

THE MPT

MULTISTATE PERFORMANCE TEST

In re Hayworth and Wexler

February 1997, Test 2



Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which are administered in February 1997 in four states: Georgia, Hawaii, Iowa, and Missouri.

The instructions for the test appear on the back cover. For further information regarding the test, see the **MPT Information Booklet**.

In re Hayworth and Wexler

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FILE

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TO: Applicant
FROM: Ellen Levine
DATE: February 25, 1997
SUBJECT: Premarital Agreement for Hank Hayworth and Wendy Wexler

Hank Hayworth is a long-time client of mine who has asked me to prepare a premarital agreement that he and Wendy Wexler, the woman he intends to marry, can sign. His goal is to keep his assets and those of his wife separate. Both of them have previously been married and divorced.

Hank is a 45-year-old real estate developer who specializes in buying distressed residential property which he refurbishes and resells. When I was in law school at the University of Mackinac he was working on his MBA, and we played intramural volleyball together. I have represented him in a number of matters dealing with his business over the course of ten years. I also represented him in his divorce.

Hank and Wendy began dating after she bought one of the houses he had remodeled. She bought the house after she separated from her first husband but prior to her divorce. Hank introduced her to me, and I represented her in a personal injury case that was settled two years ago. At the conclusion of the matter, I sent her a settlement check for \$2,250 along with our standard termination letter telling her that our representation of her was concluded and that, unless or until she retained me to work on any other matter, I was no longer her lawyer.

Wendy, who is 41, also went to the University of Mackinac, where she studied nursing. I did not know her there. She has both a B.S. and M.S. degree in nursing and has enjoyed a successful career as a hospital nurse. She has worked since college, with the exception of time she took off for maternity leave. She has one child, age 11. Five years ago she was promoted to the position of Director of Nursing Education at Oakland General Hospital.

Hank says that Wendy does not want to get her own lawyer to advise her regarding the premarital agreement. After I began drafting the agreement, I became concerned about the consequences of Wendy's being unrepresented in this matter and did some research into it. I have attached a partial first draft of the provisions I wrote to conform to Hank's wishes. I have also attached a case I found from our Supreme Court and some provisions from the Franklin Rules of Professional Conduct (which are identical in substance to the ABA Model Rules of Professional Conduct).

Since I've represented Hank for so long, I've concluded I cannot undertake the joint representation of Hank and Wendy or serve as an intermediary in this case. I have attached the Professional Conduct rule and comment on intermediaries so you can see the basis of my conclusion. Please do not spend time discussing this point.

I need to meet with Hank to discuss representing him in this matter. To help me prepare for my meeting, please write me a memorandum that discusses what advice I should give Hank about the following:

1. How do Wendy's rights and interests affect the enforceability of the agreement as it is now drafted?
2. What particular problems does Wendy's being unrepresented present for Hank and me, and how should we resolve those problems?

Be sure to state the reasons and to cite the authorities for your conclusions.

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3216 Galewood Road
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TO: File
FROM: Ellen Levine
DATE: February 21, 1997
SUBJECT: Interview with Hank Hayworth

Client wants me to draft a premarital agreement for execution prior to his marriage to Wendy Wexler. Wedding scheduled for two weeks from now. Remains very unhappy about property settlement in previous divorce, although he does not blame me. Says he worked hard for the 15 years of that marriage and resented having to give his first wife the house plus more than \$200,000, half of their assets. Does not want to make the same mistake again and will marry again only if he can be sure that he can protect assets in case of divorce.

Hank wants an agreement that all of the property and assets he now owns, any increase in their value, as well as all he later acquires, will remain his separate property both during the marriage and in the event of divorce. He wants Wendy to have the same right. He says that they will acquire some things jointly, for example their residence, and that each will pay an equal share of their living expenses from his or her separate earnings. However, he wants her to agree that anything they don't explicitly buy or own jointly will remain separate property and that each will control his or her own income. He also wants her to waive any right she has to alimony or to his separate property at the time of property distribution in case of divorce, although he is not seeking a waiver of child support should they have any children.

Under Franklin law, absent such an agreement, Wendy would be entitled to an equitable share of all property acquired during the marriage, including the increases in the value of the property brought into the marriage. She might also be entitled to alimony or maintenance because of the disparity in their incomes.

Hank brought me a financial statement that shows he has a net worth of more than \$1.5 million and last year had income in the amount of \$275,000. He says that Wendy's assets consist mainly of the equity in her house of approximately \$50,000, a vested pension worth approximately \$125,000, and a small savings account with less than \$500 in it. They each own a car and household goods.

He says that he has discussed most of the proposed agreement with Wendy and she is willing to go along. He has not yet told her about the waiver of alimony and property distribution but intends to do so before presenting her with the document. He has encouraged her to consult her brother, who is an attorney. She has declined to do so because she either feels uncomfortable discussing her financial situation with a family member or is embarrassed by the fact that Hank is insisting that they enter into a premarital agreement. Hank has offered to pay for the cost of a consultation with another lawyer, but Wendy has declined. She has agreed, he says, that I should draft the agreement and she will sign it.

