attorney proposed to represent both parties in the drafting of a premarital agreement.[69]

[66] ALASKA RULES OF PROF'L CONDUCT R. 1.7 (1998) (establishing restrictions on conflict of interest doctrine); *see* Steven Kalish, *An Instrumental Interpretation of Model Rule 1.7 (A) in the Corporate Family Situation: Unintended Consequences in Pandora's Box*, 30 MCGEORGE L. REV. 37, 70 (1998) (describing Alaska rule as simultaneous conflict of interest as opposed to prior clients); MacPherson et. al., *Recent Developments in the Law of Conflicts of Interest: Guidelines for the Intellectual Property Lawyer*, 671 PRAC. INST. L. R. 569, 576 (2001) (indicating imposition of reasonable diligence standard for determining conflict of interest).

[67] ALASKA RULES OF PROF'L CONDUCT R. 1.7, cmt. (establishing stringent due diligence standard); *see*, MacPherson, *supra* note 66, at 576 (identifying reasonable diligence standard under Alaska Rule 1.7 in determining conflict of interest); *see also*, Peter B. Brautigam, *Ethical Issues in Estate Planning*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC., August 23, 1996 at 512 (indicating importance of disclosure to the clients at early stage of proceedings).

[68] *See generally*, John M. Burman, *Lawyers and Domestic Violence: Part II*, 24 WYO. LAWYER 37, 38-39 (2001) (discussing conflict of interest and need for independent counsel domestic violence situations); Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 718 (2001) (indicating presumption of informed consent despite not having independent counsel, assuming there is clear language to explaining the significance of possible adverse consequences of prenuptial agreement); John G. Gherini, Note, *The California Supreme Court Swings and Misses in Defining the Scope and Enforceability of Premarital Agreements*, 36 U.S.F.L. REV., 151, 163-64 (2001) (examining California's decision that lack of independent counsel is an important factor in determining enforceability of prenuptial agreement).

[69] *See generally*, Wolford v. Wolford, 785 P.2d 625 (Idaho 1991) (holding prenuptial agreement drafted without independent counsel, was enforceable when there was subsequent contact with independent counsel, prior to signing of agreement); Gant v. Gant, 329 S.E.2d 106, 116 (W.Va. 1985) (stating advice of independent counsel is not

*Attorney-Client Relationship*

Before the discussion of when and how an attorney may ethically represent both parties to a prenuptial agreement, it might be beneficial to explain when and how an attorney-client relationship is formed. Whether an attorney-client relationship exists is a question of fact.[70] An attorney-client relationship does not need to be reduced to writing or formally drafted, although it may be.[71] Payment is not crucial in forming an attorney client relationship.[72] The attorney-client relationship, however, can be sufficiently formed through more informal means, such as through the party's conduct.[73] When deciding if an attorney-client relationship has been formed, courts will often look at "reasonable belief" of the client as to whether he or she reasonably believed that an attorney represented her.[74] Often the

required, (so long as independent counsel could have been obtained) however it is permissible to show absence of fraud or duress); Marston, *supra* note 6, at 914 (advocating requirement of consultation with independent counsel as prerequisite for enforceability of prenuptial agreement).

[70] *See* Bohn v. Cody, 832 P.2d 71, 74 (Wash. 1992) (stating that attorney-client relationship is question of fact); 48 AM. JUR. 2D *Proof of Facts* § 525 (1987) (establishing criteria for determining existence of attorney-client relationship at given point in time for variety of purposes); R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 11.2 n.12 (3d ed. 1989) (claiming attorney-client relationship is factual determination).

[71] *See* Edward C. Brewer, III, *The Ethics of Internal Investigation in Kentucky and Ohio*, 27 N. KY. L. REV. 721, 739 (2000) (discussing that no formal agreement is needed to form attorney-client relationship); Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 161 (1999) (clarifying that attorney-client relationship may form without formal agreement); David N. May, Note, *Inhouse Defenders of Insureds: Some Ethical Considerations*, 46 DRAKE L. REV. 881, 907-08 (1998) (noting attorney-client relationship is contractual and does not require formalism).

[72] *See* David B. Canning, Comment, *Privileged Communications in Ohio and What's New on the Horizon, Ohio House Bill 52 Accountant-Client Privilege*, 31 AKRON L. REV. 505, 516 n.38 (1998) (specifying that payment is of fees is not crucial for formation of attorney-client relationship); Gregory Huffman, Comment, *Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina*, 18 CAMPBELL L. REV. 121, 133 n.94 (1996) (noting attorney-client relationship can be formed with payment of fee); William Andy Jones, *When Are the Corporation's Partner's Also a Client?*, 24 J. LEGAL PROF. 453, 457 (1999/2000) (explaining that fee is not needed to form attorney-client relationship).

[73] *See* David Beck, *Legal Malpractice in Texas: Second Edition*, 50 BAYLOR L. REV. 551, 532 (1998) (stating that attorney-client relationship can be formed by parties conducts); Marshall, *supra* note 25, at 182 (explaining that court looks to parties conduct to see if attorney-client relationship formed); May, *supra* note 71, at 907 (noting that attorney-client relationship may be inferred by parties conduct).

[74] *See* Lanctot, *supra* note 71, at 183 n.16 (stating "reasonable belief" of parties is important factor in determining whether attorney-client relationship existed); Randall Roth, *Understanding the Attorney-Client and Trustee- Beneficiary Relationships in the Kamehamera Schools Bishop Estate Litigation: A Reply to Professor McCall*, 21 HAWAII L. REV. 511, 516 n.19 (1999) (explaining that existence of attorney-client relationship is based on "reasonable belief" of client); John Casey Pipes, Comment, *The Implied*

issue of whether or not an attorney-client relationship is formed in a prenuptial agreement is very complex. As stated earlier, because the nature of the relationship between the engaged couple is different from many other arm's-length contracts, the parties have to act in a fiduciary matter.[75] Often one party may have representation and the other party may not. Although this does not appear to present a problem on its face, the problem arises because the unrepresented party may believe that the attorney is an expert in the law and not interested in either party or that the attorney is representing his or her interests as well.[76] Perhaps the best advice an attorney can give to an unrepresented party is to seek representation.[77]

## REPRESENTATION AND THE UNIFORM PREMARITAL AGREEMENT ACT

The National Conference of Commissioners on Uniform State Laws promulgates the Uniform Premarital Agreement Act (UPAA) in 1983.[78] Since that time it has been adopted in more

*Professional Relationship: An Extension of the Attorney's Duties and Obligations*, 20 J. LEGAL PROF. 319, 324 n.21 (1995/1996) (commenting that attorney-client relationship can be formed based on "reasonable belief" of client).

[75] *See In re* Marriage of Leathers, 789 P.2d 263, 265 (Or. 1990) (commenting that nature of relationship between parties "imposes fiduciary duties in transactions between them"); *see also In re* Estate of Benker, 331 N.W. 2d 193, 196 (Mich. 1982) (discussing relationship of parties to prenuptial agreement is of "extreme mutual confidence"); Del Vecchio v. Del Vecchio, 143 So.2d 17, 21 (Fla. 1962) (stating relationship between parties to prenuptial agreement is of trust).

[76] *See, e.g.*, Tenneboe v. Tenneboe, 558 So.2d 470, 474 (Fla. Dist. Ct. App. 1990) (explaining that unrepresented party may believe attorney is disinterested in parties); Demaggio v. Demaggio, 317 So.2d 848, 849 (Fla. Dist. Ct. App. 1975) (explaining that husband thought attorney represented both parties to his prenuptial agreement). *See generally* Michael Kevin Abernathy, *Client or Adverse Party – Who Shall an Attorney Represent?: Duties Toward and Unrepresented Party in Transactions*, 19 J. LEGAL PROF. 337, 338 (1995) (explaining Model Rules of Professional Conduct require attorneys to rectify situation upon realizing that unrepresented party misunderstands attorney's role in proceeding).

