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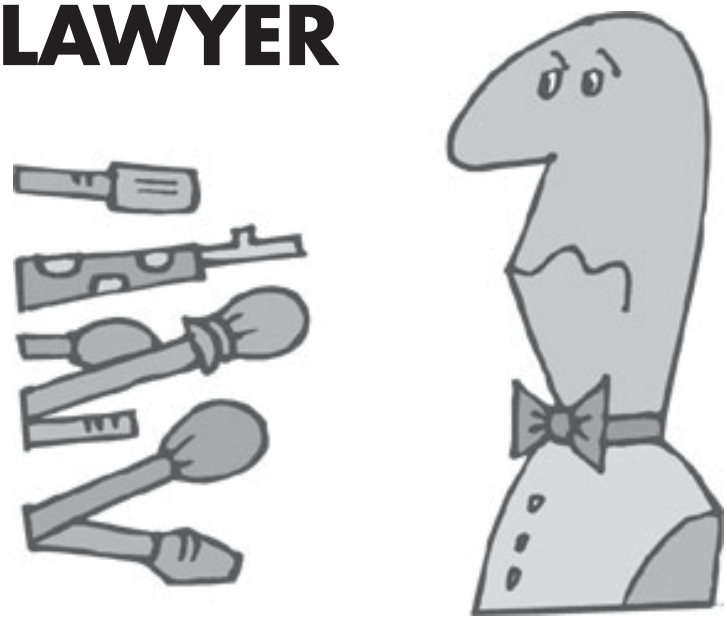

by Rebecca L. Burton, Esquire

As we are all too aware, law school does not teach you all aspects of the actual practice of law. Facing the world ten years ago clutching my treasured J.D., little did I know I was entirely unprepared for a call from the press.

Some attorneys, finding themselves with a newsworthy case, make that call themselves or at least encourage their usually very angry client to do so. Some attorneys even hire a publicist for that purpose. Other attorneys, like myself, have found themselves at the receiving end of the angry opposition and, when faced with the sudden television camera, freezes up like a deer in the headlights. What to do? Suddenly, one is walking a tightrope between the self-in-

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Publicity cont.

dulgent desire for personal attention and the necessity of protecting one's client or their own reputation. Even for the client who wants their story told, the press doesn't always tell the story in a neutral manner and there is the risk that the reporter's spin will be unfavorable to your client's position.

That first admittedly exciting call occurred about five years after I began practicing law. Getting into the case, I had no idea it would become the subject of public controversy. Representing dad, I had defeated mom's motion to relocate with the three minor children to a foreign country. The case became newsworthy after mom took her side of the story to the press. Mom subsequently filed a motion for reconsideration. Sitting among the audience at that second hearing, I thought I recognized a reporter. Nevertheless, upon leaving the courthouse, I was surprised when a news camera was pointed at my face. I remember hoping I said a few coherent words. Although the story was widely reported (my father living in Minnesota heard the story being debated on a radio program), I do not believe I actually personally appeared on television. Since my client was anxious to get his version of the story told, I accepted subsequent calls from the newspapers. Aware of horror stories about words getting misrepresented in the press, I was pleased that I was promised the opportunity to approve my quotes before they were printed. Sucked into the reporter's apparent empathy with my client's position, I felt comfortable sharing a good deal of information about dad's side of the story. Thus, I was disappointed that many facts I shared which helped dad were ignored, resulting in the story ultimately favoring mom.

Although I did not go out seeking newsworthy cases, the next opportunity for a brush with the media was probably more predictable. I was referred a case in which I defended the right of a 15 year old girl to marry her 48 year old guitar instructor against the wishes of the girl's father who wanted the marriage annulled. Not even an hour passed after I prevailed at the hearing before I began getting calls from the press. I was even invited to make appearances on national television — unfortunately they were tabloid talk shows and entertainment news programs. Recognizing that these folks were not likely interested in debating the finer points of the constitutionality of Nevada's marriage statute,[1] I declined.

