SBM
State Bar of Michigan

PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

Meeting of the Committee on Special Projects (CSP);

Meeting of the Council of the Probate and Estate Planning Section

Saturday, November 17, 2018
9:00 a.m.
University Club of MSU
3435 Forest Road
Lansing, Michigan 48910

Probate and Estate Planning Section of the
State Bar of Michigan

Meeting of the Section's Committee on Special Projects and
Meeting of the Council of the Probate and Estate Planning Section

November 17, 2018
9:00 a.m.

University Club of MSU
3435 Forest Road
Lansing, Michigan 48910

The meeting of the Section's **Committee on Special Projects (CSP)** meeting will begin at 9:00 am and will end at approximately 10:15 am. The meeting of the **Council of the Probate and Estate Planning Section** will begin at approximately 10:30 am. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

David L.J.M. Skidmore, Secretary
Warner Norcross + Judd LLP
111 Lyon Street NW, Suite 900
Grand Rapids, Michigan 49503
Voice: 616-752-2491
Fax: 616-222-2491
Email: dskidmore@wnj.com

STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION COUNCIL
Council and CSP Meeting Schedule for 2018-2019
Saturday, November 17, 2018, University Club, Lansing, Michigan**
Saturday, December 15, 2018, University Club, Lansing, Michigan**
Note the remainder of the meetings are on Fridays
Friday, January 25, 2019, University Club, Lansing, Michigan**
Friday, February 15, 2019, University Club, Lansing, Michigan**
Friday, March 8, 2019, University Club, Lansing, Michigan**
Friday, April 12, 2019, University Club, Lansing, Michigan**
Friday, June 14, 2019, University Club, Lansing, Michigan**
Friday, September 20, 2019, University Club, Lansing, Michigan**

*Somerset Inn, 2601 West Big Beaver Road, Troy, Michigan 48084
**University Club, 3435 Forest Road, Lansing, Michigan 48909
Each meeting starts with the Committee on Special Projects at 9:00am, followed by the meeting of the Council of the Probate & Estate Planning Section.

Call for materials
Due dates for Materials for Committee on Special Projects
All materials are due on or before 5:00 p.m. of the date falling 9 days before the next CSP meeting. CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@bllhlaw.com)
Schedule of due dates for CSP materials, by 5:00 p.m.:
Thursday, October 4, 2018 (for Saturday, October 13, 2018 meeting)
Thursday, November 8, 2018 (for Saturday, November 17, 2018 meeting)
Thursday, December 6, 2018 (for Saturday, December 15, 2018 meeting)
Wednesday, January 16, 2019 (for Friday, January 25, 2019 meeting)
Wednesday, February 6, 2019 (for Friday, February 15, 2019 meeting)
Wednesday, February 27, 2019 (for Friday, March 8, 2019 meeting)
Wednesday, April 3, 2019 (for Friday, April 12, 2019 meeting)
Wednesday, June 5, 2019 (for Friday, June 14, 2019 meeting)
Wednesday, September 11, 2019 (for Friday, September 20, 2019 meeting)

Due dates for Materials for Council Meeting
All materials are due on or before 5:00 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to David Skidmore (dskidmore@wnj.com).
Schedule of due dates for Council materials, by 5:00 p.m.:
Friday, October 5, 2018 (for Saturday, October 13, 2018 meeting)
Friday, November 9, 2018 (for Saturday, November 17, 2018 meeting)
Friday, December 7, 2018 (for Saturday, December 15, 2018 meeting)
Thursday, January 17, 2019 (for Friday, January 25, 2019 meeting)
Thursday, February 7, 2019 (for Friday, February 15, 2019 meeting)
Thursday, February 28, 2019 (for Friday, March 8, 2019 meeting)
Thursday, April 4, 2019 (for Friday, April 12, 2019 meeting)
Thursday, June 6, 2019 (for Friday, June 14, 2019 meeting)
Thursday, September 12, 2019 (for Friday, September 20, 2019 meeting)

Officers of the Council for 2018-2019 Term

Office	Officer
Chairperson	Marguerite Munson Lentz
Chairperson Elect	Christopher A. Ballard
Vice Chairperson	David P. Lucas
Secretary	David L.J.M. Skidmore
Treasurer	Mark E. Kellogg

Council Members for 2018-2019 Term

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Anderton, James F.	2018 (1st term)	2020	Yes (2 terms)
Jaconette, Hon. Michael L.	2017 (2nd term)	2020	No
Lichterman, Michael G.	2017 (1st term)	2020	Yes
Malviya, Raj A.	2017 (2nd term)	2020	No
Olson, Kurt A.	2017 (1st term)	2020	Yes
Savage, Christine M.	2017 (1st term)	2020	Yes
Caldwell, Christopher J.	2018 (2nd term)	2021	No
Goetsch, Kathleen M.	2018 (2nd term)	2021	No
Hentkowski, Angela M.	2018 (1st term)	2021	Yes
Lynwood, Katie	2018 (2nd term)	2021	No
Mysliwiec, Melisa M. W.	2018 (1st term)	2021	Yes
Nusholtz, Neal	2018 (1st term)	2021	Yes
Labe, Robert C.	2016 (1st term)	2019	Yes (1 term)
Mayoras, Andrew W.	2018 (to fill Geoff Vernon's seat)	2019	Yes (2 terms)
Mills, Richard C.	2016 (1st full term)	2019	Yes (1 term)
New, Lorraine F.	2016 (2nd term)	2019	No
Piwowarski, Nathan R.	2016 (1st term)	2019	Yes (1 term)
Syed, Nazneen H.	2016 (1st term)	2019	Yes (1 term)

Ex Officio Members of the Council

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack; Marlaine C. Teahan

CSP Materials

MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

AGENDA

November 17, 2018

East Lansing, Michigan

9:00 – 10:00 AM

1. **Melisa Mysliwiec — Proposed Probate Court Rule Change to MCR 5.117 to Allow Limited Scope of Representation – 30 minutes**

   See attached memorandum from the State Bar of Michigan.

2. **Meg Lentz – Fiduciary Exception to the Attorney Client Privilege – 30 minutes**

   See attached memorandum from George Bearup.

SBM STATE BAR OF MICHIGAN

To: Members of the Probate & Estate Planning Section Council

From: Christopher G. Hastings, State Bar Member and Volunteer
Kathryn L. Hennessey, Public Policy Counsel

Date: November 7, 2018

Re: Amending MCR 5.117 to Allow Limited Scope Representation in Probate Court

Effective January 1, 2018, the Michigan Supreme Court adopted rule amendments to explicitly allow limited scope representation (LSR) in civil proceedings. These rule amendments were originally proposed by the State Bar of Michigan LSR Workgroup and approved with overwhelming support by the Representative Assembly. The order adopting the amendments is included as Attachment 1. An article discussing the new rule amendments is included as Attachment 2.

When reviewing SBM-proposed LSR forms, the Court brought to our attention that the rules do not extend to probate proceedings. To remedy this oversight, SBM staff has been looking into whether amendments should be made to MCR 5.117 to allow LSR in probate proceedings and to clarify that LSR is available in civil actions pending in probate court.

Christopher Hastings, who served on the LSR Workgroup, drafted initial rule amendments, and SBM staff reached out for feedback to a number of people with expertise in probate practice, including practitioners, judges, and court administrators. The feedback we received was on the rule proposal was overwhelmingly positive, and we have been able to incorporate the suggestions we received into the draft that we are now presenting to the Section. Note that we are presenting two options for the Section to consider for MCR 5.117(C).

We would like the Probate & Estate Planning Section's feedback on:

1. Whether LSR should be extended to probate proceedings;

2. The proposed amendments to MCR 5.117 suggested below; and

3. The Section's preference for Option 1 or Option 2 for MCR 5.117(C).

We welcome any other feedback that the Section would like to provide.

Thank you for time and feedback on this project. We would like your feedback by **Monday, November 19, 2018** in order to discuss this project with our Affordable Legal Services Committee, which is meeting the next day.

RULE 5.117 APPEARANCE BY ATTORNEYS

(A) Representation of Fiduciary. An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.

(B) Appearance.

(1) In General. An attorney may appear generally by an act indicating that the attorney represents an interested person in the proceeding. A limited appearance may be made only as provided in MCR 2.117(B)(2)(c). An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person.

(2) Notice of Appearance. If an appearance is made in a manner not involving the filing of a paper served with the court or if the appearance is made by filing a paper which is not served on the interested persons, the attorney must promptly file a written appearance and serve it on the interested persons whose addresses are known and on the fiduciary. The attorney's address and telephone number must be included in the appearance.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the client.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court-ordered conference or trial if it is within the scope of the appearance.

OPTION 1 FOR SECTION (C)

(C) Duration of Appearance by Attorney.

(1) In General. Unless otherwise stated in the appearance or ordered by the court, an attorney's appearance applies only in the court in which it is made or to which the action is transferred and only for the proceeding in which it is filed.

(2) Appearance on Behalf of Fiduciary. An appearance on behalf of a fiduciary applies until the proceedings are completed, the client is discharged, a notice of termination of a limited scope appearance is filed and becomes final, -or an order terminating the appearance is entered.

(3) Termination of Appearance on Behalf of a Personal Representative. In unsupervised administration, the probate register may enter an order terminating an appearance on behalf of a personal representative if the personal representative consents in writing to the termination. Limited appearances under MCR 2.117((B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3).

(4) Other Appearance. An appearance on behalf of a client other than a fiduciary applies until a final order is entered disposing of all claims by or against the client, a notice of termination of a limited scope appearance is filed and becomes final, or an order terminating the appearance is entered.