[77] *See In re* Marriage of Foran, 57 Wash. App. 242, 254 (1992) (holding that attorney should advise unrepresented party as to *why* it is important that he or she obtain advice from independent counsel); Abernathy, *supra* note 76, at 343 (commenting it is "very good practice to advise an unrepresented party to seek independent counsel . . ."); William J. Hazzard, *Professional Responsibility: Duties Owed to an Unrepresented Party*, 44 FLA. L. REV. 489, 497 (1992) (noting that comment to Rule 4-4.3 of Model Rules of Professional Conduct advises attorney to not give legal advice to unrepresented party beyond advice to seek independent counsel).

[78] *See* Elizabeth Barker Brandt, *The Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho*, 33 IDAHO L. REV. 539, 544 n.26 (1997) (noting UPAA was promulgated in 1983); DiFonzo, *supra* note 21, at 939 (explaining UPAA was created in 1983); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93

than half of the states.[79] The purpose is to create "uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances . . ." [80]

The Uniform Premarital Agreement Act creates a presumption that premarital agreements are valid and enforceable,[81] and the party seeking to void the agreement has the burden of proving the contrary.[82] Even absent consideration, a prenuptial agreement under the UPAA is valid if it is in writing and signed by both parties.[83] Comment two, of Section two of the UPAA

NW. U.L. REV. 65, 76 (1998) (stating UPAA was promulgated in 1983).

[79] *See* Margaret F. Brinig, *Commentary: Feminism and Child Custody under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 301 n.3 (2001) (stating UPAA has been adopted in twenty five states and District of Columbia); Marston, *supra* note 6, at 889 (explaining UPAA has been adopted in more than half of states); Jennifer M. Stolier, Comment, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT'L & COMP. L. 459, 474 (2001) (explaining that UPAA has been adopted in more than half of states).

[80] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Uniform Premarital Agreement Act, Prefatory Note 1 (1983), *at* http://www.law.upenn.edu/bll/ulc/fnact99/1980s/upaa83.htm (last visited Mar. 9, 2003) (stating Act will relieve past "spasmodic, reflexive response[s]" to various situations and circumstances); *see* Hall v. Hall, 222 Cal. App. 3d 578, 583 (Cal Ct. App. 1990) (noting that general purpose of Act is to create uniformity in law related to premarital agreements among states adopting Act); Jane Aune Deach, Case Comment, *Premarital Settlements: Till Death Do Us Part – Defining the Enforceability of the Uniform Premarital Agreement Act in North Dakota In re Estate of Lutz, 563 N.W.2d 90 (N.D. 1997)*, 74 N. DAK. L. REV. 411, 417 (1998) (stating purpose of Act is to provide "model statute governing premarital agreements that offer states uniformity regarding the enforceability of premarital agreements."). *See generally* Graham, *supra* note 3, at 1050 (discussing motivation behind UPAA, as well as commenting that older rules regarding premarital agreements may have lost force and are being replaced by "modern social policy.").

[81] *See* Schwarz v. Schwarz, No. 01-99-01365-CV, 2000 Tex. App. LEXIS 7828, 5 (Tex. App., 2000) (observing that UPAA creates rebuttable presumption that premarital agreement is valid); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM & MARY L. REV. 145, 160 (1998) [hereinafter Bix, *Bargaining*] (noting under UPAA there is presumption of enforceability); Silbaugh, *supra* note 78, at 79 n.53 (stating presumption of enforceability in prenuptial agreements in UPAA).

[82] *See* Brandt, *supra* note 78, at 544 (noting party challenging prenuptial agreement has burden of proof); Mary McKelvey, *In re Marriage of Bonds: California Supreme Court: Decided: August 21, 2000: 7-0*, 30 SW. U.L. REV. 657, 661 (2001) (stating that challenging party bears burden of proof); David Westfall, *Unmarried Partners and the Legacy of Marvin v. Marvin: Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1483 (2001) (explaining burden of proof lies with challenger).

[83] *See* Jennifer Kim, *Part 3: Getting Married: Contesting the Enforceability of a Premarital Agreement*, 11 J. CONTEMP. LEGAL ISSUES 133, 134 n.10 (2000) (explaining prenuptial agreement is valid absent consideration as long as signed and in writing); Robert H. Martin, *Waivers of Spousal Support in Premarital Agreements*, 1 SAN DIEGO JUSTICE J. 475, 478 (1993) (noting prenuptial agreements that are signed and in writing are valid without consideration). *See generally*, Shukhman, *supra* note 6 (noting written

states, "what appears to be the almost universal rule regarding the marriage as consideration for a premarital agreement."[84] In order to find a prenuptial agreement invalid the party challenging it must prove that the agreement was unconscionable and there must have been nondisclosure.[85]

Perhaps the most relevant section in our discussion is Section 6 discussing enforcement. Section 6 provides the following:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> 1. that party did not execute the agreement voluntarily; or
>
> 2. the agreement was unconscionable when it was executed and, before execution of the agreement, that party
>
> i. was not provided fair and reasonable disclosure of the property or financial obligations of the other party;
>
> ii. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligation of the other party beyond the disclosure provided; and
>
> iii. did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party . . .
>
> (c) An issue of unconscionability of a premarital agreement

signed prenuptial agreement is valid absent consideration).

[84] UNIFORM PREMARITAL AGREEMENT ACT § 2, cmt. (1983); *see* Brett A. Barfield, Comment, *Are Same Sex Prenuptial Agreements Enforceable in Florida? Posik v. Layton, Law & Policy*, 10 ST. THOMAS L. REV. 407, 424 (1998) (discussing marriage as consideration); Katc and Clayman, *supra* note 24, at 446-47 (explaining marriage can serve as form of consideration); Allison J. Chen & Jonathan A. Sambur, Note, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 HOFSTRA LAB. & EMP. L.J. 165, 193 (1994) (indicating that the marriage itself serves as the requisite consideration necessary in a prenuptial agreement).

[85] *See* Bix, *Bargaining*, *supra* note 81, at 155 (noting under UPAA, prenuptial agreement is invalid if there is non-disclosure and unconscionability); Bix, *Premarital Agreements*, *supra* note 5, at 234 n.15 (explaining prenuptial agreement is invalid if unconscionable and there is non-disclosure); Brandt, *supra* note 78, at 565 (discussing premarital agreement is invalid if there is non-disclosure).

shall be decided by the court as a matter of law.[86]

The comments to this section help to explain its significance. The enforcement of a prenuptial agreement, under the Uniform Premarital Agreement Act, depends upon whether the agreement was unconscionable at the time of execution.[87] Whether or not a prenuptial agreement is "unconscionable" is a matter of law to be decided by the court.[88] Unconscionability is meant to encompass the commercial law definition,[89] which includes "protection against one-sidedness, oppression, or unfair surprise."[90] The Comments further suggest that, in determining unconscionability, the court may look at "any relevant evidence such as the conditions under which the agreement was made, including knowledge of the parties."[91] However, all courts are not in agreement. The lack of independent counsel is not a

[86] Uniform Premarital Agreement Act, § 6; *see* Brandt, *supra* note 78, at 541 (opining that section 6 of UPAA is "the key provision."); Graham, *supra* note 3, at 1051 (stating that Section 6, which outlines requirements for enforceability of premarital agreements, is often referred to as "heart" of UPAA).

[87] *See* Bix, *Bargaining*, *supra* note 81, at 155 (explaining enforceability of prenuptial agreement depends upon whether unconscionable at time of execution); Deach, *supra* note 80, at 416 (1997) (stating courts examine whether agreement was fair at time it was made, not at time of judgment); Charlotte K. Goldberg, *"If It Ain't Broke, Don't Fix It" Premarital Agreements and Spousal Support Waivers in California*, 33 LOY. L.A. L. REV. 1245, 1248 (2000) (noting enforceability of prenuptial depends upon whether agreement was unconscionable at time of execution).

[88] *See* UNIFORM PREMARITAL AGREEMENT ACT § 6, cmt. 5; Fazakerly v. Fazakerly, 996 S.W.2d 260, 265 (Tex. App. 1999) (holding that when attempting to invalidate antenuptial agreement, court must decide issue of unconscionability as matter of law before addressing disclosure questions); *see also* Ronald J. Resmini, *The Law of Domestic Relations in Rhode Island*, 29 SUFFOLK U. L. REV. 379, 392-93 (1995) (commenting that in Rhode Island, family court decides issues relating to unconscionability of prenuptial agreements as matter of law).