My most recent media adventure was yet again defensive in nature and not pleasant at all. Representing mom in a dispute brought by dad concerning the funeral of their murdered toddler, the case was undeniably high profile. Asked to help, I agreed. Hoping to soothe the raw emotions created by this horrific tragedy, we quickly settled. Meanwhile, dad's attorney passed out his court papers to the press, hired a publicist, and, by grabbing the upper hand in the media, kept the matter inflamed long after a formal resolution was reached. Frustrated with the entirely inaccurate representations being made concerning mom's alleged unwillingness to cooperate as well as with my own characterization as

the unnamed attorney who'"refused to return telephone calls," I finally conceded an interview with a news reporter. Again, while the reporter appeared empathetic with our side of the story, what actually appeared on television was merely the very shortest of "sound bites." Nevertheless, there was a moment of pride in seeing myself as a professional on television, properly identified with my name spelled correctly.

Of course, there is always the chance for truly unanticipated publicity — especially with our video taping court reporting system. Out of the blue one day, I received a telephone call from an unknown source telling me that they "had the video tape" and asked if I wanted a copy. Naturally, I was curious. As I watched the videotape, I was baffled to see a segment of the Judge Mills Lane television show. Soon, however, I recognized a former client as the defendant. The plaintiff was the former client's ex-spouse who had brought a small claims action against my former client over the destruction of the plaintiff's personal property by my former client. My amusement turned to consternation when as proof that my client "did it," the plaintiff offered his "Exhibit A." It was then I realized what was coming. "Exhibit A" was our Eighth Judicial District Family Court video tape memorializing our return before the Judge during which I was forced to explain why my client utterly failed the polygraph examination she had volunteered to take on that very issue. Much to my relief, my face was blanked out by fuzzy little squares. Thus, that was my only appearance professionally on national television.

Unable to shake the nagging guilt that as family law lawyers, we ought not exploit someone else's tragedy as a means of grabbing personal attention, yet enjoying — at least a little — the spotlight when it points even ever so inadvertently in my direction, I began to write this paper. Trying to find guidelines in navigating the media tango, I began my research.

Assuming that the American Academy of Matrimonial Lawyers probably, as a group, must deal with more high profile cases than most, I turned to the AAML website and found an interesting article entitled "Representing the High Profile Client and Celebrity" by Kathy Kinser, Spring 2001.[2] In a section of her article devoted to publicity, Ms. Kinser tells us:

> [T]he prudent family law specialist will strike a balance between the need to protect a client's privacy and the benefits of media attention. Too often, attorneys are willing to only say, "No comment." Too often, "No comment" hurts one's client more than talking to the media. The media can be a strong ally in a high profile case, and proper use of the media can strengthen one's case tremendously.

One of the main reasons it is important to provide a little information to the media in high profile cases is simple. In today's society, the lack of an answer or comment is often perceived as a sign of weakness, or a sign that someone is trying to hide something. Although in theory the case is only supposed to be tried in the courtroom, in reality high profile cases are tried in the public forum as well. . . .

Ms. Kinser wisely advised, "each state's laws and professional rules should be considered prior to making any public statement on behalf of your client."

Following Ms. Kinser's advice, I reviewed Nevada law and found only one rule regarding publicity. Among the Supreme Court Rules of Professional Conduct is Rule 177, which provides as follows:

> Rule 177. Trial publicity.
>
> 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding; however, a lawyer may make a statement if the lawyer has a good faith belief, based upon the totality of facts and circumstances known to the lawyer at the time, that the content of the statement is admissible at a subsequent hearing or trial or properly arguable from anticipated evidence; and
>
> (a) The statement protects the public from substantial future harm; or
>
> (b)The statement is one that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of publicity not initiated by the lawyer or the lawyer's client and is limited to such information as is necessary to mitigate the adverse publicity; or
>
> (c) The statement reveals governmental corruption or abuse of power.

Unfortunately, the case law which interprets SCR 177 is almost non-existent. The body of case law which deals with attorney communications with the media involves analysis of whether a criminal case should be reversed due to media information prejudicing the jury. Those cases focus on the affect the media's disbursement of information may have in contributing to an unfair trial. Those cases do not generally comment on the attorney's breech of ethics. In *Williams v. State,* 103 Nev. 106 (1987), however, the Nevada Supreme Court did criticize a prosecutor for breech of professional conduct regarding inappropriate comments to the press and made the admonishment that "lawyers are to try their cases in the courts, not in the media." *Id.* at 110.