(5) Substitution of Attorneys. In the case of a substitution of attorneys, the court in a supervised administration or the probate register in an unsupervised administration may enter an order permitting the substitution without prior notice to the interested persons or fiduciary. If the order is entered, the substituted attorney must give notice of the substitution to all interested persons and the fiduciary.

OPTION 2 FOR SECTION (C)

(C) Duration of Appearance by Attorney.

(1) In General. Unless otherwise stated in the appearance or ordered by the court, an attorney's appearance applies only in the court in which it is made or to which the action is transferred and only for the proceeding in which it is filed.

(2) Appearance on Behalf of Fiduciary. An appearance on behalf of a fiduciary applies until the proceedings are completed, the client is discharged, or an order terminating the appearance is entered.

(3) Termination of Appearance on Behalf of a Personal Representative. In unsupervised administration, the probate register may enter an order terminating an appearance on behalf of a personal representative if the personal representative consents in writing to the termination.

(4) Other Appearance. An appearance on behalf of a client other than a fiduciary applies until a final order is entered disposing of all claims by or against the client, or an order terminating the appearance is entered.

(5) Limited Scope Appearances. Notwithstanding other provisions in this section, limit appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3).

(6~~5~~) Substitution of Attorneys. In the case of a substitution of attorneys, the court in a supervised administration or the probate register in an unsupervised administration may enter an order permitting the substitution without prior notice to the interested persons or fiduciary. If the order is entered, the substituted attorney must give notice of the substitution to all interested persons and the fiduciary.

(D) Right to Determination of Compensation. An attorney whose services are terminated retains the right to have compensation determined before the proceeding is closed.

ATTACHMENT 1

Order

Michigan Supreme Court
Lansing, Michigan

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

September 20, 2017

ADM File No. 2016-41

Amendment of Rules 1.0, 1.2, 4.2 and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.0, 1.2, 4.2 and 4.3 of the Michigan Rules of Professional Conduct, and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules are adopted, effective January 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.0 Scope and Applicability of Rules and Commentary

(a)-(c) [Unchanged.]

Preamble: A Lawyers Responsibilities [Unchanged until section entitled "Terminology."]

Terminology.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. [To be inserted after term "Belief" and before term "Consult."]

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. [To be inserted after term "Fraud" and before term "Knowingly."]

Rule 1.2 Scope of Representation

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the ~~objectives~~ scope of ~~the~~ a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the ~~client consents after consultation~~ limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

(1) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)."

(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.

(c)-(d) [Unchanged.]

Comment: [To be added following the paragraph entitled "Services Limited in Objectives or Means," and before the paragraph entitled "Illegal, Fraudulent and Prohibited Transactions."]

Reasonable under the Circumstances. Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney's obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to

ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.

Rule 4.2 Communication with a Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) An otherwise self-represented person receiving limited representation in accordance with Rule 1.2(b) is considered to be self-represented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation. Oral communication shall be made first to the limited scope representation lawyer, who may, after consultation with the client, authorize oral communications directly with the client as agreed.

(c) Until a notice of termination of limited scope representation comporting with MCR 2.117(B)(2)(c) is filed, or other written communication terminating the limited scope representation is provided, all written communication, both court filings and otherwise, shall be served upon both the client and the limited scope representation attorney.

Rule 4.3 Dealing with a~~n Unr~~ Self-Represented Person

(a) 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 ~~un~~self-represented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) Clients receiving representation under a notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation are not self-represented persons for matters within the scope of the limited appearance, until a notice of termination of limited appearance representation comporting with MCR 2.117(B)(2)(c) is filed or other written communication terminating the limited scope representation is in effect. See Rule 4.2.

Rule 2.107 Service and Filing of Pleadings and Other Papers

(A) [Unchanged.]

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(c) [Unchanged.]

(d) The court may order service on the party~~.~~;

(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every paper later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.

(2)-(3) [Unchanged.]

(C)-(G) [Unchanged.]

Rule 2.117 Appearances

(A) [Unchanged.]

(B) Appearance by Attorney.

(1) [Unchanged.]

(2) Notice of Appearance.

(a)-(b) [Unchanged.]

(c) Pursuant to MRPC 1.2(b), a party to a civil action may appear through an attorney for limited purposes during the course of an action, including, but not limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

(i) The attorney files and serves a notice of limited appearance with the court before or during the relevant action or proceeding, and all parties of record are served with the limited entry of appearance; and

(ii) The notice of limited appearance identifies the limitation of the scope by date, time period, and/or subject matter.

(d) An attorney who has filed a notice of limited appearance must restrict activities in accordance with the notice or any amended limited appearance. Should an attorney's representation exceed the scope of the limited appearance, opposing counsel (by motion), or the court (by order to show cause), may set a hearing to establish the actual scope of the representation.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or a confirming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1) [Unchanged.]

(2) Unless otherwise stated in this rule, a~~A~~n attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court.

(3) An attorney who has filed a notice of limited appearance pursuant to MCR 2.117(B)(2)(c) and MRPC 1.2(b) may withdraw by filing a notice of withdrawal from limited appearance with the court, served on all parties of record, stating that the attorney's limited representation has concluded and the attorney has taken all actions necessitated by the limited representation, and providing to the court a current service address and telephone number for the self-represented litigant. If the notice of withdrawal from limited appearance is signed by the client, it shall be effective immediately upon filing and service. If it is not signed by the client, it shall become effective 14 days after filing and service, unless the self-represented client files and serves a written

objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services.

(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other papers without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a paper.

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A)-(C) [Unchanged.]

(D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except

(1) as otherwise provided by rule or statute,

(2) when it clearly appears that they apply to civil actions only, ~~or~~

(3) when a statute or court rule provides a like or different procedure~~.~~, or

(4) with regard to limited appearances and notices of limited appearance.

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

(E) [Unchanged.]

Staff Comment: The amendments of Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules were submitted to the Court by the State Bar of Michigan Representative Assembly. The rules are intended to provide guidance for attorneys and clients who would prefer to engage in a limited scope representation. The rules allow for such an agreement "preferably in writing," and enable an attorney to file a notice of LSR with the court when the representation is undertaken as well as a termination notice when the representation has ended. The rules also explicitly allow attorneys to provide document preparation services for a self-represented litigant without having to file an appearance with the court.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

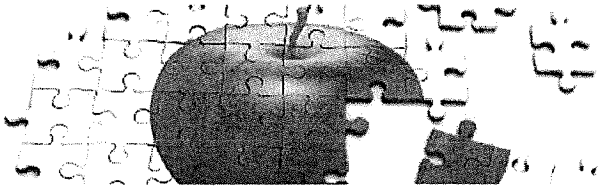
I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 20, 2017

Clerk

New Limited Scope Representation Rules Effective January 1

Limited Scope Representation



New Limited Scope Rules Benefit Underemployed Attorneys and Overburdened Courts

Attorneys looking to expand their practices, courts looking for improved efficiencies, and pro se civil litigants simply looking for help should look to the new limited scope representation (LSR) rules that became effective January 1, 2018.[1] Michigan lawyers have enjoyed success with LSR for decades: think of the commercial or real estate attorney hired to review a single contract with no expectation of further engagement in the transaction, or the traditional litigator who provides an initial case assessment and consultation for a flat fee to a potential civil plaintiff or an appellant in a criminal matter.[2]

Today, LSR usually involves an attorney providing a self-represented party with advice and coaching, mapping out an overall legal strategy to resolve the entire matter, and performing one or more discrete tasks. These often include preparing pleadings, conducting discovery, attending a hearing, or negotiating settlement. Not every type of legal matter nor every client is a good fit. LSR, also known as unbundling, has proven most effective in settings such as landlord-tenant disputes, simple divorces and other family law concerns, expungements, and noncomplex consumer or tax matters.[3] In all cases, unbundling requires education and training—of lawyers, clients, and judges and court staff. It also requires quality control mechanisms and deliberate attention to ethical questions.

Fortunately, ethicists have carefully considered LSR and have been instrumental in developing Michigan's new rules and helping the State Bar of Michigan aid members who choose to engage in LSR. The American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion in 2015 endorsing LSR under appropriate circumstances and when it complies with all related laws and rules of professional conduct.[4] Here in Michigan, Ethics Opinion RI-347 (April 23, 2010) explains

that "a lawyer is permitted to provide unbundled legal services [including assistance drafting documents] to a properly informed client, but he or she retains all of the professional responsibility that would exist in the case of ordinary services."

Michigan joins the more than 30 states that have formally adopted court and ethics rules specific to the provision of unbundled legal services.[5] Experience in these jurisdictions is encouraging: courts benefit from better-prepared litigants, fewer delays, and a more efficient docket; parties benefit from attorney expertise and skill that can be supported by a limited budget; and lawyers benefit from gaining access to a previously untapped market of self-represented clients, increasing revenues and growing their practices.

History of LSR in Michigan

Michigan has been moving toward more formal LSR since at least 2010, with the creation of the Solutions on Self-help Task Force,[6] and especially since the launch of Michigan Legal Help (MLH) in 2012. MLH's online portal and self-help centers provide access to information on a variety of law-related topics.