[89] UNIFORM PREMARITAL AGREEMENT ACT § 6, cmt. 4. *Compare* Marsh v. Marsh, 949 S.W.2d 734, 739-40 (finding "[i]n the absence of clear guidance as to the definition of "unconscionability" in marital property cases, courts have turned to the commercial context.") *with* Dematteo v. Dematteo, 436 Mass. 18, 33 (2002) (finding it inappropriate to use unconscionability as standard for antenuptial agreement and resorting to a "fair and reasonable" test for testing validity of prenuptial agreement).

[90] UNIFORM PREMARITAL AGREEMENT ACT § 6, cmt. 4; *see In re* Marriage of Riedy, 130 Ill. App. 3d 311, 317 (Ill. App. Ct. 1985) (commenting that "[a]n unconscionable bargain is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other."); Robert S. Adler and Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 AKRON L. REV. 31, 41 (Summer 1994) (stating "[t]he doctrine of unconscionability attempts to prevent oppression and unfair surprise, but not to relieve a party from a bad bargain).

[91] UNIFORM PREMARITAL AGREEMENT ACT § 6, cmt. 5 (1983); *see, e.g.*, Adler and Mann, *supra* note 90, at 40-41 (explaining that circumstances existing at time of contract formation can be used to determine unconscionability); Goldberg, *supra* note 87, at 1264 (stating that in determining unconscionability, investigations could lead back to pre-marital knowledge or expectations of finances or property).

"condition for the unenforceability of premarital agreement,"[92] although it may be a "factor in determining whether the conditions stated in Section 6 may have existed." [93]

Although there is no "absolute requirement" of independent counsel under the UPAA, some courts have held that, where an agreement is "patently unreasonable," independent counsel is required to have the agreement be enforceable.[94] Although other non-UPAA courts hold to the contrary, under the Uniform Premarital Agreement Act there is a presumption of validity and enforceability, a carte blanche requirement of independent counsel would be "arbitrary and unnecessary."[95] The idea behind this notion of not requiring independent counsel in a prenuptial agreement is that individuals should be allowed to order their own affairs.[96]

However, since there is a fiduciary relationship between the parties, each party must exercise the "highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement."[97]

[92] UNIFORM PREMARITAL AGREEMENT ACT § 6, cmt. 6 (1983); *see* McKee-Johnson v. Johnson, 444 N.W.2d 259, 266 (Minn. 1989) (noting that wife's opportunity to consult with independent counsel would be factored into court's enforcement of premarital agreement). *But see* Deach, *supra* note 80, at 431 (stating that North Dakota Supreme Court used lack of independent counsel in determining enforceability of agreement).

[93] UNIFORM PREMARITAL AGREEMENT ACT § 6, cmt. 6 (1983); *see In re* Estate Crawford, 107 Wash.2d 493, 496 (1986) (holding independent counsel was used to determine existence of voluntariness and other Section 6 factors); Deach, *supra* note 80, at 431 (noting that it may be used in determining whether voluntariness existed).

[94] *See e.g.*, Foran v. Foran, 67 Wash. App. 242, 256 (1992) (explaining that when agreement is "patently unreasonable" independent counsel is required); *Crawford*, 107 Wash.2d at 496-97 (noting that there is no requirement for independent counsel); *see also* Gherini, *supra* note 68, at 166 (commenting that UPAA should but does not require independent counsel for both parties).

[95] *Crawford*, 107 Wash.2d at 497 (noting existence of arbitrariness especially when "strong independent mind," free from "objectionable influence" is established); *see* Whitney v. Seattle First National Bank, 90 Wash.2d 105, 109 (1978) (holding that independent counsel was unnecessary due to fair, reasonable nature of agreement); Fletcher v. Fletcher, 68 Ohio St. 3d 464, 473 (1994) (Resnick, J., dissenting) (arguing that agreements should be unenforceable unless forfeiting party is represented by independent counsel).

[96] *See* Bix, *Bargaining*, *supra* note 81, at 146 (1998) (commenting that individuals should be allowed to order their own affairs); Silbaugh, *supra* note 78, at 136 (acknowledging courts in favoring individual's ordering their own affairs); Fraatz, *supra* note 4, at 459 (noting ability to order own affairs is "essential" for stability).

[97] *Crawford*, 107 Wash.2d at 497 (explaining that parties to prenuptials do not deal at arm's length, rather their relationship is one of mutual trust and confidence); *see* Hamlin v. Merlino, 44 Wash.2d 851, 864 (1954) (noting strict requirements of good faith imposed upon intended husband). *But see*, Adler and Mann, *supra* note 90, at 41-42 (recognizing obligation of good faith in arm's length contracts as well).

## JOINT REPRESENTATION AND THE COMMON LAW

Although the UPAA has been adopted in the majority of states, there are still states that chose to follow the common law.[98] As indicated above, prenuptial agreements are no longer considered void as against public policy.[99] Today, courts not only recognize premarital agreements as valid, but even find them favored in public policy. Accordingly, courts have set forth requirements for valid prenuptial agreements.[100] Although the requirements for a valid prenuptial agreement may vary according to jurisdiction there are three common criteria.[101] The first criterion asks whether the agreement was created as a result of "fraud, duress or mistake, or misrepresentation or nondisclosure of material fact."[102] The second criterion is whether the agreement was unconscionable when executed and the third is whether the situation has changed since the agreement was made making its enforcement "unfair and unreasonable."[103] If none of the three questions is answered in the affirmative then the court generally

[98] *See* Atwood, *supra* note 15, at 136 (stating that states that followed common law had little guidance in prenuptial agreements); Homer H. Clark, *Antenuptial Contracts*, 50 COLO. L. REV. 141, 148 (1979) (noting that many states continue to rely on common law); Shukhman, *supra* note 6, at 463-64 (clarifying requirements that common law states use in prenuptial agreements).

[99] *See* Button v. Button, 388 NW 2d 546, 548 (Wis. 1986) (explaining useful financial function of premarital agreements in helping people achieve expectations, as well as financial certainty); *TJAGSA Practice Note: Legal Assistance Items*, 1992 ARMY LAW. 43 (noting historical contempt for premarital agreements has been discarded). *See generally* Davis, *supra* note 17, (indicating significant judicial recognition of premarital agreements through rulings that make these agreements binding on creditors).

[100] *See* Bix, *Premarital Agreements*, *supra* note 5, at 234 (explaining existence of procedural rights as well, such as need to be in writing); Featherson and Douthitt, *Changing the Rules by Agreement. The New Era in Characterization, Management and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 298-99 (Spring 1997) (noting that Texas statute affects prenuptial requirements); Faun M. Phillipson, *Fairness of Contract v. Freedom of Contract: The Problematic Nature of Contract Obligation in Pre-Marital Agreements*, 5 CARDOZO WOMEN'S L. J. 79, 98 (stating requirements exist for contractual fairness purposes).

[101] *See* Brooks v. Brooks, 733 P.2d 1044, 1049 (Alaska 1987) (noting three common criteria considered in questioning validity of prenuptial agreement); Gant v. Gant, 329 S.E. 2d 106, 112 (W. Va. 1985) (explaining that three criteria are considered in light of public policy recognizing rapid growth in divorce rate); Scherer v. Scherer, 249 Ga. 635, 641 (Ga. 1982) (holding that Trial Judge has discretion in determining three criteria).

[102] *Brooks* 733 P.2d at 1049. *See* Posner v. Posner, 257 So. 2d 530, 534 (Fla. 1972) (holding prenuptial invalid due to nondisclosure); Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) (explaining that prior to three criteria wife will be bound even though husband failed to disclose).

