Mediating Prenuptial Agreements

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Historically, there has been considerable uncertainty with respect to the validity and enforceability of prenuptial agreements.[i] The parties' emotional perspectives on their situation and the concerns of the lawyers involved about their potential liability constitute additional complications. This article suggests that the traditional model for negotiating and preparing prenuptial agreements may not serve the best interests of the parties or their lawyers, and that mediation offers an alternative that ameliorates many of the problems inherent in the traditional model.

The traditional model.

In the traditional model, prenuptial agreements are negotiated by the parties' lawyers. If Husband is the stronger economic party, the agreement is typically prepared by his attorney. It is then presented to Wife, either directly or through counsel. Negotiations ensue. While it is possible that the parties get married without an agreement, or call the whole thing off, it is most often the case that the parties and their lawyers sign off on an agreement that is satisfactory to Husband and more or less unsatisfactory to Wife.[ii]

In its final form, the agreement is satisfactory to Husband because it has enabled him to accomplish his primary goals. Those goals typically include avoiding any community interest in his separate property, particularly an ongoing business or professional practice, characterizing his earnings during the marriage as separate property, and waiving or limiting his obligation to pay spousal support if the marriage ends in divorce.[iii] The final agreement is more or less unsatisfactory to Wife because it deprives her of the property and support rights to which she would otherwise be entitled under California law. It is very common for Wife to feel (and say) that she only signed the agreement because "she had no choice."[iv] Under these circumstances, the marriage may start out on a sour note.

Disadvantages of the traditional model.

1. The parties do not take responsibility for the positions they take. In an effort to avoid emotional confrontations, the parties may never have discussed the prenuptial agreement except in general terms. Husband may announce casually that he would like to have a prenuptial agreement and Wife may reflexively assent. In many instances, the statements the parties make to each other are not only misleading, they actually frame the issue.

   For example, in an effort to assuage Husband's concerns, Wife may say: "If anything ever happens to us, I would never want any of your money." Translation: You don't need a prenuptial agreement to protect yourself. In an effort to ameliorate Wife's anxieties, Husband might say: "Don't worry. If anything ever happens to us, I will always take care of you." Translation: You

have nothing to fear from a prenuptial agreement.

From a legal point of view, this is just talk. The parties may believe what they say, but neither party is willing to rely on the other's verbal assurances.

2. When the parties finally do discuss the prenuptial agreement – either directly or through their lawyers – that conversation is usually based on a prenuptial agreement that has already been prepared by Husband's attorney. This creates a situation in which, both practically and psychologically, Wife is attempting to attack (or at least modify) an agreement that Husband is attempting to defend.

3. The lawyers take over the negotiations, which can become contentious. The parties may have many common interests – otherwise they wouldn't be getting married – but the negotiation of a prenuptial agreement will focus on their conflicting positions. When the parties' positions are developed by a lawyer looking at things only from one party's point of view, those positions are more likely to become polarized. In many cases, the lawyers become obsessed with "protecting" clients they have only recently met. They do not think of themselves as wise counselors, but rather as zealous advocates.

4. This dynamic relieves the parties of the need to take responsibility for their positions. Statements such as "My lawyer has advised me . . ." and "According to my lawyer . . ." become each party's mantra. The other party cannot contradict such statements. Along the same lines, each lawyer contends that he or she is only "representing my client." The parties who are the decision-makers are not talking; the lawyers who are talking are not the decision-makers.

5. The parties' lawyers have no personal or professional stake in whether the parties end up getting married. For example, Wife's lawyer may genuinely believe that Wife is better off not getting married at all than entering into the prenuptial agreement. A lawyer representing Wife in this situation often feels that she has represented the client well if the marriage never takes place. Another way to put this: It's easy to be a tough negotiator when you have no skin in the game.[v]

6. The lawyers who represent Husband and Wife charge a premium for their services. Minimum fees can range from $5,000 to $25,000. Depending on how the negotiations proceed, a party's fees can be significantly higher than the minimum.