MLH also facilitates comprehensive triage procedures that help isolate and define legal problems and then identify the best starting point for resolving them. For example, MLH provides a much-used pipeline to the State Bar's new online legal services portal, the backbone of which is the enhanced profile directory and lawyer referral service, which now includes a modest means panel.[7]

Formalized LSR in Michigan advanced again in 2016 with the publication of the State Bar's *Twenty-First Century Practice Task Force Report*, which recommended:

- Implementing a high-quality, comprehensive, limited scope representation system, including guidelines, attorney and client education, rules and commentary, and court forms focusing on civil cases.
- Incorporating a certified limited scope representation referral component into both the SBM online directory and MLH, and ultimately into the unified online legal services platform.
- Continuous review of the rules of professional conduct and regulations to eliminate unnecessary barriers to innovation, consistent with the highest standards of ethical obligations to clients and the public.
- Educating State Bar members regarding new and proven innovative law practice business models ... to improve economic viability of solo and small firm practices, while expanding service to undeserved areas and populations.[8]

These recommendations are currently being implemented thanks to the collaborative efforts of the State Bar LSR Implementation Work Group, MLH, the State Court Administrative Office, the Institute for Continuing Legal Education, the Michigan Judicial Institute, and other partners.[9] In September 2017, Michigan took a critical step when the State Bar Representative Assembly recommended a set of LSR-related rules revisions to the Michigan Supreme Court.

The Court adopted the proposal and the new rules became effective January 1 of this year. The revised rules are MCR 2.107, 2.117, and 6.001 and MRPC 1.0, 1.2, 4.2, and 4.3.[10]

Essentially, the new rules facilitate the use of two tools in a lawyer's LSR toolbox: (1) ghostwriting without entering an appearance, or even necessarily disclosing the attorney's identity; and (2) the ability, with the client's informed consent, to define the scope of a limited appearance and both enter and withdraw that appearance by simply filing proper notice and serving all parties of record.

Ghostwriting

The revised rules provide attorneys with clear guidance on how to help a client draft pleadings without being forced into a more extensive representation. To start, MCR 2.117(D) sets forth that an "attorney who assists in the preparation of pleadings or other papers without signing them ... has not filed an appearance and shall not be deemed to have done so." MRPC 1.2(b)(1) allows a lawyer to "draft or partially draft pleadings, briefs, and other papers to be filed with the court [and this] does not require the signature or identification of the lawyer, but does require the following statement on the document: 'This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to MRPC 1.2(b).'" And MRPC 1.2(b)(2) provides that the "filing of such documents is not and shall not be deemed an appearance by the lawyer in the case."

From a court's perspective, the new rules provide greater transparency by requiring the pleading to contain notice that it was drafted with the help of an attorney. In addition, MCR 2.117(D) confirms the court's authority to "investigat[e] issues concerning the preparation of such a paper." With these changes, courts can expect better-drafted documents and increased scrutiny over papers filed by some self-represented parties. MRPC 1.2(b)(2) provides attorneys with additional protections by allowing them to "rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation" is materially insufficient, false, seeks objectives that are inconsistent with the lawyer's obligations under the MRPC, or asserts claims or defenses that, if signed by the lawyer, would violate MCR 2.114. In sum, the new ghostwriting rules open exciting new avenues for pro se parties to gain much-needed assistance drafting legal documents while providing clear guidance to attorneys and increased transparency for courts.

Making a limited appearance

In cases where ghostwriting may not provide adequate assistance, a "lawyer licensed to practice in the State of Michigan may ... file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing."[11] In parallel, MCR 2.117(B)(2)(c) allows "a party to a civil action [to] appear through an attorney for limited purposes...including, but not limited to, depositions, hearings, discovery, and motion practice... "

Reasonable under the circumstances

MRPC 1.2(b) permits an attorney to enter a limited appearance under two conditions. The first is where "the limitation is reasonable under the circumstances..." In almost all cases, parties are better off with some representation rather than none. Nevertheless, LSR is not always a reasonable alternative. For example, a party seeking LSR may be agitated, pressed for time, or disorganized for myriad reasons, not least the stress of attempting to address legal issues pro se. Some parties may struggle with literacy, mental or emotional challenges, or poor communication skills. A lawyer considering LSR should explore other alternatives when it is not clear the client understands or agrees to the objectives or limits of the proposed representation or has the capacity for effective self-representation.[12] In addition, it is seldom, if ever, appropriate for an attorney to attempt to divide what the client wishes to be a general representation into a series of LSRs, with each ensuing representation conditioned on the replenishment of a retainer. Under these circumstances, the attorney should file a general appearance.

Informed consent

The second condition for entering a limited appearance under MRPC 1.2(b) is the client's "informed consent, preferably in writing." MRPC 1.0 defines informed consent as "agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of the proposed course of conduct, and reasonably available alternatives to the proposed course of conduct," which points the way to the first step in any successful LSR engagement—the initial consultation. This introductory meeting should involve a wide-ranging and probing conversation that includes accurately diagnosing the legal issues presented; determining whether *any* LSR services are appropriate, including the ethical obligation to assess the client's capacity for self-representation; identifying which tasks the client could perform and which should be performed by an attorney; discussing the client's ability to pay; and sketching out a rough-draft budget.

Only after such a comprehensive consultation is it possible to determine with confidence whether to engage the client at all, and whether the client actually needs full representation by a lawyer, ongoing support via LSR as a self-represented litigant, or little more than some advice and a game plan to proceed with self-representation. A written letter of engagement is appropriate in all of these scenarios, outlining the specific tasks to be performed by the attorney, perhaps the specific tasks to be performed by the client, and clarifying costs and fee arrangements. The purpose is to engage the client up front in a deliberate discussion leading to informed consent, clear definition of the scope of representation, and a written document that can evolve, if needed, into a notice of limited appearance in the event of litigation.

Notice of limited appearance

An entry of limited appearance must be accompanied by notice served on all parties of record.[13] Such notice must identify the scope of the limited appearance by date, time period, or subject matter.[14] In addition, the attorney's activities must be restricted to accord with the notice. If an attorney exceeds the scope of the notice, the court (by order to show cause) or opposing counsel (by motion) may set a hearing to establish the actual scope of the representation.[15] Just as with the LSR engagement letter, care must be taken to thoughtfully considered and precisely draft any notice of limited appearance. Following this, additional care must be taken to act in accordance with the notice or, when changes in scope are anticipated, to make timely prospective amendments to the notice of appearance.

Withdrawal of limited appearance

Under MCR 2.117(C)(3), to terminate a limited appearance, a lawyer is required only to file a simple notice of withdrawal and serve it on all parties of record. With the client's signature, a notice of withdrawal takes immediate effect. Without the client's signature, it becomes effective after 14 days unless the client files and serves a written objection on the grounds that the attorney did not complete the agreed-upon services.[16] Here is yet another reason to be careful and precise in obtaining informed consent and in drafting engagement letters and notices of limited appearance. When conversation with the client is thorough, understanding clear, and writing precise, getting in and out of a limited appearance is a comparatively quick and simple task. When sufficient care is not taken, whether in obtaining informed consent, defining the scope of representation, or complying with the terms of the notice of limited appearance, complications may abound. Diligence is key.

Two more considerations regarding professional conduct in LSR

MCR 2.107(B)(1)(e)—Service in the Limited Scope Context

Once an attorney has made a limited appearance, every paper filed in the matter must continue to be served on the party and the LSR attorney for the duration of the limited appearance unless the LSR attorney requests, or the court orders, that service be made only on the party.

MPRC 4.2—Communication with a Person Represented by Counsel

Once notice of limited appearance is filed and served, and until written communication of withdrawal of that appearance is provided to the opposing party, all oral communication must begin with LSR counsel. However, after consultation with the client, counsel may authorize oral communication directly with the client.[17] For the duration of any limited appearance, all written communication—both court filings and otherwise—must be served on both the party and LSR counsel.[18]

Conclusion

The new LSR rules authorizing ghostwriting and streamlined limited appearances create tremendous opportunities for Michigan's self-represented civil litigants, lawyers, judges, and court administrators. They expand access to justice; open business opportunities, especially for solo practitioners and smaller firms; and help ease docket congestion. As with virtually every aspect of the law, not paying careful attention to what the new rules require creates risk. With the exercise of proper care and diligence, the new LSR rules offer Michigan a truly winning combination.

[1] Administrative Order 2016-41 (September 20, 2017). All websites cited in this article were accessed May 5, 2018.

[2] Vauter, *Unbundling: Filling the Gap*, 79 Mich B J 1688, 1689 (December 2000).

[3] *Limited scope representation helps lawyers expand practice.*

[4] ABA Standing Comm on Ethics and Prof Responsibility, Formal Op 472 (November 30, 2015) (*Communication with Person Receiving Limited-Scope Legal Services*).

[5] Buiteweg, *Limited Scope Representation: A Possible Panacea for Reducing Pro Per Court Congestion, Attorney Underemployment, and a Frustrated Public*, 95 Mich B J 10 (2016).

[6] Toy, *Justice for Whom?*, 89 Mich B J 18 (2010).

[7] Michigan Legal Help website.

[8] State Bar of Michigan 21st Century Practice Task Force, *Envisioning a New Future Today* (July 18, 2016).

[9] State Bar of Michigan website.

[10] Administrative Order 2016-41.

[11] MRPC 1.2(b).

[12] Michigan Ethics Opinion RI-347 (April 23, 2010).

[13] MCR 2.117(B)(2)(c)(i).

[14] MCR 2.117(B)(2)(c)(ii).

[15] MCR 2.117(B)(2)(d).

[16] MCR 2.117(C)(3).

[17] MPRC 4.2(b).

[18] MPRC 4.2(c).

SMITH HAUGHEY
RICE & ROEGGE
ATTORNEYS AT LAW

MEMORANDUM

TO: Probate and Estate Planning Council

FROM: George F. Bearup

RE: Should the Fiduciary Exception to the Attorney-Client Privilege Extend to Trust and Estate Beneficiaries?