[103] *See Brooks*, 733 P.2d at 1049; Allen v. Allen, 400 S.E.2d. 15, 16 (Ga. 1991) (using same three criteria for determining validity of marriage agreement); Gentry v. Gentry, 798 S.W.2d. 928 (Ky. 1990) (applying same three criteria to antenuptial agreement).

recognizes the agreement.[104] A valid prenuptial agreement must be "fair, equitable and reasonable in view of the surrounding circumstances."[105] "It must be entered into voluntarily by both parties, with each understanding his or her rights and the extent of the waiver of such rights."[106]

Perhaps the clearest test is a two-prong test. The first prong of analysis is whether the prenuptial agreement "provides fair and reasonable provisions for the party not seeking enforcement of the agreement."[107] If the court decides it does then the agreement is valid; if it does not then the court will move to the second-prong of analysis.[108] The second-prong asks two distinct questions. The first question is whether there was full disclosure by the parties in which they disclosed "the amount, character, and value of the property involved."[109] The second question involves whether the parties entered into the agreement, "fully

[104] *Brooks*, 733 P.2d. at 1049 (explaining if none of three criteria are met prenuptial agreements are generally recognized); *see In re* Marriage of Pendleton & Fireman, 5 P.3d. 839, 845-46 (Cal. 2000) (stating demographic trends of state courts in allowing waiver of spousal support through prenuptial agreements). *See generally Ex parte* Walters, 580 So.2d 1352, 1354 (Ala., 2000) (stating that prenuptial agreements are generally enforceable if certain standards of fairness, free will, and knowledge are satisfied).

[105] *In re* Estate of Benker, 331 N.W.2d 193, 196 (Mich. 1982). *See generally* Snedaker v. Snedaker, 660 So.2d 1070, 1072 (Fla. Dist. Ct. App. 1995) (requiring prenuptial agreement be fair and reasonable); Frey v. Frey, 471 A.2d 705, 711 (Md. 1984) (stating antenuptial agreement is enforceable if it is fair and equitable in procurement and result).

[106] *Benker*, 331 N.W.2d at 196; *see Brooks*, 733 P.2d at 1049 (stating that one factor that can invalidate otherwise valid prenuptial agreement is if one party did not voluntarily waive his or her rights, or could not have had knowledge of the waiver of his or her rights); *In re* Marriage of Bonds, 5 P.3d 815, 822-23 (Cal. 2000) (stating that prenuptial agreement is valid only if party did not voluntarily waive rights to property, or could not have reasonably have had knowledge of the other parties property or finances).

[107] *In re* Marriage of Matson, 730 P.2d 668, 670 (Wash. 1986) (cited in Foran v. Foran, 834 P.2d 1081, 1085 (1992)). *See generally* Rolfe v. Rolfe, 130 A. 877, 878 (Me. 1925) (stating that gross disproportionality in provision for spouse may invalidate the antenuptial agreement); Sogg v. Nevada State Bank, 832 P.2d 781, 784 (Nev. 1992) (stating that some jurisdictions presume fraud where the agreement greatly disfavors the party not seeking enforcement).

[108] *Matson*, 730 P.2d at 670; *see, e.g., In re* Estate of Crawford 730 P.2d 675, 678 (Wash. 1986) (holding prenuptial agreement unfair based on same prongs in *Matson* because no provisions were made for spouse in event of divorce or death); *In re* Marriage of Fox, 795 P.2d 1170, 1172 (Wash. Ct. App. 1990) (outlining two pronged test set out in *Matson*, including first consideration of whether there were fair and reasonable provisions provided in the agreement).

[109] *Matson*, 730 P.2d at 670. *See generally* Conley, *supra* note 18, at 1024-25 (explaining that most jurisdictions require disclosure of nature and extent of assets for antenuptial agreements to be valid); David Westfall, *Unmarried Partners and the Legacy of Marvin v. Marvin: Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institutes Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1484-90 (2002) (discussing ALI's requirements of disclosure of assets and income for purposes of premarital agreements).

and voluntarily on independent advice and with full knowledge by [both spouses of their] rights."[110] The common law in its two-prong analysis differs from the UPAA. The UPAA only questions whether there is "fair and reasonable disclosure," not specific, detailed disclosure.[111]

The question of full and fair disclosure is discussed in many cases. Full and fair disclosure is commonly required in prenuptial agreements; however, full disclosure does not necessarily mean disclosure of each asset owned.[112] Full and fair disclosure requires that each party to the premarital contract "be given a clear idea of the nature, extent and value" of the other parties' assets.[113] Even absent full and fair disclosure, an antenuptial agreement may still be valid if the spouse seeking to void the agreement had "independent knowledge" of the "full nature, extent, and value or the other spouses' property and holdings."[114] Whether full and fair disclosure was given or is

[110] *Matson*, 730 P.2d at 670. *See generally In re* Marriage of Norris, 624 P.2d 636, 640 (Or. Ct. App. 1981) (holding invalid a prenuptial agreement where wife did not have knowledge of husband's property, and did not have time to retain advice of counsel independently); Bauer v. Bauer, 464 P.2d 710, 711 (Or. Ct. App. 1970) (holding agreement unenforceable when husband presented it on day parties left town to get married and failed to disclose his assets and allow sufficient time for wife to consult lawyer independently).

[111] *See* Bix, *Bargaining*, *supra* note 81, at 145, n.36 (quoting UPAA requirement that there be fair and reasonable disclosure to both parties). *See generally* Brandt, *supra* note 78, at 565 (stating that although detailed disclosure is best, disclosure is not mandatory in all circumstances under UPAA); Shukhman, *supra* note 6, at n.73 (stating UPAA requirements for enforcement of prenuptial agreements, including "fair and reasonable disclosure").

[112] *See, e.g.*, Randolph v. Randolph, 937 S.W.2d 815, 820-21 (Tenn. 1996) (stating that spouse seeking to enforce antenuptial agreement must prove full and fair disclosure of the nature, extent, and value of his or her holdings was provided to the spouse seeking to avoid the agreement); *see also* Conley, *supra* note 18, at 1027 (discussing that full and fair disclosure does not require "exact and detailed" disclosure of assets). *See generally* Counce, *supra* note 18, at 1054 (explaining full disclosure means nature and extent of assets).

[113] Humphries v. Humphries, No. E1999-02694-R3-CV, 2000 Tenn. App. LEXIS 455, at *27-28 (Tenn. Ct. App. July 18, 2000) (explaining that while disclosure need not reveal precisely every asset owned by an individual spouse, at a minimum, full and fair disclosure requires that each contracting party be given a clear idea of the nature, extent, and value of the other party's property and resources). *But see* Hess v. Hess, 580 A.2d 357, 359 (Pa. Super. Ct. 1990) (stating that full disclosure requires that a reasonable estimate of the worth of the assets must be attempted so that the general financial resources of the parties are not obscured). *See e.g.*, Lowe v. Lowe, No. E2000-01456-COA-R3-CV, 2001 Tenn. App. LEXIS 401, at *4 (Tenn. Ct. App. May 30, 2001) (quoting *Randolph*, stating "While disclosure need not reveal precisely every asset owned by an individual spouse, at a minimum, full and fair disclosure requires that each contracting party be given a clear idea of the nature, extent, and value of the other party's property and resources.").

[114] *Humphries*, 2000 Tenn. App. LEXIS 455, at *28 (holding that disclosure of the

needed depends on the particulars of each case.[115] The party challenging the prenuptial agreement bears the burden of proof.[116] Further, "in the absence of proof of facts from which concealment or imposition may reasonably be inferred, fraud will not be presumed . . . such a presumption must have as its basis evidence of overreaching, the concealment of facts, misrepresentation or some form of deception."[117] Courts have typically looked at substantive fairness at the time of dissolution on a case-by-case basis.[118] This means that an agreement will only be invalidated with regard to provisions that are unforeseeable, one-sided or unconscionable at the time of dissolution not at the time of enforcement or execution.[119] In *In Matter of Greiff*,[120] the New York court examined the burden

nature, extent, and value of a spouse's holdings was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the spouse's holdings); *see* Pite v. Pite, No. FA990429262S, 2001 Conn. Super. LEXIS 522, at *21 n.4 (Conn. Super Ct. Feb 20, 2001) (explaining that party's general knowledge of other's assets may be enough to protect against overreaching). *See generally* Deach, *supra* note 80, at 422-23 (explaining that adequate knowledge of the other spouse's obligations or property is one of a few things that can help to determine enforceability of an antenuptial agreement).