The only case with interprets the statute directly is *Gentile v. State Bar,* 106 Nev. 60 (1990) involving a previous version of SCR 177.[3] In *Gentile v. State Bar,* the Nevada Supreme Court affirmed the State Bar's private reprimand of a criminal defense attorney for making certain statements to the press, which were found to violate SCR 177. However, the case against the attorney was reversed by the United States Supreme Court. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720 (1991). Applying First Amendment analysis, the United States Supreme Court found our prior Nevada SCR 177 unconstitutionally vague, especially because Nevada lacked interpretive law.

The United States Supreme Court also affirmatively recognized that "in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts." *Id.* at 1058. Important to the United States Supreme Court was that the speech criticized government activities, the speech was timed many months before trial so it would not have likely prejudiced the juror pool, and that, prior to the speech, the attorney had made a conscientious effort to study SCR 177 and abide by it.

SCR 177 has been subsequently changed to its current version, but no case since then has interpreted the rule as currently written.

The ABA Model Rules of Professional Conduct,[4] however, are similar to the current SCR 177 in some respects and offer commentary, which is useful. Most helpful to family law lawyers are the following points to ponder:

> [1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know

about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. . . .

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

. . . .

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others. . . .

Continuing in my search for guidance, I returned to the American Academy of Matrimonial Lawyers and the Bounds of Advocacy. Lo and behold, Section 2.9 deals specifically with publicity as follows:

> An attorney should not communicate with the media about an active case under most circumstances. An attorney should not communicate with the media about a case, a client or a former client without the client's prior knowledge and consent, except in exigent circumstances when client consent is not obtainable.

The AAML's Comments, with which I wholeheartedly agree, were the most enlightening:

> Statements to the media by an attorney representing a party in a family law matter may be inappropriate because family law matters tend to be private and intimate. They are not the business of anyone but the parties and their family. Public discussion of a case tends to obstruct settlement, cause

embarrassment, diminish the opportunity for reconciliation and harm the family, especially the children. Statements to the media by an attorney representing a party in a matrimonial matter are also potentially improper because they tend to prejudice an adjudicative proceeding.

An attorney's desire to obtain publicity conflicts with the duty to the client. If contacted by the media, the attorney should respond by saying: "I cannot give you information on that matter because it deals with the personal life of my client." The attorney, as an officer of the court, has duties to both the courts and the client. The parties, subject to order of the court, have a right to discuss their case if they so desire, despite the advice of their counsel. However, a lawyer's statements may have the effect of influencing an adjudicative body presently sitting or to be convened in the future. An attorney may withdraw if the client disobeys instructions not to speak publicly about the case.

It is no excuse that the opposing party, his counsel or agents, first discussed the matter with the media. However, if necessary to mitigate recent adverse publicity, the attorney may make a statement required to protect the client's legitimate interests. Any such statement should be limited to information essential to mitigate the recent adverse publicity.

An attorney should never attempt to gain an advantage for the client by providing information to the media to embarrass or humiliate the opposing party or counsel.

Jury trials are uncommon in the Family Court (unless, of course, we start trying domestic torts in Family Court)[5] Because comments made by family attorneys to the press are less likely to influence the outcome of a case tried by a judge, those comments are less susceptible to criticism and ethics violation. Still, our judges are human beings who must rely on the public to re-elect them to keep their jobs and, therefore, are somewhat vulnerable to public opinion created by the press. Thus, while the temptation to make a name for oneself is great, biting one's tongue may be the safer and more ethical approach.

The combined guidelines offered by these various commentaries caution angry attorneys tempted to take their displeasures to the press to instead take a big deep breath, or run the risk of violating ethics rules. Less risky is being forced to speak out to protect a client who is being abused by public commentary, which has not been initiated by them or by you acting as their attorney. At the very least, a thoughtful consideration of the ethical principles set forth in these various guidelines may allow one to bask in that spotlight without adverse professional consequences.[6]

NOTES

[1] Incidentally, the constitutionality of our marriage statute and the validity of that sensational marriage was upheld by the Nevada Supreme Court by a (pardon the pun) hot off the presses decision in *Kirkpatrick v. District Court*, 119 Nev. Adv. Op. No. 8 (March 14, 2003).