The subcommittee of the Probate and Estate Planning Council is unable to make a formal recommendation to the Council on this question. It seeks direction from the Council on whether to proceed with a formal proposal.

The subcommittee consists of David Skidmore, Ken Konop, Kal Goren, Shaheen Imani, and ad hoc member, David Kovac, who acts as liaison with The Michigan Banker's Association (MBA) – Trust Council.

The subcommittee is unable to reach a consensus on whether the fiduciary exception to the attorney-client privilege should be recognized in Michigan. Some attorneys who regularly handle probate litigation on behalf of beneficiaries believe that an exception to the attorney-client privilege is warranted in limited situations. Other attorneys who regularly represent fiduciaries believe that no exception should be recognized to the longstanding attorney-client privilege.

The MBA endorses the "no exception" position. It believes Michigan should consider adopting a rule of evidence (like Florida) or a statute by an amendment to the Michigan Trust Code (like Ohio) that expressly announces that there is no exception to the attorney-client privilege. If the Probate Council endorses the "no exception" position, the MBA is willing to prepare the draft legislation/or court rule for the Council's consideration.

If the Probate Council concludes that there should be a recognized exception to the attorney-client privilege, then the subcommittee needs guidance with regard to: (i) statutory, court rule, or rule of evidence change? (ii) whether the source of payment of the attorney's fees should make a difference to identify when the exception exists? (iii) whether the exception should extend to other fiduciaries, e.g., guardians, conservators, Personal Representatives, etc.

Previously a research memo was prepared with regard to this topic which is attached to provide some background to the common law rule, the recognized exception, the difficulty of identifying a "bright-line" test when the exception might apply, and how some states have addressed the issue.

George F. Bearup, Subcommittee Chair

SMITH HAUGHEY
RICE & ROEGGE
ATTORNEYS AT LAW

MEMORANDUM

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RE: The Fiduciary Exception to the Attorney-Client Privilege Extend to Trust and Estate Beneficiaries

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The attorney-client privilege is one of the "oldest and most established" evidentiary privileges. *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2318 (2011).[1] Nevertheless, the application of the privilege is often opaque when a beneficiary of a trust seeks to uncover communication between a trustee and an attorney. Within this context, courts and legislatures are sharply divided. In some jurisdictions, a beneficiary is prohibited from discovering communication between a trustee and an attorney. In other jurisdictions, a beneficiary may discover such communication, provided the communication was *administrative*. *Wynne v. Humberston*, 27 Beav. 421, 243-424, 54 Eng. Rep. 165, 166 (1858); *Tablot v. Marshfield* 2 Dr. & Sm. 549, 550-551, 62 Eng. Rep. 728, 729 (1865). Ultimately, disagreements center on whether the beneficiary should be considered the attorney's *client*.

Michigan law does not address the exception. MCR 5.117(a) only provides: Representation of Fiduciary.

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[1]. In *Jicarilla Apache Nation, Supra*, the U.S. Supreme Court expressly addressed the fiduciary exception to the attorney-client privilege.

> English courts first developed the fiduciary exception as a principal of trust law in the 19th century. The rule was that when the trustee obtained legal advice to guide the administration of the trust, and for the trustee's own defense and litigation, the beneficiaries were entitled to the production of documents related to that advice. . . the courts reasoned that normally attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiary's benefit and was obtained at the beneficiary's expense by using trust funds to pay the attorney's fees. . . the fiduciary exception quickly became an established feature of English common law. . . but did not appear in this country until the following century. American courts seemed first to have expressed skepticism. See In Re: Prudence Bonds Corp., 76 F.Supp 643, 647 (E.D.N.Y. 1948) declining to apply the fiduciary exception to the trustee of a bond holding corporation, because of the "important right of such a corporate trustee. . . to seek legal advice and nevertheless act in accordance with its own judgment." By the 1970's, however, American courts began to adopt the English common-law rule. See Garner v Wolfinbarger, 430 F.2. 1093, 1103-1104 (C.A. 5, 1970) (allowing shareholders upon a showing of "good cause" to discover legal advice given to corporate management.

I. Majority Rule: Only the Fiduciary is the Client

The majority rule is that the trustee is the client. There are two (2) main reasons that courts and legislatures have supported this rule: (1) a general reluctance to recognize an exception to the attorney-client privilege; and (2) a fiduciary exception to the attorney-client privilege creates too much uncertainty, which discourages open and honest communication, which perhaps even discourages a trustee to seek legal advice. *Huie v. DeShazo*, 922 S.W.2d. (Tex. 1996).

a. **Texas.** In *Huie, supra*, the court explained that without the exclusive right to the attorney-client privilege, the trustee – fearing "second guessing" by the beneficiary – might neglect or avoid legal advice, and thus, the trust would be adversely affected. The court held that "only the trustee, not a trust's beneficiary, is the client and is entitled to assert the attorney-client privilege."

b. **California.** In *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 594 (Cal. 2000), the court held that "there is no authority under California law for requiring a trustee to produce communications protected by the attorney-client privilege." To reach its decision the court noted that "a trustee can keep beneficiaries 'reasonably informed' and provide 'a report of information' without necessarily having to disclose privileged communications." *Id.*

c. **Massachusetts.** In *Spinner v. Nutt*, 631 N.E.2d 542, 544 (Mass. 1994), the court held that an attorney "advising a trustee owe[s] no duty to beneficiaries, only to their clients – the trustees." To reach its decision the court explained that "conflicting loyalties" between the beneficiaries and the trustee would interfere with the attorney-client relationship. *Id.* at 544-46.

d. **Florida.** In *First Union Nat'l Bank v. Turney*, 824 So.2d 172 (Fla. Dist. Ct. App. 2001), the court rejected the fiduciary exception. *Id.* at 186 (holding that "an attorney represents a single client, the trustee"). The court noted that without the guarantee of the attorney-client privilege, the trustee might be thrust into conflict with the settlor's intentions, which are frequently different than the wishes of the beneficiaries. See Louis H. Hamel Jr., "Trustee's Privileged Counsel: A Rebuttal," 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, "The Fiduciary Exception to a Trustee's Attorney/Client Privilege," 21 ACTEC Notes 236 (1995).

II. Minority Rule: The Fiduciary and the Beneficiary are *Both* Clients if the Communication is Administrative.

The minority rule is that the fiduciary and the beneficiary are *both* clients if the communication is administrative. Courts and legislatures have reached this conclusion because: (1) administrative matters are *ultimately* for the benefit of the beneficiary; and (2) the attorney is generally paid out of *trust funds*. However, the latter (source of payment) rationale lost traction – even in Delaware – as courts and the legislature have recognized that who pays is not

determinative of who the attorney's client actually is. Del. Code. Ann. Tit. 12, § 3333 (2008)(emphasis added).[2]

a. Delaware. In *Riggs Nat'l Bank of Wash. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), the court noted that the beneficiary is the "real" client of the attorney. Accordingly, the court held that trust beneficiaries are privy to attorney-client communication between a trustee and an attorney when the communication pertains to an *administrative* matter.

b. South Carolina. In *Floyd v. Floyd*, 615 S.E.2d 465 (S.C. Ct. App. 2005), the court explained that the beneficiary possesses a *client's* right to the information. However, in 2008, South Carolina reversed course by enacting S.C. Code Ann. Section 62-1-110(2011).[3]

c. Pennsylvania. In *Follansbee v. Gerlach*, 56 Pa.D. & C.4th 483 (County Ct. 2002), the court reasoned that a beneficiary has an *essential right* to complete information. Accordingly, the court held that a beneficiary may view attorney-client communications with regard to *administrative* matters.

III. Minority Rule: How do Courts Determine Whether a Matter is Administrative or Defensive?

Under the minority rule, the fiduciary and the beneficiary are *both* clients if the communication is *administrative*. However, it is difficult to determine whether the subject matter of the communication is *administrative* in nature. Accordingly, most courts tend to focus on two (2) factors to make this determination.

1. Payment of the Attorney. Though not dispositive, courts will consider who pays the attorney as a factor in the determination of who the client actually is. In *Riggs*, the court viewed it as a "significant factor." *Id.* at 711-12("the payment of the law firm out of the trust assets [was] a significant factor . . .").

In *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 609 (N.D. Ca. 2000) the court explained that "while generally the fiduciary exception applies to matters of trust administration,

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[2] "Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. However, in the event that the fiduciary is found to have breached some fiduciary duty, the Court may, in its discretion, deny such fiduciary the right to have some part or all of such fees and expenses paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have previously been paid."

[3] "Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary."

the attorney-client privilege reasserts itself as to any advice that a fiduciary obtains to protect itself from liability."

The *Restatement (Second) of Trusts* takes a similar approach when it suggests that a trustee must pay for legal advice out of his own pockets in order to retain the attorney-client privilege.

2. A Divergence of Interests. Another way to determine whether a matter is administrative or defensive is to consider whether there exists a divergence of interests. In *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. Dist. Ct. App. 2004), the court noted that "[t]o the extent that the lawyers' work concerns the dispute with [the beneficiary], their client is the trustee, not the beneficiary." *See also Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. 1993). Clearly, attorney advice after a lawsuit begins will prove a divergence of interests because the communication is defensive.

Also, there is generally a divergence of interests when the issue pertains to trustee compensation. *Wachtel v. Health Net*, 482 F.3d 225, 234 (3d Cir. 2006).