115 *See* Judith T. Younger, *Perspectives On Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. LAW. 1, 26 (1992) (noting that extent of disclosure varies depending upon several factors considered by reviewing court). *See generally* Atwood, *supra* note 15, at 138 (indicating that some courts maintain power to review agreement terms); Westfall, *supra* note 109, at 1489 (stating court will make findings based on facts presented at time of trial).

116 *See* Brandt, *supra* note 78, at 541 (noting party challenging prenuptial agreement has burden of proof); Mary McKelvy, *In re Marriage of Bonds: California Supreme Court: Decided: August 21, 2000: 7-0*, 30 SW. U.L. REV. 657, 661 (2001) (stating that challenging party must carry weight of evidence); Westfall, *supra* note 109, at 1481 (revealing that onus of proof lies with challenger).

117 Elgar v. Elgar, 679 A.2d 937, 944 (Conn. 1996) (quoting Matter of Sunshine, 381 N.Y.S.2d 260, 262 (App. Div. 1976)); Matter of Phillips, 293 N.Y. 483, 491 (1944) (cited in Panossian v. Panossian, 172 A.D.2d 811, 812 (N.Y. 1991). *See generally* Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1444-45 (1984) (highlighting that inequality of terms alone may be insufficient to set aside agreement in "absence of fraud, duress, overreaching, concealment.").

118 *See generally* Atwood, *supra* note 15, at 139 (articulating that analysis is performed on each case individually); Goldberg, *supra* note 87, at 1264-65 (proffering that case specific examination is performed upon dissolution proceedings); Sharp, *supra* note 117, at 1444 (explaining that judicial approval may be withheld at time of divorce if such were product of unfair bargaining methods).

119 *See* McKee-Johnson v. Johnson, 444 N.W.2d 259, 267 (Minn. 1989) (asserting that freedom of contract limits invalidity to conditions unforeseeable at time of execution). *See generally* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 257 (1995) (purporting that such agreements are afforded a second look at dissolution); Goldberg, *supra* note 87, at 1264-65 (explaining court scrutiny at time of divorce to find altered circumstances not foreseeable at time of contract execution).

120 92 N.Y.2d 341 (1998).

upon a party to a prenuptial agreement.[121] Traditionally, a party seeking to "vitiate: a contract based upon fraud bears the burden of proof.[122] However, *Greiff* held "that where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed . . . to disprove fraud or overreaching."[123] What causes the burden to shift is a "specific fact based inequality."[124] Therefore, "it is incumbent on the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair and open, voluntarily and well understood."[125] The question then becomes whether at the time of execution the nature of the relationship between the parties was such that it shifted the burden of proof to the "proponents of the agreement to prove freedom form fraud, deception or undue influence."[126]

[121] *See* id. at 343 (determining which party bears weight of persuasion in subsequent divorce proceedings where premarital agreement has been executed); *see also Elgar*, 679 A.2d at 944 (noting challenger bears responsibility to proffer evidence sufficient to show fraud). *See generally* Shukhman, *supra* note 6, at 465 (advocating that burden of proof regarding premarital agreements resides with challenging party).

[122] *See Greiff*, 92 N.Y.2d at 344 (noting customary requirement confronting challenging party); Parker v. Parker, 413 N.Y.S.2d 388, 391 (App. Div. 1979) (upholding principle that evidentiary burden usually lies with disputing litigant); *see also* Gordon v. Bialystoker Center, 45 N.Y.2d 692, 698 (1978) (asserting "fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground." (quoting Cowee v. Cornell, 75 N.Y. 91, 99 (1878)).

[123] *Greiff*, 92 N.Y.2d at 344. *See generally* E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.20 (2d ed. 2001) (discussing implications for enforcement of contractual provisions where parties are shown to share relationship of trust or confidence); Brandon Campbell, *Cohabitation Agreements in Massachusetts: Wilcox v. Trautz Changes In the Rules But Not the Results*, 34 NEW ENG. L. REV. 485, 506 (2000) (recognizing that confidential relationships must be scrutinized closely).

[124] *See Greiff*, 92 N.Y.2d at 346 (1998) (noting that court must allow for calibration and application of these legal principles); Joel R. Brandes, *The Validity of Prenuptial Agreements*, N.Y.L.J., Dec. 22, 1998, at 3 (stating that special burden may be shifted to party in whom trust is reposed to disprove fraud or overreaching); *Proponent of Prenuptial Agreement Bears Burden of Proof*, N.Y.L.J., Oct. 28, 1998, at 26 (citing *Greiff*).

[125] Cowee v. Cornell, 75 N.Y. 91, 99-100 (1878) (cited in Greiff v. Greiff, 92 N.Y.2d 341, 345 (1998)); Kevin Livingston, *Burton Lays Down Law with Enron Sedgwick Names New Managing Partner*, THE RECORDER, Sept. 14, 2001, at 2 (discussing bill that will make all prenuptial agreements in state invalid unless voluntarily signed by both parties); Brandes, *supra* note 124, at 3 (citing *Greiff*).

[126] *Greiff*, 92 N.Y.2d at 343 (1998); Myrna Felder, *Guidance Provided on Two Major Issues*, N.Y.L.J., Oct. 4, 1999, at S6 (quoting *Greiff*); *Court Decisions*, N.Y.L.J., May 10, 1999, at 31 (quoting *Greiff*).

## ANALYSIS

Lack of independent counsel is not fatal to a prenuptial agreement.[127] The mere fact that a party was not represented is not enough, per se, to have a marital settlement agreement vacated or modified.[128] The parties must have an opportunity to consult with an attorney, however, the lack of counsel in the formulation of a prenuptial agreement can be a factor or serve to corroborate a claim of fraud, deceit, duress, non-disclosure, coercion or overreaching.[129] Also, the fact that one party was unrepresented is a factor in determining whether the agreement was entered into voluntarily.[130] The term voluntary determines whether the parties knowingly entered into the agreement, which means they understood the "terms or basic effect of the agreement."[131] The determination of whether a party "knowingly" or "voluntarily" entered into an agreement is decided on a case-by-case basis, and the court frequently looks to some factors including, but not limited to, the sophistication and experience of the parties with regard to business dealings, the time between the signing of the agreement and the wedding, the length of the

[127] *See* Tenneboe v. Tenneboe, 558 So.2d 470, 473 (Fla. Dist. Ct. App. 1990) (explaining lack of independent counsel is not enough to invalidate prenuptial agreement); Barbara Drury, *For Richer, For Poorer*, THE AGE, April 1, 2002, at 8 (commenting on only times prenuptial agreement may be set aside); Rovella, *supra* note 7, at 11 (discussing near impossibility of having agreements set aside).

[128] *See* Cowen v. Cowen, 95 So.2d 584, 585 (Fla. 1957) (explaining incompetent counsel is not basis for vacating agreement in dissolution proceeding); Bubenik v. Bubenik, 392 So.2d 943, 944 (Fla. Dist. Ct. App. 1980) (noting lack of legal representation is not enough to invalidate agreement); McGuire v. McGuire, 385 So.2d 151, 152 (Fla. Dist. Ct. App. 1980) (commenting lack of legal representation is insufficient to modify or invalidate agreement).

[129] *See In re* Estate of Benker, 416 Mich. 681, 693 (1982) (noting lack of independent counsel is factor in considering voluntariness of prenuptial agreement); *McGuire*, 385 So.2d at 152 (commenting in prenuptial agreements lack of independent counsel as factor); Scott Barancik, *Beer Brawl; The Broken Pieces of a Millionaire Marriage*, ST. PETERSBURG TIMES, June 9, 2002, at 1H (discussing case where lack of counsel was argued to be factor in claim of coercion).