Wendy's job as Director of Nursing Education is an administrative one and she deals with contracts, grants, budgets, and other business matters. Her income is \$63,000 per year.

I agreed to prepare a draft of the premarital agreement and to review it with him. Told him we will need to attach his financial statement and a complete schedule of disclosures to the agreement; gave him a sample so that he can prepare for our next meeting.

PARTIAL FIRST DRAFT
Premarital Agreement
between
Hank Hayworth and Wendy Wexler

* * * *

1. All of the separate property of Hank Hayworth, including, but not limited to, the real property described in Schedule A, which is attached, and the personal property described in Schedule B, which is attached, shall, after the contemplated marriage, remain the separate property of Hank Hayworth, free and clear of any interest on the part of Wendy Wexler or any creditor or other person claiming any interest through Wendy Wexler. Wendy Wexler disclaims any interest in and to the separate property of Hank Hayworth, both now and after the contemplated marriage.

2. The parties agree that any accumulations of income or property that might be construed under the laws of any state as the acquisition of marital property shall for all purposes of this Agreement and their marriage be the separate property of the party responsible for such acquisition.

3. Each party agrees that, in the event of termination of the marriage by any means other than death, each shall retain his or her separate property and shall make no claim against the other for maintenance, alimony, or any other type of financial settlement, except as hereinafter specifically provided:

* * * *

LIBRARY

In the Matter of the Marriage of Robert T. Watson and Jane A. Watson

Supreme Court of Franklin (1986)

Petitioner Robert Watson challenges a decision voiding his premarital agreement with respondent Jane Watson. We affirm.

Jane Watson, then Jane Dilts, worked for Robert Watson as a secretary during the 1969 legislative session when he was a member of the Franklin State Senate. She subsequently filed for divorce from her first husband in July 1969.

In the early part of 1970, Robert and Jane became engaged to marry. During this same period, around February, Robert began discussing his desire for a premarital agreement with Jane. He told her he wanted to protect the interests of his three sons by his previous marriage. Robert did not communicate to Jane his specific intent to make certain everything obtained in the future would be separate and go to his sons.

In early March 1970, Robert asked his attorney to prepare a premarital agreement for the upcoming marriage; the attorney testified he was representing Robert in this transaction but that he had never informed Jane of that fact. Shortly after, in the week before their marriage, the couple met with the attorney on two occasions to discuss premarital agreements. The first meeting on March 17, 1970 (four days before the wedding), was to discuss the nature of the premarital agreement, the need for it, the effect of it, and the property involved. The attorney and the couple reviewed, paragraph by paragraph, a sample premarital agreement. The attorney then drafted a premarital agreement that provided all income and earnings derived from Robert's separate property would remain separate, as would any increases in value to that property. The attorney gave the parties separate copies of the agreement, including itemized lists of property, to read through before meeting with the attorney again.

On the eve of the wedding, the couple met to execute the premarital agreement. The attorney had never advised Jane to seek independent counsel but did say to both parties, "If you want somebody else to look at this, fine." In addition, paragraph 15 of the agreement stated (just above the couple's

signatures): "This agreement is being signed only after having been read completely by each party, and after each has had an opportunity to seek advice and counsel of his or her own choosing."

After being advised of the nature and value of the other's property, each party signed the premarital agreement. Robert testified that if Jane had objected to signing the agreement on the eve of the wedding, the wedding would have been delayed until an unobjectionable agreement could have been prepared.

At the time of the agreement, Robert owned stock and real estate worth about \$330,000. Jane, on the other hand, owned only her personal effects. In June 1983, Robert petitioned for dissolution of the couple's marriage. He requested the court divide their property in accordance with the premarital agreement. His net worth, as of the trial date, was approximately \$830,000. Jane challenged the validity of the premarital agreement.

We have long recognized the right of the members of a prospective marriage to contract between them regarding their property. If fair and fairly made, we have held premarital agreements between competent parties to be valid and binding.

During the past 30 years, we have developed a two-pronged analysis for evaluating the validity of a premarital agreement. Under the first prong, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated. If the agreement is not fair, the court must invoke the second prong and decide: (A) whether full disclosure has been made by the parties of the amount, character, and value of the property involved, and (B) whether the agreement was entered into intelligently and voluntarily on independent advice and with full knowledge by both spouses of their rights.

Here, the premarital agreement was grossly disproportionate in favor of petitioner. In fact, after over 13 years of marriage, the agreement would serve to deny respondent any of her common law and statutory rights for a just and equitable distribution of property and prevent her from making any

claim against or seeking any rights in Robert's separate property. Since the agreement fails the test of fairness, we turn to the second prong of our analysis.

We find that part A of the second prong of the premarital agreement test was satisfied. The record reveals that Robert disclosed to Jane the nature and extent of his assets. Jane, in turn, communicated how limited were her resources. Thus, the parties made full disclosure of the amount, character, and value of the property involved in the premarital agreement.