But other bright lines are more elusive. See *Black v. Pitney Bowes*, No. 05 Civ. 108 (GEL), 2006 U.S. Dist. LEXIS 92263, at *3-7 (S.D.N.Y. Dec. 21, 2006). Courts might consider whether the fiduciary has a legitimate personal interest in the legal advice sought. But words like *legitimate*, *personal*, and *interest* all lend themselves to a court's discretion. *See, e.g., Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232 (3d Cir. 2007).

IV. Uniform Rule: The Fiduciary is the Sole Client if the Communication is "Defensive"

Regardless of jurisdiction, courts and legislatures tend to agree that a fiduciary is the *sole* client if he or she has assumed a defensive posture against the beneficiary. Accordingly, if a fiduciary retains an attorney in a personal, defensive, non-administrative capacity, in anticipation of litigation or after its commencement, the fiduciary is solely entitled to the attorney-client privilege. *Restatement (Second) of Trusts* § 173 cmt. B (1959)(which explains that a trustee retains the attorney-client privilege if the trustee obtains counsel "at his own expense and for his own protection."). See also *United-States v. Mett*, 178 F.3d 1058, 1063-64 (9th Cir. 1999)(which noted that where a fiduciary seeks advice of counsel for his own personal defense in contemplation of adversarial proceedings against beneficiaries, the trustee has the attorney-client privilege).

V. A handful of other states had addressed the question of the fiduciary exception to the attorney-client privilege by statute.

Florida.

90.5021. Fiduciary-Client Privilege

(1) For purposes of this Section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in SS. 731.201 and 736.0103, an administrator ad litem as described in S. 733.308, a curator as described in S. 733.501, a guardian or a guardian ad litem as

defined in S. 744.102, a conservator as defined in S. 710.102, or an attorney-in-fact as described in Chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is ***privileged and protected from disclosure*** under S. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying S. 90.502 to a communication under this Section, only the person or entity acting as a fiduciary is considered a client of the lawyer. (emphasis added.)

(3) This section does not affect the crime or fraud exception to the attorney-client privilege as provided in S. 90.502(4)(a).

New York. New York Civil Practice Law and Rule Section 4503, *Attorney*:

> Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of any attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

(1) Personal Representative.

> (A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:
>
> ***(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and***
>
> ***(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the***

> ***privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.*** (emphasis added.)

Ohio. Ohio is currently looking at proposed legislation on the exception. *Schwartz and Langsam, attorney-client privilege: Representing Trustees in Ohio*, 19 Ohio Prob. L.J. 236 (July/August 2009) suggesting that Ohio appears to be aligned with majority view.

Ohio R.C. 5815.16: A lawyer to a fiduciary such as a trustee is not the lawyer, i.e., ***owes no duties or obligations, to those the fiduciary serves***:

A. Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort or otherwise to any third-party to whom the fiduciary owes fiduciary obligations.

B. As used in this Section fiduciary means a trustee under an express trust or an executor or administer of a decedent's estate. (emphasis added.)

VI. Practical Realities

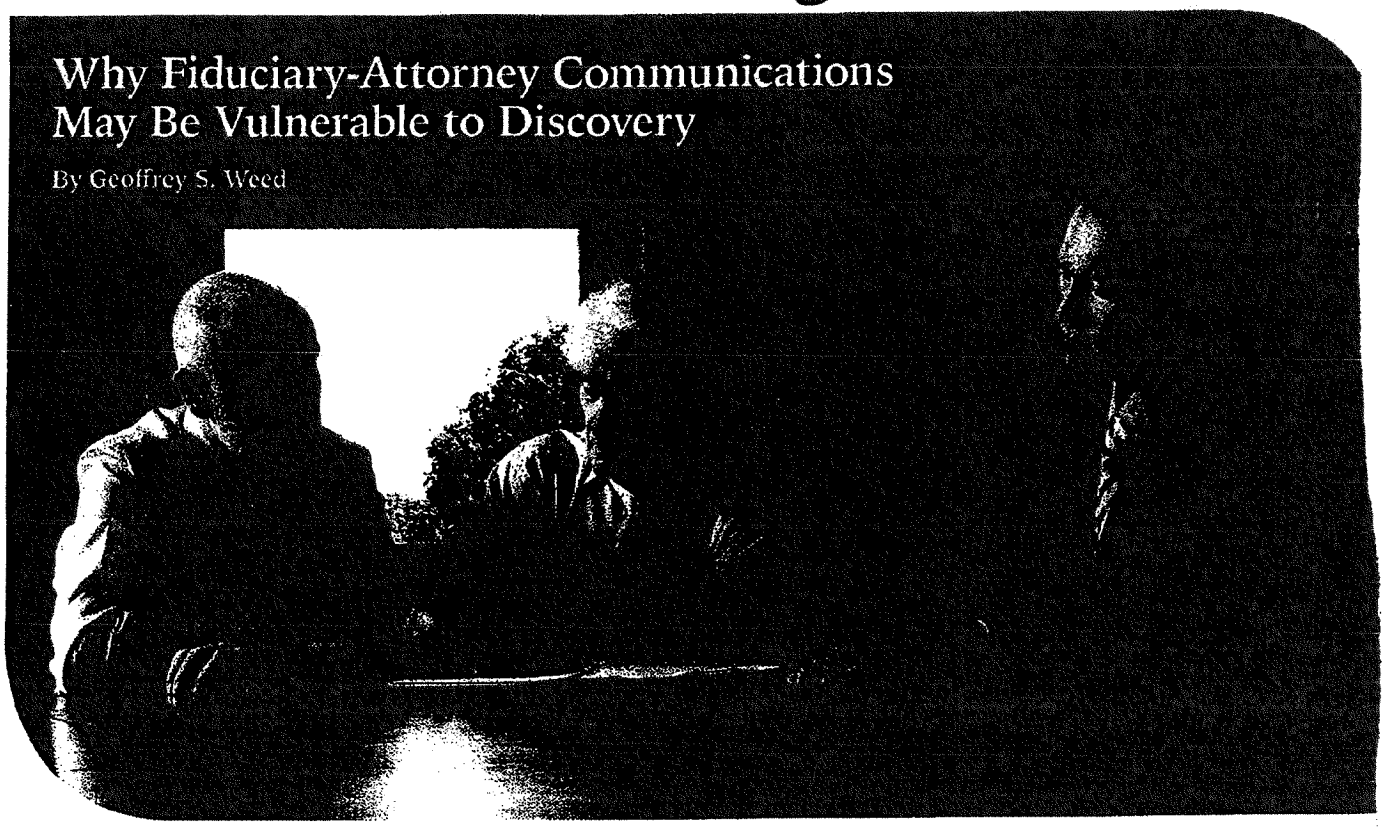
While many jurisdictions obviously reject the notion that a beneficiary is the client of the fiduciary's attorney, beneficiaries may see thing with an entirely different perspective, particularly where trust funds are used to pay for the fiduciary's legal advice. Beneficiaries may reach this expectation when they are informed of their fiduciary's continuing duty to inform and report. See MCL 700.7814(1):

> (1) A trustee is directed to keep the qualified trust beneficiaries reasonably informed about the administration of the trust and material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust.
>
> (2) A trustee shall do all of the following: (a) upon the reasonable request of a trust beneficiary to promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relative information about the trust property.

Probate and Privilege

Why Fiduciary-Attorney Communications May Be Vulnerable to Discovery

By Geoffrey S. Weed



At first blush, the issue seems simple. Of course, at first blush, many complex legal issues seem simple. The plain language of MCR 5.117(a) states that "[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary."[1] From that language, one might logically conclude that the attorney-fiduciary relationship is the same as any other attorney-client relationship—that the rules governing attorney-client privilege remain the same whether one is representing a criminal defendant, a civil litigant, or a trustee.

The legal reality, however, is convoluted. From the common law, courts have recognized a fiduciary exception to attorney-client privilege.[2] In the 1865 trust contest *Talbot v Marshfield*,[3] an English court held that a trustee could not assert attorney-client privilege against trust beneficiaries.[4] The court made this decision while reviewing the modern-day equivalent of two requests for production of documents that ordinarily would have been privileged.[5] The *Talbot* court reasoned that the trustee could not assert the privilege because, as a fiduciary, he was obligated to provide the beneficiaries with information regarding the trust.[6] The court further reasoned that the source of the attorney's fees prevented assertion of the privilege; since the trustee had paid his attorney with trust assets—assets which rightfully belonged to the beneficiaries, not the trustee—how could he then hope to assert attorney-client privilege against those same beneficiaries?[7]

Today, while a split of authority exists, the fiduciary exception is alive and well in American jurisprudence.[8] The seminal iteration of the modern exception is found in *Riggs National Bank of Washington, DC v Zimmer*.[9] In *Riggs*, while acknowledging the importance of the attorney-client privilege, the court held that "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship" outweighed the policy considerations that justify the [attorney-client] privilege.[10] The court reasoned that, in any event, trust beneficiaries are a trust attorney's real clients, going so far as to imply that a trustee cannot, without necessarily breaching the trustee's duties as a fiduciary, obtain legal representation if the attorney-client privilege might later be asserted against beneficiaries.[11]

Since 1976, when the *Riggs* decision was announced, numerous jurisdictions have upheld the fiduciary exception following largely the same reasoning.[12] Often, the potential harshness of

Communications to an attorney by a fiduciary are often deemed to be privileged if they are made in a defensive posture relative to litigation, but communications are not privileged if they are made in relation to normal administration of the trust or estate.