[130] Bonds v. Bonds, 24 Cal. 4th 1, 22 (2000) (noting fact that one party is unrepresented is factor in considering voluntariness); *see* Lutgert v. Lutgert, 338 So.2d 1111, 1116-17 (Fla. Dist. Ct. App. 1976) (discussing parties right to obtain legal advice while considering validity of prenuptial agreement); Conley, *supra* note 18, at 1036 (listing opportunity to consult with independent counsel as one relevant factor in determining if antenuptial agreement is enforceable).

[131] *Bonds*, 24 Cal. 4th at 17-18 (2000) (explaining voluntariness of agreement considers whether party involved knowingly entered into agreement); *see* Del Vecchio v. Del Vecchio, 143 So.2d 17, 21 (Fla. 1962) (commenting that party having some understanding of waiver is sufficient to keep agreement enforced); Hafner v. Hafner, 295 N.W. 2d 567, 571-72 (Minn. 1980) (noting party understood purpose of agreement).

relationship between the engaged couple prior to the signing of the agreement, and of course the "parties' representation by, or opportunity to consult with, independent counsel."[132] In order for a prenuptial agreement to be valid it must be "fair, equitable, and reasonable in view of the surrounding facts and circumstances."[133] "It must be entered into voluntarily by both parties, with each understanding his or her rights and the extent of the waiver of such rights."[134] Therefore, and despite the fact that the parties to a prenuptial agreement are not required to have independent counsel, it is recommended because often their interests will be adverse and the independent representation will help to establish voluntarily and knowingly entering into the agreement.[135] Thus the court in *In re Matson*[136] stated that independent counsel is strongly advised, "to provide the best opportunity for both sides to receive objective and independent information regarding the legal consequences of the agreement."[137] Also, independent counsel is advisable because

[132] Humphries v. Humphries, No. E1999-02694, 2000 Tenn. App. LEXIS 455, at *29 (Tenn. Ct. App. July 18, 2000) (listing factors to consider in each case to determine if parties voluntary entered into prenuptial agreement); *see* Conley, *supra* note 18, at 1036 (exploring factors determining parties volutariness of prenuptial agreements); *see also In re Leathers*, 309 Or. 625, 629 (1990) (Van Hoomissen, J., dissenting) (noting sophistication of wife was factor in determining if she fully understood prenuptial agreement's "effect and terms").

[133] *Benker*, 416 Mich. at 689 (1982) (stating an antenuptial agreement must be fair, equitable and reasonable to be valid); *see also* Richard v. Detroit Trust Co., 269 Mich. 411, 416 (1934) (stating law of this state recognizes there must be good faith, fair dealings and open disclosure for agreement to be valid); Hockenberry v. Donovan, 170 Mich. 370, 380 (1912) (stating in absence of fraud and upon sufficient consideration agreement is valid, enforceable and not against public policy).

[134] *Benker*, 416 Mich. at 689 (1982) (stating that agreement must be entered into voluntarily and with parties understanding his or her rights); *see also Hockenberry*, 170 Mich. 370 at 380 (stating parties must have full understanding of agreement); Chen & Sambur, *supra* note 84, at 193 (1999) (stating prenuptial agreement must be entered into voluntarily and be consistent with public policy).

[135] *See Leathers*, 309 Or. at 630 n.5 (1990) (noting prenuptial agreements made with advice of independent counsel are more likely to be upheld); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, n.239 (1997) (stating prenuptial agreement is invalid where only husband had counsel and wife did not); Mike McKee, *Bonds Hits Supreme Court Grand Slam*, THE RECORDER, Aug. 22, 2000, at 1 (explaining independent counsel speaks to voluntariness of agreement).

[136] *In re* Marriage of Matson, 107 Wash.2d 479 (1986).

[137] *Matson*, 107 Wash.2d. 488 (1986) (stating court urges both parties to seek independent counsel prior to signing premarital agreement); see also *In re* Estate of Crawford, 107 Wash.2d 493, 496 (1986) (noting to prevent abuse and overreaching of dominant party court will look at whether agreement was entered into with advice of independent counsel and with full awareness of economic and legal ramifications of agreement); *In re* Marriage of Foran 67 Wash. App. 242, 256 (Ct. App. 1992) (citing *Matson*, 107 Wash.2d 479 (1986)).

legal policy disfavors waivers of marital rights without the consultation of independent counsel.[138]

*Attorney's Obligation to Client (Represented Party)*

The relationship between the attorney and his or her client is that of counselor, advisor and sometimes an intermediary.[139] This relationship demands trust and confidentiality.[140] The first aspect of this relationship is that the lawyer must be competent.[141] A lawyer is competent to handle a client's case if she or he has the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[142] It is

[138] *Foran*, 67 Wash. App. at 251-52 (noting legal policy disfavors waivers in prenuptial agreements without guidance of independent counsel); see also *Matson*, 107 Wash.2d. at 488 (noting court insists both parties enter into agreement intelligently before it will bind parties); Marston, *supra* note 6, at 898 (stating agreement provisions which conflict with public policy will not be enforced).

[139] Bruce A. Green, *Thoughts About Corporate Lawyers After Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407, 417 (2001) (stating lawyers served as intermediaries); Carl A. Pierce, *ABA Model Rule 2.2: Once Applauded and Widely Adopted, Then Criticized, Ignored or Evaded, Now Sentenced to Death with Few Mourners, But Not in Tennessee*, 2 TENN. J. BUS. L. 9, 15 (2000) (discussing how lawyer acts as intermediary and advisor); Sandra E. Purnell, Comment, *The Attorney as Mediator-Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 992 (1985) (noting sometimes lawyers act as intermediaries or advisors).

[140] *See* Rachel S. Arnow Richman, *A Cause Worth Quitting for? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel*, 75 IND. L.J. 963, 972 (2000) (stating attorney-client relationship is one of trust and confidence); Cathyrn C. Dakin, Note, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043, 1045 (1995) (commenting attorney client relationship is one of trust and confidence); Linda Ann Reid, Note, *Crockett and Brown, P.A. v. Courson: Determining the Fee of an Attorney Discharged "For Cause"*, 47 ARK. L. REV. 725, 747 (1994) (explaining attorney client relationship is one of trust and confidence).

[141] Michelle Craven & Michael Pitman, *To the Best of one's Ability: A Guide to Effective Lawyering*, 14 GEO. J. LEGAL ETHICS 983, 983 (2001) (noting ABA Model Rules of Professional Conduct require attorney competence); *see also* Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135, 1142 (2001) (stating there is duty of competent representation of client); Brad S. McLelland, Comment, *Attorney Competence or Lack thereof-Under What Circumstances may an Attorney Handle a Matter in which the Attorney is not Competent? Is an Ethical Rule Necessary to restrain such an Attorney?*, 22 J. LEGAL PROF. 297, 298 (1998) (stating courts will guard defendant's right to have competent counsel).

[142] MODEL RULE OF PROF'L CONDUCT R 1.1 (discussion Draft 1983) (stating "A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill thoroughness and preparation reasonably necessary for the representation."); D. Franklin Arey, III, Essay, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. APP. PRAC. & PROCESS 27, 27 (2000) (stating competence is demanded of every attorney); Hon. Kay D. Sloan, Essay, *Competence Means Never Having to Say You're Sorry*, 28 STETSON L. REV. 335, 335 (1998) (noting competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for representation).

true that no attorney is competent in every area of law; however, in the area of matrimonial law, lawyers are often asked about other areas of law and personal advice as well.[143] The American Academy of Matrimonial Lawyers provides in Rule 1.3 that an attorney should not advise a client in areas in which the lawyer "is not sufficiently competent."[144] It is further suggested that a matrimonial lawyer should advise and recommend to the client to consult with other professionals and more competent lawyers if it is in the client's best interest to do so.[145] New York does not affirmatively require competence, but instead states that a lawyer shall not handle a case in which he or she is not competent.[146] New York goes further to require that a lawyer be a zealous advocate and lists prohibitions of what a lawyer shall not do in order to zealously represent a client.[147]

[143] *See* Michael Klausner, Geoffrey Miller & Richard Painter, Symposium, *The Law and Economics of Lawyering, Second Opinion in Litigation*, 84 VA. L. REV. 1411, 1414 (1998) (stating lawyer may be incompetent); Lanctot, *supra* note 71, at 219 (stating lawyer should not answer questions as to what client should personally do); Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 263 (1993) (stating lawyer should not offer advice that is not accurate).