[2] To find the article, go to http://aaml.org/Articles/2001-03/KinserCelebrity.org

[3] In their opinion at pages 1060-62, the United States Supreme Court opinion set out Nevada 's prior SCR 177 as follows:

Trial Publicity

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(e) information the lawyer knows or reasonably should know is likely

to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(a) the general nature of the claim or defense;

(b) the information contained in a public record;

(c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(d) the scheduling or result of any step in litigation;

(e) a request for assistance in obtaining evidence and information necessary thereto;

(f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(g) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

[4] Model Rules of Professional Conduct, Client-Lawyer Relationship

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

[5] See "Domestic Torts in Nevada: A New and Potentially Dangerous Frontier for the Nevada Family Law Practitioner," Eric A. Pulver, Esquire, and Ronald Logar, Esquire, NFLR, Volume 17, Number 2, September 2002.

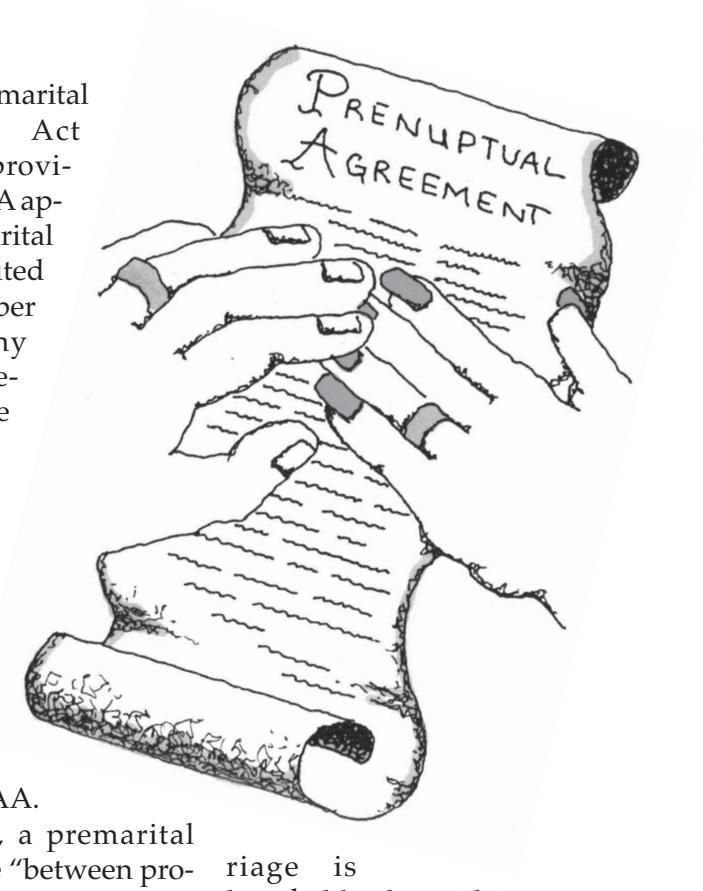
[6] Hey, Chris Boadt! I've got a CLE idea. How about an Ely roundtable headed by an attorney who deals regularly with high profile cases, a publicist, and a member of the press?

MARITAL AGREEMENTS: A DO'S AND DON'TS PRIMER

By Fred Page, Esq.

While there are exceptions, marriage is generally a heady thing to contemplate for all of our clients. On occasion, a premarital agreement may be in order. There are two primary situations in which these agreements are utilized. The first is when one of the prospective spouses is in a much stronger financial position, with either assets or income earning ability, and that party wishes to protect those assets in the event of divorce. The second is when an older couple is getting married and both parties want to make sure they can leave their assets to the natural objects of their bounty.

Generally, marital agreements or contracts require full disclosure of all assets, a written document, and both parties' signatures. Additionally, in order for a prenuptial agreement to be held valid, the marriage must occur. If the marriage is later held to be void, the agreement is held valid only to the extent of avoiding an inequitable result.



PREMARITAL AGREEMENTS

GENERALLY

Premarital agreements are covered in the Nevada Statutes under 123A, otherwise known as the Uniform Premarital Agreements Act (UPAA). The provisions of the UPAA apply to any premarital agreement executed on or after October 1, 1989, but any premarital agreement made before that date is enforceable if it conforms to the common law, as interpreted by the courts of this state before that date, or the requirements of the UPAA.

By definition, a premarital agreement is one "between prospective spouses made in contemplation of marriage and to be effective upon marriage." NRS 123A.030(1). It affects property – broadly defined as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings." NRS 123A.030(2).