7. If the validity of the prenuptial agreement is ever litigated, the parties and their lawyers may be required to testify with respect to the circumstances under which the agreement was negotiated, prepared, and signed. To be sure, attorneys are required to assert the attorney-client privilege, but if the parties waive it, the attorneys have the same obligations as any other percipient witness.

8. The lawyers are concerned about their potential liability for professional negligence; hence the letters that the parties' lawyers routinely write their respective clients to guard against that possibility. In essence, Wife's lawyer wants to be sure she understands that if and when the marriage is dissolved, she will be held to the agreement; that there is no realistic possibility of challenging it successfully; and that she is signing it against her lawyer's advice. Husband's lawyer

wants to be sure Husband understands the possibility that the agreement could be successfully challenged.

If Wife's lawyer is wrong, and the agreement is challenged successfully, Wife has no cause for complaint against her. In contrast, in the event of a successful challenge, Husband's lawyer would have at least ruled out the claim that he guaranteed that the agreement would be upheld. If the agreement is upheld, of course, neither party has any cause for complaint against the lawyers. Husband got exactly what he bargained for. Wife was told that she would be held to the agreement, that a challenge would be unsuccessful, and that she was signing it against her lawyer's advice.

The lawyers' concerns are the stated or unstated justification for charging a premium. If the validity of the prenuptial agreement is ever litigated, the lawyers could be called as witnesses. Depending on the outcome of that litigation, one or both lawyers could also be sued. Even a bogus lawsuit has to be defended, usually at a cost that substantially exceeds the fee that was received. Based on their tolerance for risk, many lawyers have concluded that a minimum fee, or even a specified premium over and above their hourly charges, is insufficient compensation.[vi]

The irony is that there is a dearth of suits by disgruntled clients against the lawyers who negotiated their prenuptial agreements.[vii] The notion that lawyers may have genuine exposure is somewhat farfetched. Most of the lawyers who do this work are adept at disavowing any responsibility for the deal.

The mediation model.

In the mediation model, the parties start out with a conversation between themselves instead of a document prepared by one party's lawyer that reflects only that party's agenda. The focus is on the parties' interests and concerns, not on their positions. For this reason, the parties are more likely to end up with an agreement that satisfies both of them. When the conversation between the parties is supervised by a knowledgeable and experienced neutral, each party's notion of fairness is recognized and respected even if it may ultimately have to be compromised. Not so incidentally, a collaborative process ameliorates the feeling that the prenuptial agreement is being imposed by one party on the other.

Advantages of the mediation model.

1. The parties discuss the terms of the agreement under the auspices of a neutral. The discussion does not focus on an agreement that has already been prepared by Husband's lawyer; the agreement evolves from the parties' discussion.
2. The neutral helps the parties articulate their concerns, moderates the discussion, and offers suggestions for accomplishing their goals based on the neutral's knowledge and experience that may not have occurred to the parties.
3. The process is collaborative instead of competitive. A conversation takes place before positions are adopted. Each party takes responsibility for expressing his or her concerns, the tone of the

discussions, and the deal that is ultimately embodied in the prenuptial agreement. Most importantly, the parties cannot hide behind their lawyers.

4. The parties are free to obtain whatever analysis they deem appropriate from attorneys, accountants, or other advisors as part of the process. The ability of the parties to consult counsel during the course of the mediation goes a long way toward ensuring that they will be informed with respect to their legal rights and duties under California law, what they are giving up, and what they are getting in exchange.
5. The attorneys retained by the parties are hired to explain the parties' legal rights and duties under California law, provide whatever analysis and advice is requested, suggest options for achieving the parties' goals, offer suggestions for strengthening and clarifying and enhancing the enforceability of the agreement, and sign off. *The attorneys are not hired to negotiate the deal.*[viii]
6. The attorneys' fee agreements confirm the limited scope of the representation.
7. As the lawyers assume no responsibility for the parties' deal, there is no longer a justification for a minimum fee or a premium. The lawyers involved can provide the requested services at their regular hourly rates.
8. The principle of mediation confidentiality precludes testimony from the parties, their attorneys, or the mediator with respect to the circumstances under which the agreement was negotiated, prepared, and signed. While the mediator is specifically protected,[ix] the principle of mediation confidentiality also extends to the parties and their attorneys; since it is a public policy, it can only be waived by all of the participants.[x]

The context of the negotiations.