In part B of the second prong of the premarital agreement test, the circumstances surrounding and the procedure followed in the execution of the agreement are the crucial factors. The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are some of the factors involved in the circumstances surrounding the document signing. The status of the relationship between the two parties entering into the agreement requires procedural fairness to allow both parties the knowledge and sufficient opportunity to act voluntarily and intelligently.

The question of whether enforcement of the agreement is dependent upon each party's being represented by independent counsel can be considered only on a case-by-case basis. For example, in *In re Marriage of Knoll* (Oregon Supreme Court, 1983), the wife challenged the validity of the premarital agreement. The court found the agreement valid, judged in light of the circumstances in the case and the wife's range of experience. Important facts in the court's decision were: (1) the wife was advised of the necessity of a premarital agreement at least nine months before the wedding and knew and understood the purpose of the agreement; (2) she had been given a copy of the agreement at least seven months before the wedding; (3) she was advised on numerous occasions by her husband's attorney to seek independent counsel; and (4) she had an excellent understanding of her husband's assets, because she handled the bookkeeping and payroll for her husband's businesses and was in charge of ten of his business checking accounts. The court decided that the failure to provide the wife with a detailed explanation of the agreement and her failure to follow advice and seek independent counsel were offset by her advance knowledge of the agreement, her receiving subsequent advice to seek independent counsel, and her extensive understanding of her husband's assets. These circumstances put her in a fair position to sign the agreement freely and intelligently.

Parties to a premarital agreement do not deal at arm's length with one another. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement. The beneficial aspects of a premarital agreement must be obtained without abuse, and, in particular, without any overreaching on the part of the spouse initiating the agreement.

Here, the agreement is void for several reasons (all involving the circumstances leading up to the execution of the agreement): (1) the attorney never advised Jane that he was representing only Robert; (2) the attorney never advised Jane that the practical effect of the agreement was to eliminate any rights she might have in the accumulation of property; (3) the disparity between the parties in business experience and assets mandated a more vigorous urging by the attorney that Jane seek independent advice; and (4) the timing of the agreement negated any inclination respondent may have had to secure independent advice. Jane had an extremely short period of time in which to consider the premarital agreement; she received no specific verbal encouragement to seek independent advice; and from the record it is not apparent she had even a minimal understanding of the legal consequences of the rights she was signing away. We find the circumstances surrounding her signing of the agreement did not afford her with sufficient opportunity to sign the agreement intelligently and voluntarily.

There is no absolute requirement of independent counsel. If the agreement had been fair and reasonable, and had there been no showing of fraud or overreaching, there would be no such requirement. Here the agreement was patently unreasonable. Independent counsel was required. A clear and important distinction certainly exists between saying that in particular circumstances a transaction could not be supported in the absence of independent advice, and saying that a general rule of equity exists which makes independent advice indispensable to the validity of transactions between persons occupying a fiduciary relationship.

Where it is plainly shown that a transaction was fair and free from objectionable influence, and especially where the person supposed to have been at a disadvantage is shown to have been of

strong and independent mind and in a position to form an intelligent judgment, a requirement that, in addition, he or she must have had independent advice would seem to be arbitrary and unnecessary.

Although we strongly urge both parties to seek advice from independent counsel before signing a premarital agreement, we hold that it is not an indispensable prerequisite where it is otherwise shown that the agreement makes fair and reasonable provision for the party against whom enforcement is sought or that full disclosure was made and that each party entered into the premarital agreement intelligently and voluntarily. The absence of independent counsel is a factor to consider in deciding whether there has been full disclosure and intelligent and voluntary waiver of statutory and common law rights.

In light of the circumstances in the present case, we find respondent Jane Watson did not intelligently and voluntarily sign the premarital agreement and affirm the decision voiding the agreement.

Franklin Rules of Professional Conduct

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations to any proceeding concerning the lawyer's representation of the client.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(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

(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 interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after 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.

Comment to Rule 1.7

Loyalty to a Client. Loyalty is an essential element in the lawyer's relationship with a client.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

* * * *

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict, in effect, forecloses alternatives that would otherwise be available to the client.

* * * *

Consultation and Consent. A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client.

* * * *

Interest of Person Paying for a Lawyer's Service. A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.

* * * *

Other Conflict Situations. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict, if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

* * * *

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit or require with respect to a client, or when the information has become generally known; or

- (2) reveal information relating to the representation except as Rule 1.6 would permit or require with respect to a client.

Comment to Rule 1.9

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.

* * * *

RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

* * * *

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

* * * *

Comment to Rule 2.2

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Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

* * * *

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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 the 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.

Comment to Rule 4.3

An unrepresented person, particularly one not experienced in dealing with legal matters, might

assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. However, as long as the lawyer makes clear that he or she is not acting on behalf of the unrepresented person or taking steps to advance the interests of the unrepresented person, the lawyer may provide accurate statements of the law.

NOTES

INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the task you are to complete.
4. The Library contains the legal authorities needed to complete the task. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 45 minutes to organizing and writing after you have studied and digested the materials. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet.
7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete given to you in the first memorandum in the File and on the content, thoroughness, and organization of your response.