A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration, and is effective upon marriage. NRS 123A.040 and 123A.060. The court will apply equitable relief, if the marriage is later held to be void, in the form of enforcement of the agreement to the extent required to avoid an inequitable result. NRS 123A.090, *see also* NRS 123A.100.

The Nevada Revised Statutes provide additional guidance on formation. All marriage contracts must "be in writing, and executed and acknowledged or proved in like manner as a conveyance of land is required to be executed and acknowledged or proved." *See* NRS 123.270. Certain agreements are void unless the agreement is in writing and

subscribed by the party to be charged. *See* NRS 111.220. This specifically includes "every promise or undertaking made upon consideration of marriage, except mutual promises to marry." However, the "right of a child to support may not be adversely affected by a premarital agreement." *See* NRS 123A.050(2).

The parties may amend the agreement after marriage or revoke it, in whole or in part, by a later signed written agreement. No consideration is required for a revocation to be enforceable. NRS 123A.070. *But see Jensen v. Jensen*, 104 Nev. 95, 753 P.2d 342 (1988) (In a pre-Act decision where the prenuptial agreement was modified orally, in an agreement which expressly provided that its terms could be changed, the parties' consent to modification was implied from their conduct consistent with the asserted modification).

No attorney should either prepare a premarital agreement, or approve a premarital agreement for his client, without first scrutinizing the story in *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992). Essentially, the facts provide a model for all things ***not*** to do in a case, including choosing the attorney for the other party, leaving a party without ample to review the document, interrupting the other party's appointment with counsel by barging in and yelling "What's taking so long!" or otherwise forcing a party to sign an agreement under duress.

JUDICIAL REVIEW, DISCLOSURE AND FAIRNESS

Premarital agreements prior to the adoption of the Act (October 1, 1989) are controlled by the common law as interpreted by the Nevada courts. The Supreme Court can review the validity of a premarital agreement de novo. *See Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993). Also, the issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law. NRS 123A.080(3).

In *Sogg v. Nevada State Bank, supra,* the court concluded that if the disadvantaged party would have received more under community property laws, the agreement is ***presumed*** to be fraudulent. That presumption can be overcome by showing the disadvantaged party (1) had ample opportunity to obtain the advice of an independent attorney, (2) was not coerced into making a rash decision by the circumstances under which the agreement was signed, (3) had substantial business experience and business acumen, and (4) was aware of the financial resources of the other party and understood the rights that were being forfeited. *See also Muscelli v. Muscelli*, 96 Nev. 41, 604 P.2d 1237 (1980).

The *Sogg* court relied on the following factors in determining the premarital agreement was invalid:

(1) The husband's attorney drafted the agreement and selected the wife's attorney for review of the agreement;

(2) the disadvantaged party was never advised that she should select her own attorney;

(3) the agreement did not have an asset list attached, although it referred to such an attachment;

(4) the selected attorney for the disadvantaged party had a brief conference with the wife, and refused to sign the "advice" certificate on the agreement;

(5) the disadvantaged party was not given a copy of the agreement to take to another attorney prior to signing; and,

(6) the disadvantaged party was not presented the agreement for review by independent counsel until the wedding day, and was not given time to consult independent counsel.

As with all contracts, the court retains the power to refuse to enforce a particular premarital agreement if it is unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress. *See Lewis v. Lewis*, 53 Nev. 398, 2 P.2d 131 (1931); *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990).

Counsel and their clients can avoid attacks on premarital agreements at a later date by following the "fair and equitable" guidelines to avoid being accused of the agreement being "unconscionable." Counsel should also keep in mind that what falls under an unconscionable standard is a moving target – what is fair for a five year marriage may be unconscionable for a twenty year marriage. As an example, an agreement which provides the weaker spouse only gets 15% of the property during the course of the marriage and no alimony, may be fair for a five-year marriage, but may be considered unconscionable after a twenty-year marriage.