The laws of the State of California are often used as the standard by which the fairness of prenuptial agreements should be judged. Thus, in the typical case, Husband's goal is to deviate from those laws. For example, Husband's goals often include:

- Avoiding the creation of any community interest in his separate property.
- Ensuring that his business or professional practice remains separate.
- Waiving or limiting his obligation to pay spousal support.

Under these circumstances, the lawyers representing Wife understandably strive for an agreement that deviates as little as possible from California law. In effect, California law becomes the touchstone for "fairness" – at least from Wife's point of view: Losing *anything* (property interests or support rights) to which she would otherwise be entitled seems unfair.[xi]

But there is nothing about the laws of the State of California that are inherently fair or unfair. As any family lawyer knows, the notion of fairness is subjective. Indeed, it is a truism that men believe the laws

of the State of California are unfair to men in various respects, and women believe the laws of the State of California are unfair to women in various respects.

Apart from that issue, the laws of the State of California differ in significant respects from the laws of other states. For example, in Connecticut, the court has the power to distribute separate property as well as marital property.[xii] A Court in California or New York does not.[xiii] A professional license is marital property subject to distribution upon divorce in New York.[xiv] Not so in California or New Jersey.[xv] Property received by a spouse by gift or inheritance during the marriage is marital property, subject to distribution between the parties at the time of their divorce in Delaware and North Dakota, but not in California or New Jersey. Fault may not be considered in the equitable distribution of property in California or Illinois, although it may be in Alabama, and must be in Missouri.[xvi] It would be difficult to argue convincingly that the laws of the State of California are entirely fair, and the conflicting laws of other states are thus unfair. The reality is that the laws of every state – including California – constitute an arbitrary set of legal rules.

Even the concept of equality is not consistently considered fair. Thus, for example, a wife whose husband owns and operates a business or professional practice would readily agree that it's only fair for all of the earnings as a result of his personal services, skills, and efforts during the marriage to be considered community property, owned half by each party. That same wife might consider a 50-50 parenting plan to be unfair. It always depends on the issue, the context, and each party's point of view.

In most instances, Husband is concerned about the implications of California law if there is a divorce. A common goal is to protect his separate property by contracting around those principles of California law that might result in the creation of a community interest. The clearest example is a husband with a successful professional practice. He will understandably be disinclined to argue about whether the practice increased in value (or should have increased in value) during the marriage as a result of his community services, skills, and efforts.

In many cases, this is unobjectionable. The uncertainty of whether there would be any such community interest and its potential value usually enables Wife to acquiesce without much resistance or regret. Primarily, this is because the idea of separate property remaining separate property seems fair to Wife. However, this perception may be affected if the prospects for amassing a substantial community estate are slight.

The psychology of the situation changes markedly if Husband attempts to convert community property into separate property. Under those circumstances, Wife often feels that she is being deprived of property to which she would otherwise be entitled, and that there is either no consideration or inadequate consideration. At least two issues merit discussion: First, the rationale for transmuting the parties' community property into Husband's separate property and, second, the consideration to which Wife is entitled in exchange. Absent adequate consideration, Wife is likely to feel that the elimination of community property rights isn't fair and undermines the concept of marriage as an equal partnership.

Regardless of how the substantive issues may be resolved, the opportunity to negotiate those issues

– or at least to discuss them under the auspices of a neutral – fosters a sense that the prenuptial agreement results from a fair process.

Conclusion.

The mediation model is not for everyone. There will always be husbands who would prefer to present a prenuptial agreement to their wives as a condition of getting married, and end up modifying it a little or not at all at the behest of the attorneys who represent their wives. There will always be wives who do not feel up to the task of negotiating with their husbands, and prefer to hire a lawyer to do their negotiating for them.

But there is a price to be paid. Resorting to the traditional model for the negotiation of a prenuptial agreement is inherently adversarial. An adversarial process is not the best way to deal with the parties' anxieties and apprehensions about what the future might hold. The resulting frustration, resentment, and anger may be suppressed, but it is unlikely to dissipate merely because the parties sign off on an agreement. There will always be a sense in which Wife feels she had no choice.