the exception is softened by allowing for a distinction based on the purpose of the communication.[13] Communications to an attorney by a fiduciary are often deemed to be privileged if they are made in a defensive posture relative to litigation, but communications are not privileged if they are made in relation to normal administration of the trust or estate.[14]

On the other hand, several jurisdictions have, either through legislation or judicial decision, done away with the fiduciary exception altogether.[15] The Texas Supreme Court, for instance, has decided against the exception, reasoning that the attorney-client privilege is just as important to the trustee-attorney relationship as it is to any other attorney-client relationship and that the real client is the trustee—after all, a beneficiary cannot sue his or her trustee's attorney for malpractice because no attorney-client relationship exists.[16] Likewise, since 2002, New York, Delaware, South Carolina, and Florida have all enacted statutory schemes that either limit or expressly eliminate the fiduciary exception.[17]

Unfortunately, however, the exception remains unlegislated and largely unlitigated in the majority of jurisdictions.[18] In Michigan, the legal authority is anything but authoritative.[19] In a 1990 published opinion, *Steinway v Bolden*,[20] a panel of the Michigan Court of Appeals held unanimously that, under the Revised Probate Code, the real client of an attorney retained by the personal representative of an estate was the estate itself, not the personal representative.[21] Although attorney-client privilege was not at issue in *Steinway*, the opinion appeared to imply that Michigan would follow the *Riggs* example and embrace the fiduciary exception.[22]

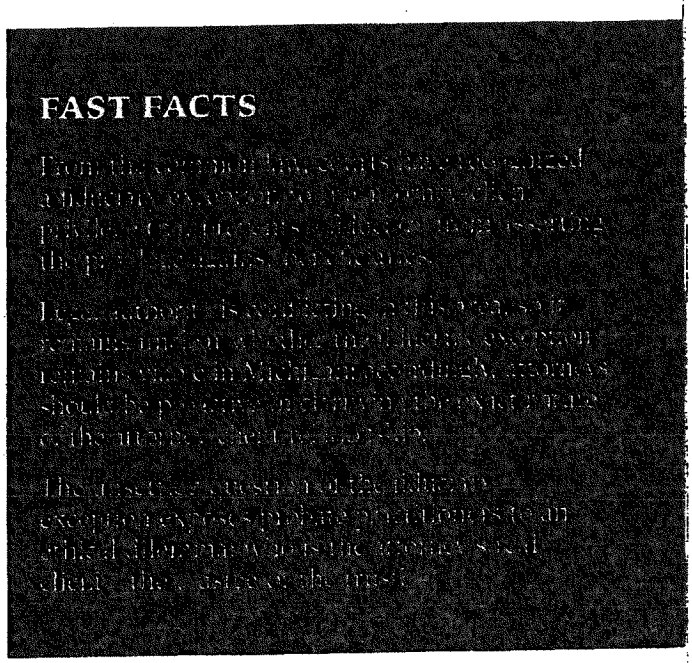
In direct response to *Steinway*, the Michigan Supreme Court promulgated MCR 5.117(a), which stated that "[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary."[23] The new rule seemingly resolved the question of the fiduciary exception's fate in Michigan.[24] But in 2009, the Michigan Court of Appeals issued another unanimous published opinion, *Estate of Graves v Comerica Bank*,[25] which presumably ignored MCR 5.117(a).[26] In *Graves*, the Court of Appeals held that "when an attorney is retained by a fiduciary, the attorney represents *both* the fiduciary and the estate."[27] Since *Graves* was announced, however, the Court of Appeals, on its own motion, issued an order rescinding publication of the opinion.[28]

While it may seem that the *Graves* court simply ignored MCR 5.117(a), there is another distinct possibility. The authority of the Michigan Supreme Court to establish "rules of practice and procedure" is, of course, beyond question.[29] But it is also axiomatic that "the Court is not authorized to enact court rules that 'establish, abrogate, or modify the substantive law.'"[30] Thus, the Court in *Graves*, while cognizant of MCR 5.117(a), may have decided that the court rule could not control its decision regarding the substantive law of privilege.

Muddying things further still, the most relevant ethics opinion, informal opinion RI-350, has left attorneys to tread water alone in these treacherous ethical currents.[31] The 2010 opinion states that determining the identity of the client "requires an examination of applicable substantive law, which is beyond the scope of the Committee's charge," and goes on to explain that the question of who the real client is has not been conclusively decided as a matter of law in the fiduciary-attorney context.[32] Thus, probate practitioners are left to their own devices in deciding how to deal with the many ethical implications posed by owing duties to multiple masters, to both the trustee and the beneficiary, the personal representative, and the heir.

In the end, that is the position each attorney for a fiduciary faces under the current state of the law. Without sufficient guiding precedent or legislation, each attorney stands alone regarding

FAST FACTS



the fiduciary exception. A thorough analysis of the law here reveals almost nothing besides a general state of disarray. There is a split of authority in other jurisdictions, a conflict between Michigan precedents, and an ethical morass that threatens to swallow probate practitioners whole. A court rule seems to conflict with caselaw, and there are complex questions of constitutional law and separation of powers.[33] Everything is in flux, and every step the practitioner takes across this legal landscape appears precarious.

Accordingly, when representing fiduciaries, it is imperative to be proactive and clarify the exact nature of the attorney-client relationship from the outset. If you will be representing the fiduciary only, be sure to include language to that effect in your fee agreement or engagement letter. Also, notify the beneficiaries in writing that you do not represent them and that they may wish to consult independent counsel. Conversely, if you consider your true client to be the trust or estate, be sure to inform the fiduciary, include notice of that fact in your engagement letter, and consider having the fiduciary sign an acknowledgment that you represent the fiduciary only as an agent of the trust or estate. Finally, if you are representing a fiduciary in litigation against beneficiaries, explain that it might be in your client's best interests—despite the general availability of the trust or estate assets[34]—to pay the litigation costs from the client's own funds or file a petition asking whether the trust or estate assets can be used without invoking the fiduciary exception. While it might, indeed, be painful for the fiduciary to pay your retainer from personal funds, emphasize that something else could be far worse: being ordered to produce privileged documents and attorney-client communications for opposing counsel's review. ■

Geoffrey S. Weed focuses his Grosse Pointe practice on estate planning and probate matters. He graduated magna cum laude from Thomas M. Cooley Law School, where he won 10 "book awards" and served on the board of the Law Review. Geoff has published several scholarly articles in various legal periodicals and is an active contributor for ICLE. He lives in Macomb County with his wife, Kristin, and two daughters, Erin and Olivia.

ENDNOTES

1. MCR 5.117(c).
2. See, e.g., *Talbot v Marshfield*, 62 Eng Rep 728 (1865).
3. *Id.*
4. Bartolacci, Short & Tacen, *The attorney-client privilege and the fiduciary exception: Why frank discussions between fiduciaries and their attorneys should be protected by the privilege*, 48 Real Prop Tr & Est LJ 1, 9 (Spring 2013), citing *Talbot*, 62 Eng Rep 728.
5. *Id.*
6. *Id.*
7. *Id.*
8. Babel, *Attorney for the trust: Does attorney-client privilege belong to the trustee or the beneficiary?*, 98 Ill B J 524, 524–525 (2010).
9. Bartolacci, n 4 *supra* at 10, citing *Riggs Nat'l Bank of Washington, DC v Zimmer*, 355 A2d 709 (Del Ch, 1976).
10. *Id.* at 11, quoting *Riggs*, 355 A2d at 714.
11. *Id.*
12. See Babel, n 8 *supra* at 524–526.
13. *Id.*
14. *Id.*
15. See Bartolacci, n 4 *supra* at 17–24.
16. *Id.* at 17–18, citing *Huie v DeShazo*, 922 SW2d 920 (1996).
17. *Id.* at 19–20.
18. See Magee, *Who is the client? Who has the privilege?: The attorney client privilege in trust relationships in Arkansas*, 65 Ark L R 637, 639–648 (2012); Bartolacci, n 4 *supra*; Babel, n 8 *supra* at 524–526.
19. See Supina & Cohen, Michigan Probate Litigation: A Guide to Contested Matters (2d ed, 2001), § 1.8.
20. *Steinway v Bolden*, 185 Mich App 234, 237–238; 460 NW2d 306 (1990).
21. *Id.* at 237–238.
22. See *id.*
23. MCR 5.117(a), see also Supina, n 19 *supra* at § 1.8.
24. See *id.*
25. *In re Estate of Graves*, unpublished opinion of the Court of Appeals, issued December 3, 2009 (Docket No. 286674).
26. See *id.* 2523 (December 3, 2009) (publication rescinded).
27. *Id.* (emphasis added).
28. *In re Estate of Graves*, unpublished order of the Court of Appeals, entered February 18, 2010 (Docket No. 286674).
29. *In re Williams*, 481 Mich 852, 855; 747 NW2d 867 (2008) (Corrigan, J. dissenting), quoting *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999).
30. *Id.*, quoting *McDougall*, 461 Mich at 27.
31. See Michigan Basic Practice Handbook (6th ed, 2007), § 22.13.
32. RI-350.
33. See *In re Williams*, 481 Mich at 855.
34. MCL 700.7817(w)–(x); MCL 700.3715(w)–(x).

The Attorney-Client Privilege Is Alive And Well, Hallelujah!