[144] *The Bounds of Advocacy, American Academy of Matrimonial Lawyers Standards of Conduct*, 9 J. AM. ACAD. MATRIMONIAL LAW 7 (1992) (stating attorney should not advise clients in areas which attorney is not competent); *see also* Joan F. Kessler, Allan R. Kortzinsky & Stephen W. Schlissel, *Why Arbitrate Family Law Matters?*, 14 J. AM. ACAD. MATRIMONIAL LAW. 333, 334 (1997) (noting American Academy of Matrimonial Lawyers has adopted rules for arbitration); Christine Albano, Comment, *Binding Arbitration: A Proper Forum for Child Custody?*, 14 J. AM. ACAD. MATRIMONIAL LAW. 419, 443 (1997) (stating arbitrator must be recognized by bench and bar in jurisdiction as expert in matrimonial law).

[145] *The Bounds of Advocacy, American Academy of Matrimonial Lawyers Standards of Conduct*, *supra* note 144, at 7 (stating matrimonial lawyer should suggest client consult more competent attorneys or professionals if in clients best interest); *see also* Meredith J. Duncan, Article, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, n.209 (stating lawyer should be competent, prompt and diligent in all professional functions); John A. Tisdale, Note, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Employment Opportunity.*, 64 B.U.L. REV. 151, 164 (1984) (stating adequacy of representation requires counsel to be competent).

[146] *See* NEW YORK CODE OF PROF'L RESPONSIBILITY, DR 6-101 (amended 1999) (stating that a lawyer shall not "handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it."); Michelle Craven & Michael Pitman, *supra* note 141, at 988 (noting New York's DR 6-101 does not affirmatively require competence). *See generally* Comm. On Prof'l Ethics, Op. 751 (2002) (discussing how attorney representing government agency may not undertake more matters than attorney can competently handle).

[147] *See* NEW YORK CODE OF PROF'L RESPONSIBILITY, DR 6-101 (amended 1999) (requiring that a lawyer shall not handle a legal matter without adequate preparation or neglect a legal matter entrusted to him or her); Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 67 ALB. L. REV. 153, 201 (2000) (commenting that New York demands

Another obligation that the lawyer owes his or her client is that of diligence.[148] A lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[149] Although a lawyer has "professional discretion" in determining how to proceed in a case, he or she should act with "commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[150] The client, as a result, is entitled to the lawyer's honest and candid advice referring not only to law "but other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[151] Typically the attorney-client relationship is thought of in terms of one attorney and one client; however, this is not always the case. A lawyer can also act as an intermediary between multiple clients.[152] Under the ABA Model Rules of

attorneys to be zealous advocates); Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857, 1865 (1996) (noting New York mandates "zealous advocacy").

[148] *See* McCoy v. Court of Appeals, Dist. 1, 486 U.S. 429, 442 (1988) (discussing diligent attorney); Moores v. Greenberg, 834 F.2d 1105, 1108 (1st Cir. 1987) (specifying attorney's duty to use degree of skill, diligence, and judgment); Cannon v. Cherry Hill Toyota, Inc., 190 F.R.D. 147, 162 (D.N.J. 1999) (discussing lawyer's duty to represent his client with diligence).

[149] MODEL RULES OF PROF'L CONDUCT, R. 1.3, cmt. 1 (1983); *see* Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics that we Can Learn on the Road*, 15 GEO J. LEGAL ETHICS 95, 99-100 (2001) (asserting that Rule 1.3 is among most frequently violated rules of professional conduct); Roger C. Crampton, *What Does it Mean to Practice Law "in the Interests of Justice" in the Twenty-first Century?: Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1601-02 (2002) (noting that zealous advocacy, while excised from black letter of Model Rules, is considered by many lawyers to be their most sacred duty).

[150] MODEL RULES OF PROF'L CONDUCT, R. 1.3, cmt. 1 (1983); *see* Douglas H. Yarn, *The Attorney as Duelist's Friend: Lessons from the Code Duello*, 51 CASE W. RES. L. REV. 69, 80 (2000) (clarifying that zealous advocacy is limited to representation of parties within adversarial forum); *cf.* Allen K. Harris, *The Professionalism Crisis – The 'z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 579 (2002) (cautioning that some attorneys may erroneously rely on language in comment to Rule 1.3 in order to justify excessive and improper practices).

[151] MODEL RULES OF PROF'L CONDUCT, R. 2.1 (1983); *see* Geoffrey C. Hazard, Jr., *Under Shelter of Confidentiality*, 50 CASE W. RES. L. REV. 1, 13 (1999) (asserting that Rule 2.1 permits but does not require counseling beyond the scope of legal advice); Jonathan M. Hyman, *Slip-Sliding into Mediation: Can Lawyers' Mediate their Clients' Problems?*, 5 CLINICAL L. REV. 47, 75 n.63 (1998) (noting that lawyers are free to advise clients that stated objectives of client may be unwise, impractical, or immoral).

[152] *See* H. Lowell Brown, *A Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 811 (1996) (noting lawyer may act as intermediary);Yarn, *supra* note 150, at 213 (discussing lawyer as intermediary); Jankowski, *supra* note 47, at 184 n.19 (1993) (explaining lawyers as intermediaries).

Professional Conduct an attorney may act as an intermediary after consultation regarding the implications of the common representation, including the risks with all clients involved.[153] This common representation, such as would be the case in a prenuptial agreement, is allowed contingent upon the fact that the lawyer believes that the "common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients."[154] The attorney must also "reasonably" believe that the matter can be resolved in the best interest of the clients, and, if the suggested solution is not accepted, that none of the clients will be materially prejudiced.[155] If the attorney is either asked to withdraw by either of the clients or must withdraw, then the attorney may not further represent either party in the subject in which he or she acted as an intermediary.[156]

*Attorney's Obligation to Unrepresented Party*

In a situation such as a prenuptial agreement it is not uncommon or unheard of for one of the parties to have secured representation while the other party has not.[157] It is clear that an

[153] *See* MODEL RULES OF PROF'L CONDUCT, R. 2.2(a)(3) (1983); *see* Dzienkowski, *supra* note 51, at 764 (noting that one significant risk of multiple representation is waiver of attorney-client privilege as among parties); Matt Wise, *Current Public Law and Policy Issues in ADR: Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4*, 24 HAMLINE J. PUB. L. & POL'Y 383, 388 n.26 (2001) (quoting Model Rule 2.2).

[154] MODEL RULES OF PROF'L CONDUCT, R. 2.2(a)(3); *see* Dzienkowski, *supra* note 51, at 802 (explaining that traditional duty of loyalty must necessarily be modified in intermediation context to recognize that lawyer is representing conflicting interests); Tuttle, *supra* note 25, at 915 (explaining that rules seek to foster situation where each client actively directs attorney-client relationship).

[155] MODEL RULES OF PROF'L CONDUCT, R. 2.2(a)(2); *see* H. Peter Nesvold, *Going Private or Going for Gold: The Professional Responsibilities of the In-house Counsel During a Management Buyout*, 11 GEO. J. LEGAL ETHICS 689, 716 (1998) (discussing requirement that attorney reasonably believe that matter can be resolved in manner compatible with best interests of parties); Alysa Christmas Rollock, *Professional Responsibility: Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567, 579 (1998) (quoting ABA Model Rules of Professional Conduct, Rule 2.2, Intermediary).

[156] MODEL RULES OF PROF'L CONDUCT, R. 2.2(c); *see* Nesvold, *supra* note 155, at 717 (noting that once asked to withdraw as intermediary lawyer may not represent either party), Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 679-80 (2001) (explaining intermediary lawyer once asked to withdraw may not represent either party).