The parties share a confidential, fiduciary relationship, and each has a responsibility to act with good faith and fairness to the other. Such responsibility contemplates that each party will make a full and fair disclosure prior to the execution of a premarital agreement. *See* NRS 123A.080(1)(c); *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993); and *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

POSTNUPTIAL AGREEMENTS - MARRIAGE CONTRACTS

GENERALLY

Similar to the Act, the Nevada Revised Statues allow for marriage contracts under Chapter 123, a subset of the chapter dealing with "Rights of Husband and Wife." This chapter also addresses general provisions, separate property, and community property. Further, Nevada will honor either postnuptial or antenuptial agreements executed in another state. The agreements are controlled by the law of that state at the time of the execution of the agreement. *Barbash v. Barbash*, 91 Nev. 32, 535 P.2d 781(1975), *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975), and *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1980).

FORM AND CONSENT

The parties are free to engage in marriage contracts. Either husband or wife may enter into a contract with the other, or with any other person affecting property, which either might enter into if unmarried. They are bound by the general rules, which control the actions of persons "occupying relations of confidence and trust toward each other." NRS 123.070. NRS 123.080 provides that parties cannot alter their legal relations, except as to property, and except that they can agree to an immediate separation and provide for support during separation. Mutual consent is sufficient consideration. NRS 123.080(2). A com-

mon use is the property settlement agreement at divorce. *See* NRS 123.080(4).

All marriage contracts or settlements must be in writing, executed and acknowledged or proved in like manner as a conveyance of land is required to be executed, acknowledged or proved. NRS 123.270. In other words, the agreement must be ready for recording, and recorded, with the County Recorder wherever the real property of the marriage is located. NRS 123.280. The agreement is not valid for real property if no attempt is made to record the document, except as the agreement relates between the parties. NRS 123.300. Essentially, the recorded agreement acts as notice to all persons that an encumbrance is placed in the chain of title. NRS 123.290.

Separate or community property can be transmuted by the agreement of the parties. The agreement may be oral. *See Mulikin v. Jones*, 71 Nev. 14, 278 P.2d 876 (1955). An oral agreement supported by documents of note and deed of trust can satisfy the statute of frauds and NRS 111.210(1). *See Daniel v. Executrix of the Estate of Hiegel*, 96 Nev. 456, 611 P.2d 207 (1980). Parties are estopped to assert the requirement that an agreement be in writing where an oral agreement at the time of separation dividing assets has been fully performed. *See Schreiber v. Schreiber*, 99 Nev. 453, 663 P.2d 1189 (1983). However, an agreement conveying a real property interest must be in writing. *See Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568, NRS 111.220.

An agreement can provide for support and the division of property and survive the decree of divorce. The decree, however, must provide the agreement is not merged, but survives the decree. *See Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964). The parties may remove the subject matter of the agreement from litigation in divorce and they may agree to merge the agreement into the decree. *Balin v. Balin*, 78 Nev. 224, 371 P.2d 32 (1962).

CONCLUSION

For cases like *Sogg*, it is not too difficult to see why the parties ended up getting divorced. Illustrative as the case is, it is hard to imagine who would want to enter a marriage under those conditions. As can be seen, most of the problems stem from the financially stronger party's unwillingness to adhere to basic concepts of fairness. Discretion is the better part of valor, and avoiding the problems of *Fick* and *Sogg* can be relatively simple. Counsel and client can avoid attacks on the agreement at a later date by following the proper "dos's and don'ts".

Do ensure:

1. The agreement is in writing.
2. The other party has ample time to review the agreement.
3. The other spouse or prospective spouse has access to an independently chosen counsel, and ample time in which to confer with said counsel.
4. The other party's counsel is willing to sign an "advised" certificate.
5. There is full and complete disclosure of all assets.
6. The terms are fair and equitable, or
7. That the party relinquishing a fair and equitable settlement:

A. has substantial business experience and business acumen, and

B. is aware of the financial resources of the other party and understands the rights that are being forfeited.

Don't allow:

1. Duress to be used to coerce the other party into making a rash decision.
2. An oral arrangement to be considered a "prenuptial agreement."
3. A written "agreement" to be thrust at the other party for signature within days, hours, or moments before the wedding ceremony.
4. An agreement to be signed without having been read.
5. An agreement to be signed without having a full disclosure of each party's assets.
6. One party (or that party's attorney) to choose the other party's attorney.
7. One party to interfere with the other party's ability to confer independently with counsel.
8. One party to keep all of the assets acquired by his or her greater earning capacity during the marriage, no matter how long the marriage lasts.

By adhering to these simple steps, both parties can be ensured of an equitable, sustainable agreement.

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