In contrast, those husbands and wives who elevate their common interests over their conflicting concerns, explore the options for achieving their goals as part of a collaborative process, and assume responsibility for negotiating a deal that takes the parties' emotional perspectives into account, are more likely to end up with a prenuptial agreement that they can both live with.[xvii]

Endnotes.

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i. For example, for over 150 years, it was a truism that the public policy of the State of California prohibited any attempt to waive or limit the parties' support obligations in the event of a divorce. On August 21, 2000, the California Supreme Court decided in *Marriage of Pendleton and Fireman* that a waiver was not against the public policy of the State of California: "No public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver." Subsequently, in response to the decision, the Legislature enacted Section 1612(c) of the *California Family Code*, which provides in pertinent part as follows: "Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought is not represented by independent counsel at the time the agreement containing the provision was signed, or the provision regarding spousal support is unconscionable at the time of enforcement." The current state of the law is that a waiver or limitation of spousal support in a prenuptial agreement that is otherwise valid and enforceable will also be deemed valid and enforceable unless a judge concludes that it is unconscionable.

ii. Even though prenuptial agreements are negotiated by parties who are planning to marry, for convenience and clarity, I refer to the parties as "Husband" and "Wife" throughout this article. I also assume that Husband is the stronger economic party because that is the more common situation.

There are of course many other situations in which one or both parties may request a prenuptial agreement. Wealthy women marry men of modest means. Even if both parties are of modest means, one of them may have interests in family businesses or partnerships, or stand to inherit substantial wealth. Women of modest means may insist on a prenuptial agreement. This article does not purport to analyze the substantive issues that might derive from these circumstances; the focus is on the process for negotiating a

prenuptial agreement regardless of the circumstances that motivate it.

iii. The fear that motivates many husbands to insist on a prenuptial agreement has been waggishly expressed as follows: "There's a way of transferring funds that is even faster than electronic banking. It's called marriage." (Sam Kinison)

iv. Strictly speaking, this is incorrect. Wife always has a choice: She may decline to get married if the agreement is unacceptable to her. That happens occasionally. But more often than not the agreement is signed, and the parties get married notwithstanding the frustration, resentment and anger the process has engendered on Wife's part. That frustration, resentment and anger may be suppressed – at least until the parties' marriage ends in divorce – or it may adversely affect the parties' relationship from the outset. After all, a wife who did not think the agreement was fair to her when it was negotiated is unlikely to ever consider it fair to her.

v. There is an aspect of representing Wife in connection with a prenuptial agreement that deserves special mention: The practice of certain attorneys of accepting the representation, taking a retainer, negotiating on Wife's behalf, and then refusing to sign off on the agreement. In my opinion, this is unconscionable and may even constitute a breach of fiduciary duty. To begin with, such attorneys do not alert the client that they may refuse to sign off on the agreement if it fails to meet with *their* approval. At the very least, the client believes that she is hiring an attorney who will sign off. Moreover, the attorneys are not parties to the agreement. It is up to the client to decide if she is willing to enter into the agreement. An attorney should not usurp the client's right to make that decision. Finally, attorneys may protect themselves from the charge that they approved the agreement by documenting the inadequacies of the agreement, confirming that the agreement will nonetheless be enforceable, and advising the client not to sign it. Apart from all other considerations, attorneys who reserve the right to refuse to sign off on the agreement should alert their clients to this possibility in the fee agreement. Of course, if they do so, they may not be retained in the first place.

vi. It is never possible to eliminate the risk of being sued by a disgruntled client. It is only possible to minimize that risk and, of course, the related risk of being found liable. A fee agreement that limits the lawyer's assignment and precludes contacting the other party's attorney or otherwise negotiating the terms of the deal goes a long way toward accomplishing both goals.