[157] *See* MODEL RULES OF PROF'L CONDUCT, R. 4.3 (1983); *see also* Engler, *supra* note 135, at 79-80 (emphasizing frequency of legal encounters between attorneys and unrepresented parties); *cf. In re* Marriage of Bonds, 5 P.3d 815, 833 (Cal. 2000) (declining to decide issue of counsel's duty to unrepresented party in premarital agreement but

attorney has an obligation to his or her client, but the attorney may also owe an obligation to the unrepresented party.[158] The ABA's Model Rule 4.3 describes the way that a lawyer should deal with an unrepresented party:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[159]

The comment to rule 4.3 suggests that the only "legal" advice an attorney may give to an unrepresented party is to seek representation.[160] Although not mandated by the Model Rules or the NY Code of Professional Responsibility, some courts have defined the obligation of an attorney to the unrepresented party.[161] Merely telling a party that you do not represent him or her may not be enough, but rather an attorney should advise the party to seek his or her own counsel.[162] An unrepresented party

observing that best assurance of enforceability of such agreement is independent representation for each party).

158 *See* MODEL RULES OF PROF'L CONDUCT, R. 4.3; *see also id.* R. 4.3 cmt. (explaining that "lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."); Engler, *supra* note 135, at 82 (noting that attorney must refrain from providing legal advise to unrepresented party).

159 MODEL RULES OF PROF'L CONDUCT, R. 4.3; *see also id.* R. 4.3 cmt. (reasoning that "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested . . . even when the lawyer represents a client."); Engler, *supra* note 135, at 79-80 (commenting that ethical rules fail to sufficiently address issues at stake in negotiations between attorneys and unrepresented parties).

160 *See* MODEL RULES OF PROF'L CONDUCT, R. 4.3, cmt. (instructing lawyer to limit legal advice given to unrepresented persons); NEW YORK CODE OF PROF'L RESPONSIBILITY DR 7-104(a)(2) (amended 1999) (discussing scope communications with represented and unrepresented persons); Andrew Horwitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1324 n.89 (1989) (quoting ABA Model Rules of Professional Conduct, Rule 4.3, Comment).

161 *See* Abernathy, *supra* note 76, at 342 (noting courts differ as to what obligation attorneys owe to unrepresented party). *See generally* Mark H. Aultman, *The Story of a Rule*, 2000 DET. C.L. MICH. ST. U.L. REV. 713, 722-23, 737, 741 (2000) (discussing the evolution of model rules); Smith, *supra* note 36, at 23-24 (contrasting Louisiana's rules with model rules).

162 *See* Abernathy, *supra* note 76, at 342 (noting it is best for attorney to advise unrepresented party to seek independent counsel); John R. Price, *The Lawyer's Duties and Liabilities to Third Parties: Article, Duties of Estate Planners to Non Clients: Identifying, Anticipating and Avoiding Problems*, 37 S. TEX L. REV. 1063, 1074 n.45 (1996) (noting case in which attorney advises unrepresented person to seek independent counsel before going forward); *see also* Engler, *supra* note 135, at 94 (stating that if

may not understand the adversarial position that the opposing attorney will have to take if his or her interests are adverse to the represented party's.[163] If an attorney conveys "part of the story to an unrepresented party with whom the attorney's client is doing business, the attorney must take reasonable steps to tell the whole story, not just the self-serving portions of it."[164]

It is well established that an attorney may only be liable for malpractice to his or her client.[165] However, the rule is not applicable in all cases. Liability may be incurred to a third-party in at least two distinct situations. An attorney may be liable to a third-party beneficiary on a negligence theory,[166] or under a "multifactor balancing test."[167] The balancing test requires the examination of:

> . . .the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct

communication between unrepresented party and counsel is inevitable then counsel may be required to advise unrepresented to seek independent attorney).

[163] David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 371, n.136 (2000) (quoting Charles B. Rosenberg, *The Law After O.J.*, A.B.A. J., June 1955, at 72, that most people do not understand the adversary system); Emily Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyer's Roles*, 64 FORDHAM L. REV. 1699, 1738 (1996) (explaining how non-clients may reveal confidences to an attorney not understanding that s/he may become an adversary's lawyer); *see also* Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595 (1986) (articulating that one who argues against lawyer's role as advocate for client does not understand adversary system).

[164] *Bohn v. Cody* 119 Wash.2d 357, 367 (1992) (holding attorneys need to advise unrepresented parties to obtain independent counsel); *see also In re* Marriage of Foran, 834 P.2d 1081, 1088 (Wash. Ct. App. 1992) (looking at reasons why attorney should advise unrepresented party to seek independent counsel); Engler, *supra* note 135, at n.241 (quoting *Foran*).

[165] *See Bohn*, 119 Wash.2d at 364-65 (stating "strict privity" is required for malpractice claim); Marianne B. Hill, *Trends in New Mexico Law: 1994-95: Tort Law (Legal Malpractice) – Attorneys May Owe a Duty to Statutory Beneficiaries Regardless of Privity: Leyba v. Whitley*, 26 N.M.L. REV. 643, 645 (1996) (explaining traditional view that attorney is only liable in malpractice to client); Christopher G. Sablich, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 517 n.8 (1992) (commenting attorney is liable to client for malpractice).

[166] *See Stangland v. Brock*, 109 Wash.2d 675, 681 (1987) (explaining duty between an attorney and non-client in will context); *see also Bohn*, 119 Wash.2d at 365 (stating attorneys can be liable to third party beneficiaries); *Bowman v. John Doe*, 104 Wash.2d 181, 188 (1985) (acknowledging that negligence liability does not extend to unlimited amount of potential plaintiffs).

[167] *See Stangland*, 109 Wash.2d at 680 (observing that duty between attorney and non-client plaintiff can be grounded on two theories); *see also Bohn*, 119 Wash.2d at 365 (listing all six factors of multifactor balancing test); *Bowman*, 104 Wash.2d at 187-88 (noting multi-criteria balancing test).

> and the injury; the policy preventing future harm; and the extent to which the profession would be unduly burdened by a finding of liability. The inquiry under this multi-factor test has generally focused on whether the attorney's services were intended to affect the plaintiff.[168]

It appears rather clear that the prudent course for an attorney representing a party in a premarital agreement is not to give any advice to the unrepresented party, except to seek independent counsel.[169] If the attorney gives advice to the unrepresented party, liability may result if the attorney's services were intended to affect the unrepresented party, and the balancing test favors the unrepresented party.[170]

## CONCLUSION

It is very clear that divorce rates are on the rise, and so too are prenuptial agreements. Accordingly, attorneys in this area need to know how to protect themselves and their clients from any possible malpractice. We no know that the laws regarding prenuptial agreements differ depending upon the jurisdiction, and as such an attorney should be very aware of the laws in the jurisdiction. Although independent counsel is not required an attorney should be very skeptical to represent both parties to such an agreement. If an attorney finds him or herself in a position in which a party is unrepresented he or she should be very careful not to give advice; however, the best advice to give is to seek independent counsel.

[168] *Stangland*, 109 Wash.2d at 681 (analyzing courts that apply the multi-factor test); *Bowman*, 104 Wash.2d at 188 (recognizing California courts focus on affect to plaintiff); *see also McKasson v. State*, 55 Wash. App. 18, 28 (Ct. App. 1989) (summarizing rationale for finding duty).

[169] *See* Engler *supra* note 135, at 94 (commenting that it is permissible to advise unrepresented party to seek counsel); Kenneth R. Margolis, *Responding to the Value Imperative: Learning to Create Value on the Attorney-Client Relationship*, 5 CLINICAL L. REV. 117, 147 n.101 (1996) (explaining attorney should not advise unrepresented party except to seek counsel); Burnele V. Powell & Ronald C. Link, *Proceed of the Conference on Ethical Issues in Representing the Elderly*, 62 FORDHAM L. REV. 1197, 1242 n.161 (1994) (quoting New York's Code of Professional Responsibility DR 7-104(a)(2)).

[170] *See Bohn*, 119 Wash.2d at 365-67 (discussing attorney's duties to third parties); *see also Heyer v. Flaig*, 70 Cal. 2d 223, 227-29 (1969) (justifying duty to non-client third parties plaintiff on public policy grounds); *Lucas v. Hamm*, 56 Cal. 2d 583, 588 (1961) (restating and applying rules announced).