By Lian de la Riva, Esq., Markowitz, Ringel, Trusty and Hartog, Miami, Florida

The Attorney-Client Privilege is an indispensable tool of any attorney. Practitioners rely on their client's communications and the free flow of information to be effective advocates. The privilege can be loosely traced back to the Roman Republic. In the 16th century, under the rule of Elizabeth I, the privilege was firmly established in English law.[1] During the Elizabethan Era, the privilege was based on a concept of honor and barred any barrister from testifying against their client. Over time, the privilege morphed into the tool we utilize today. The privilege creates a sacred space between the attorney and the client, and therefore allows the attorney to provide "sound legal advice and] advocacy."[2] The doctrine of the Attorney-Client Privilege as been defined by the distinguished Dean Wigmore as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived."[3]

Florida first codified the Attorney-Client Privilege in 1976.[4] However, certain privileged communications are not absolutely protected. An exception to the Attorney-Client Privilege was carved out for communications between an attorney and a client who is acting in a fiduciary capacity. This exception can be traced as far back as Trust cases in the English Courts.[5] The Fiduciary Exception was particularly troublesome in the world of Guardianship, Probate and Estate Planning because the exception permitted certain communications to become discoverable. Due to litigants' (typically a beneficiary) creative arguments, the Fiduciary Exception was used to pierce the veil of protected communications, resulting in a chilling effect on the free flow of information from the fiduciary clients, whether a Guardian, a Personal Representative or a Trustee. The District Court of Appeal for the Second District of Florida recognized that billing records and other confidential communications between the fiduciary and her attorney could ome discoverable if it was found that the services rendered ere for the benefit of a third-party beneficiary. See *Jacob v. Barton*[6] and *Tripp v. Salkovitz*.[7] The United States Supreme Court also turned its attention to the matter of the Attorney-Client Privilege in the context of a fiduciary client in *United States v. Jicarilla Apache Nation*,[8] and held that the fiduciary exception to privileged communications does not apply to the general trust relationship between the United States and Indian tribes.

Given the ambiguity and attacks on the Attorney-Fiduciary Client Privilege, in 2011 the Florida Legislature enacted Fla. Stat. §90.5021, which provides that communications between a lawyer and client acting as a fiduciary are privileged and protected from disclosure to the same extent as if the client were not acting as a fiduciary. Fla. Stat. §90.5021 was intended to clarify Florida law and protect communications between the attorney and the fiduciary client. The Florida Trust Code[9] and Probate Rules[10] were also amended to ensure qualified beneficiaries and interested persons were made aware of the Attorney-Fiduciary Client privilege applicability to both Personal Representatives and Trustees. Most practitioners sighed in relief upon the passing of this statute, but the relief was short lived.

Our state's Supreme Court has been balancing the fiduciary client's privilege versus the need to pierce the Privilege for the benefit of the victim (typically a third-party beneficiary) of that privilege. Although passed in 2011, Fla. Stat. §90.5021, was not adopted until January 25, 2018. In 2014, the Supreme Court questioned the need for and casted doubt on the privilege on what appeared to be procedural grounds.[11] Then again in 2017, the High Court outright declined to adopt the Fla. Stat. §90.5021.[12] Thankfully, in part due to work of the Probate Rules Committee and this Section, the Supreme Court formally adopted Section 90.5021 of the Evidence Code in an out-of-cycle report.[13]

This is a moment to rejoice and then review what many consider basic principles of the Attorney-Client Privilege. For seven years, we have cautiously advised our Fiduciary Clients of the potential litigation and possibility of communications becoming discoverable. Now is the time to take a proactive

continued, page 51

approach and educate our clients about the intricacies of the Privilege, how it works, how it can be lost or waived and how the communications can be used against them. First you should assess each Client's understanding of the privilege and evaluate the dangers of losing it on a case-by-case basis. A key point to review with our clients is when the privilege can be asserted, these basic elements must be present: a *communication* between lawyer and client and the purpose of which is to *seek legal advice*.

It must be understood that the Fiduciary Protection, found under Fla. Stat. §90.5021, is not absolute and can be pierced leading certain communications to become discoverable.[14] Most often the privilege is lost by the intentional or inadvertent production of the communication to a third party, such as a beneficiary in a Trust or Probate Administration. Many times, production of a privileged communication occurs when a Fiduciary Client forwards an email thread including communications between them and their attorney. Fiduciary Clients should be consulted during the engagement process and during the progression of the matter of the dangers of making any disclosures or deciding to include beneficiaries in what would have been a privileged communication. Although cumbersome, a one-time review of communications your client intends on sending to third-parties to assess whether any privileged information is being disclosed is reasonable and efficient way to protect the privilege. Avoid electronic mail threads where privileged and non-privileged communications may be discussed interchangeably. It's better to send separate emails. Finally, writing Attorney-Client Privilege in a subject line of a communication will not provide the protection if the communication is sent to a third party.

Endnotes

1 Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2 (4th ed. 2001).

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2292, at 554 (McNaughton 1961 & Supp. 1991).

4 1976 Fla. Laws ch. 237, §1.

5 See In re Mason, 22 Ch. D. 609 (1883); *Talbot v. Marshfield*, 2 Dr. & Sm. 549, 62 Eng. Rep. 728 (1865); *Wynne v. Humberston*, 27 Beav. 165, 54 Eng. Rep. 165 (1858).

6 877 So. 2d 935 (Fla. 2d DCA 2004).

7 919 So. 2d 716 (Fla. 2d DCA 2006).

8 131 S.Ct. 2313 (2011).

9 Fla. Stat. §736.0813(1)(a).

10 Fla. Prob. R. 5.240(b)(2).

11 In re Amendments to the Florida Evidence Code, 144 So. 3d 536 (Fla. 2014).

12 In re Amendments to the Florida Evidence Code, 210 So. 3d 1231 (Fla. 2017).

13 In re Amendments to the Florida Evidence Code — 2017 Out-of-Cycle Report, No. SC17-1005.

14 Notably, in most will and trust contests, exceptions to the Attorney-Client Privilege have been codified to authorize the disclosure of most communications between an estate planning attorney and their deceased client. See, e.g., Fla. Stat. §90.502(4)(b), (d) and (e).

Council Materials

MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN

November 17, 2018

Agenda

I. Call to Order

II. Introduction of Guests

III. Excused Absences

IV. Lobbyist Report—Public Affairs Associates

V. Monthly Reports:

A. Minutes of Prior Council Meeting -- Attachment 1

B. Chair's Report – Attachment 2

1. Updated list of committees
2. Updated list of liaisons
3. Lists of legislative reports

C. Treasurer's Report – Attachment 3

D. Committee on Special Projects

VI. Other Committees Presenting Oral Reports

1. Electronic Communications (Michael Lichterman)
2. State Bar & Section Journals Committee (Richard Mills)
3. Tax Committee (J.V. Anderton) – Attachment 4
4. Budget Committee (David Skidmore)

VII. Other Committees/Liaisons Presenting Written Reports Only

1. Legislative Development and Drafting Committee – Attachment 5
2. Uniform Law Commission Liaison – Attachment 6

VIII. Other Business

IX. Adjournment

Next Probate Council Meeting: December 15, 2018.

Attachment 1

Meeting of the Council of the
Probate and Estate Planning Section of the
State Bar of Michigan

October 13, 2018
Troy, Michigan

Minutes

I. Call to Order

The Chair of the Council, Marguerite Munson Lentz, called the meeting to order at 10:45 a.m.

II. Introduction of Guests

A. Meeting attendees introduced themselves.
B. The following officers and members of the Council were present: Marguerite Munson Lentz, Chair; Christopher A. Ballard, Chair Elect; David P. Lucas, Vice Chair; David L.J.M. Skidmore, Secretary; Mark E. Kellogg, Treasurer; Christopher J. Caldwell; Kathleen M. Goetsch; Angela M. Hentkowski; Robert C. Labe; Michael G. Lichterman; Katie Lynwood; Richard C. Mills; Lorraine F. New; Kurt A. Olson; James F. Anderton; Neal Nusholtz; Andrew W. Mayoras; and Nazneen H. Syed. A total of 18 Council officers and members were present, constituting a quorum.
C. The following ex officio members of the Council were present: George W. Gregory; Nancy L. Little; and Thomas Sweeney.
D. The following liaisons to the Council were present: Hon. David Murkowski (Michigan Probate Judges Association); Daniel W. Borst (Michigan Bankers Association); Susan L. Chalgian (SCAO); John R. Dresser (Business Law Section); Jeanne Murphy (ICLE); and James P. Spica (Uniform Law Commission).
E. Others present: Ken Silver; Ron Knieser; and Erica Berezny.

III. Excused Absences

The following officers and members of the Council were absent: Hon. Michael L. Jaconette; Raj A. Malviya; Melisa M.W. Mysliwiec; Nathan R. Piwowarski; and Christine M. Savage.

IV. Lobbyist Report – Public Affairs Associates

Jim Ryan of Public Affairs Associates reported that (1) HB 6129, 6130, and 6131, the divided and directed trusteeship bills, were moved out of the judiciary committee and to the floor of the House; (2) following Nathan Piwowarski's testimony, HB 5362 and 5398, the certificate of trust bills, were referred out of committee and to the House floor; (3) the EPIC rewrite project resulted in the creation of 5 separate bills, 2 of which will be sponsored by Rep. Elder, 2 by Rep. Lucido, and 1 by Rep. Kesto; (4) the assisted productive technology bill is to be introduced in the Senate; and (5) HB 4741, the prenuptial agreement bill, previously passed by the House, was referred out

of the Senate judiciary committee, is on third reading on the Senate floor, and then will require House concurrence.

V. Monthly Reports

A. Minutes of Prior Council Meeting (David P. Lucas): It was moved and seconded to approve the Minutes of the September 8, 2018 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

B. Treasurer's Report (Mark E. Kellogg): It was reported that the Budget Committee is working on the annual budget and that the expense reimbursement form was included in the meeting agenda materials.