There is also the fear of disqualification, if not as a legal matter, at least as a practical matter. If the marriage ends in divorce, the attorneys who represented the parties in connection with the prenuptial agreement will be potential witnesses, and may be unable to represent the parties in the dissolution action. Moreover, depending on how any challenge to the prenuptial agreement is resolved, one or both parties may exercise their rights to sue the lawyers who participated in its negotiation and preparation. Under those circumstances, the parties often prefer to be represented by new counsel. For these reasons, many otherwise competent family lawyers decline to represent a party in the negotiation of a prenuptial agreement.

vii. There are not reported California cases holding a lawyer liable for negligence in the preparation of a prenuptial agreement. While it is theoretically possible that such claims are routinely settled prior to trial, or that adverse trial results are never appealed, an informal inquiry of two leading underwriters of errors and omissions insurance confirmed that such claims are rare.

viii. The mediation model by no means eliminates a meaningful role for the lawyers. To the contrary, it enables lawyers who may have felt obligated to charge a minimum fee to compensate themselves for the responsibility (and potential liability) inherent in negotiating a prenuptial agreement to charge their regular hourly rates instead, and it enables clients to obtain the analysis and advice they need to make informed decisions without paying a premium.

ix. *Evidence Code* § 703.5 provides as follows: "No person presiding at any judicial or quasi-judicial proceeding, no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to

any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding . . . ." While various courts of appeal have purported to create exceptions to the principle of mediation confidentiality, the most recent appellate opinion unequivocally affirms it: "The mediation confidentiality statutes prohibit a mediator from testifying to anything about the agreement, including the number of pages it contains." *Radford v. Shehorn* (August 19, 2010) ___ Cal.App.4th ___.

x. In *Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, the court concluded "that the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation" notwithstanding that "in transactions between themselves, husband and wife are subject to the general rules governing fiduciary relationships . . . which impose a duty of the highest good faith and fair dealing on each spouse." *California Family Code* § 721(b). Given that there is no presumption of undue influence when it comes to prenuptial agreements as opposed to marital settlement agreements, the protection afforded by the principle of mediation confidentiality is even stronger. Combined with a recitation in the agreement that neither party was acting as a result of any fraud, coercion, duress, or undue influence by the other party, the principle of mediation confidentiality virtually ensures that a mediated prenuptial agreement cannot be attacked on any of those grounds. The *Kieturakis* court opined: "[I]f there is a price to be paid in fairness to preserve mediation confidentiality, the cases have required that it be paid by parties challenging, not defending, what transpired in the mediation." 138 Cal.App.4th at 84, 87.

xi. This is not always the case. Assume a situation in which Husband is independently wealthy. All of his property is separate property, all of his income is passive, and he does not work. Under those circumstances, no wealth would be generated as a result of Husband's personal services, skills, and efforts during the marriage, and there would be no community property. If the marriage lasts fewer than ten years (especially if there are no children), Wife would presumptively be entitled to reasonable spousal support for a period equal to half the length of the marriage under California law. Upon the dissolution of the marriage, wives in that situation frequently complain that they never should have gotten married *without* a prenuptial agreement.

xii. Connecticut General Statutes Annotated, Title 46b-81.

xiii. McKinney's *New York Domestic Relations Law*, Section 236B.

xiv. *O'Brien v. O'Brien*, 66 N.Y.2d 582 (1985).

xv. *Mahoney v. Mahoney*, 91 N.J. 488 (1982).

xvi. These examples come from Lenard Marlow, *Divorce Mediation*, at 51 fn. 40 (2009). There are many others. For example, a parent's obligation to support a child ends at the age of 21 in New York; 18 in California and Florida; there is no hard and fast rule in New Jersey. The Court has the power to require a husband to support his ex-wife following her remarriage in Washington and Nebraska, but not in California or Utah. See Marlow, at 102, fn. 10-26.

xvii. Most of the observations in this article are equally applicable to postnuptial agreements. Sometimes, the parties may have a prenuptial agreement that they desire to modify; at other times, the postnuptial agreement is *sui generis*: The parties may wish to restructure their property rights in recognition of a long and successful marriage, or the postnuptial agreement may be part of an effort to save a troubled marriage. In either situation, an adversarial model is unlikely to meet the parties' needs.