C. Chair's Report (Marguerite Munson Lentz): It was reported that an updated list of chairs and members of the Council's committees, and an updated list of liaisons to the Council, were included in the meeting agenda materials. Regarding vacant liaison positions, the Chair asked to be contacted by anyone interested in serving as the Council's liaison to law schools; the SBM Board of Commissioners selects its own liaison to the Council. The Chair has received inquiries from attorneys interested in becoming more involved with the Council, and so she asked to be contacted by committee chairs who need additional committee members. It was reported that a revised plan of work for the Council was included in the meeting agenda materials. It was reported that Nancy Little is the recipient of the 2018 Michael Irish Award.

D. Committee on Special Projects (Katie Lynwood):

Katie Lynwood reported on the discussion at the Committee on Special Projects meeting. Kathleen Goetsch reviewed the terms of the uniform premarital agreements act, which the Premarital Agreement Legislation Ad Hoc Committee is working on. Andrew Mayoras discussed the work of the Lawyer Drafter/Beneficiary Ad Hoc Committee and sought the group's input as to the scope of the work.

VI. Other Committees Presenting Oral Reports

A. Amicus Curiae Committee

Andrew Mayoras reported that a request for an amicus brief from the Section has been requested in In re Estate of Louis Henry Bitto III, a matter in which leave to appeal is being sought from the Michigan Supreme Court. The Michigan Court of Appeals docket numbers are 339083 and 339507. The committee's motion is:

The Probate and Estate Planning Section declines to authorize the preparation and filing of an amicus brief in the matter before the Michigan Supreme Court, captioned, In re Estate of Louis Henry Bitto III, Court of Appeals Docket Nos. 339083 & 339507.

The Chair stated that since an application for consideration was made, the vote of the Council should be recorded. Following discussion, the Chair called the question, and the Secretary recorded the vote of 18 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 5 not voting. The Chair declared the motion approved.

B. Guardianships, Conservatorships & End of Life Committee

Kathleen Goetsch reported the status of the work of the committee.

C. Tax Committee

Lorraine New reported on a tax nugget, which was included with the meeting materials.

D. Court Rules, Forms, and Procedures Committee

Susan Chalgian reported on the committee's review of certain proposed revisions to the Michigan Court Rules. The committee's report on the proposed Michigan Court Rule revisions is included with the meeting materials. The committee's motion is:

The Probate and Estate Planning Section objects to the proposed revisions to MCR 5.107(B)(1) (specifically, the addition of "previous mailings to the last known address have been returned at least two times as undeliverable"); 5.113(A) (specifically, the delegation of "substantially in the" and the addition of "filed on a"), and 5.307(A) (specifically, the deletion of "submit to," the addition of "file with," and the deletion of "computation of.").

The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded the vote of 18 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 5 not voting. The Chair declared the motion approved.

VII. Other Committees Presenting Written Reports Only

The Chair stated that there were written reports from the following committees:

A. Court Rules, Forms, and Proceedings Committee (regarding forms)

B. Divided and Directed Trusteeships Ad Hoc Committee

C. Liaison to the Uniform Law Commission

VIII. Other Business

None.

IX. Adjournment

Seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 11:17 a.m.

Respectfully submitted,
David L.J.M. Skidmore, Secretary

Attachment 2

Updated 10/16/2018

Probate and Estate Planning Section

2018-2019 Proposed Committee Chairs

Committee/Mission	*Chair*	*Other Members*
Amicus Curiae Committee To review requests made to the Section to file, and to identify cases in which the Section should file, amicus briefs in pending appeals and to engage and oversee the work of legal counsel retained by the Section to prepare and file its amicus briefs.	Andrew W. Mayoras	Ryan P. Bourjaily Nazneen Hasan Kurt A. Olson Patricia M. Ouellette David L.J.M. Skidmore Trevor J. Weston Timothy White
Annual Meeting To arrange the annual meeting at a time and place and with an agenda to accomplish all necessary and proper annual business of the Section.	Christopher A. Ballard	
Assisted Reproductive Technology Ad Hoc Committee To review the 2008 Uniform Probate Code Amendments for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction.	Nancy Welber	Christopher A. Ballard Edward Goldman James P. Spica Lawrence W. Waggoner
Awards Committee To periodically award the Michael Irish Award to a deserving recipient and to consult with ICLE concerning periodic induction of members in the George A. Cooney Society.	Amy Morrissey	Mark Harder Thomas Sweeney
Budget Committee To develop the annual budget and to alert the Council to revenue and spending trends.	David L.J.M. Skidmore	David P. Lucas Mark Kellogg
Bylaws Committee To review the Section Bylaws and recommend changes to ensure compliance with State	David Lucas	Christopher A. Ballard Nazneen Hasan John Roy Castillo

Bar requirements, best practices for similar organizations and assure conformity of the Bylaws to current practices and procedures of the Section and the Council.		
Charitable & Exempt Organization Committee To educate the Section about charitable giving and exempt organizations and to make recommendations to the Section concerning federal and state legislative developments and initiatives in the fields of charitable giving and exempt organizations.	Christopher J. Caldwell	Celeste E. Arduino Christopher A. Ballard Michael W. Bartnik William R. Bloomfield Robin D. Ferriby Mark E. Kellogg Richard C. Mills
Citizens Outreach Committee To provide for education of the public on matters related to probate, estate planning, and trust administration, including the publication of pamphlets and online guidance to the public, and coordinating the Section's efforts to educate the public with the efforts of other organizations affiliated with the State Bar of Michigan.	Kathleen M. Goetsch	Michael J. McClory Neal Nusholtz Jessica M. Schilling Nicholas J. Vontroba
Committee on Special Projects To consider and study in depth a limited number of topics and make recommendations to the Council of the Section with respect to those matters considered by the Committee.	Katie Lynwood	All members of the Section who attend a meeting of the Committee on Special Projects ("CSP") are considered members of CSP and are entitled to vote on any matter brought before the CSP.
Community Property Trusts Ad Hoc Committee To review the statutes, case law, and legislative analysis of Michigan and other jurisdictions (including pending legislation) concerning community property trusts and, if advisable, to recommend changes to Michigan law in this area.	Neal Nusholtz	George W. Gregory Lorraine F. New Nicholas A. Reister Rebecca K. Wrock

Court Rules, Forms, & Proceedings Committee To consider and recommend to the Council action with respect to contested and uncontested proceedings, the Michigan Court Rules, and published court forms, including their development, interpretation, use, and amendment.	Melisa M.W. Mysliwiec	James F. (J.V.) Anderton Susan Chalgian Phillip E. Harter Hon. Michael L. Jaconette Warren H. Krueger, III Michael J. McClory Andrew W. Mayoras Shaina Reed Marlaine Teahan
Divided and Directed Trusteeships Ad Hoc Committee To review the Uniform Directed Trust Act and other legislative proposals concerning the division of fiduciary labor and responsibility among non-trustee directors, co-trustees, and divided trusteeships and, if advisable, to recommend changes to Michigan law in this area.	James P. Spica	Judith M. Grace Marguerite Munson Lentz Gabrielle M. McKee Ray A. Malviya Richard C. Mills Jeffrey A. Robbins Robert P. Tiplady
Drafter/beneficiary ad hoc committee To make recommendations for possible statutory changes to deal with the situation where a drafter (whether a lawyer or a non-lawyer) prepares an instrument for a non-relative which includes a gift to that drafter or members of that drafter's family.	Andrew Mayoras	Erica Berezny George W. Gregory Kenneth Silver David P. Lucas Kurt A. Olson
Electronics Communications Committee To oversee all forms of electronic communications with and among members of the Section, including communication via the Section's web site (SBM Connect site) and the ICLE Online Community site, to identify emerging technological trends of important to the Section and its members, and to recommend to the Council of	Michael G. Lichterman	William J. Ard Amy N. Morrissey Jeanne Murphy (Liaison to ICLE) Neal Nusholtz Marlaine Teahan

the Section best practices to take advantage of technology in carrying out the Section's and Council's mission and work.		
Electronic Wills Ad Hoc Committee To study the proposal on electronic wills of the Uniform Law Commission, determine problems and pitfalls of the formation, validity, and recognition of electronic wills, and be prepared to respond to both the Uniform Law Commission's proposal and any related legislation introduced in Michigan.	Kurt A. Olson	Kimberly Browning Douglas A. Mielock Neal Nusholtz Christine Savage James P. Spica (Special Advisor)
Ethics & Unauthorized Practice of Law To consider and recommend to the Council action with respect to the Michigan Rules of Professional Conduct and their interpretation, application, and amendment, including identifying the unauthorized practices of law, reporting of such practices to the appropriate authorities, and educating the public regarding the inherent problems relying on non-lawyers.	Kurt A. Olson	William J. Ard Raymond A. Harris J. David Kerr Robert M. Taylor Amy Rombyer Tripp
Guardianships, Conservatorships, & End of Life Committee To monitor the need for, and make recommendations with respect to, statutory and court rule changes in Michigan related to the areas of legally incapacitated individuals, guardianships, and conservatorships.	Kathleen M. Goetsch	William J. Ard Michael W. Bartnik Kimberly Browning Raymond A. Harris Phillip E. Harter Hon. Michael L. Jaconette Michael J. McClory Kurt A. Olson James B. Steward Paul S. Vaidya
Legislative Analysis & Monitoring Committee	Daniel S. Hilker	Christopher A. Ballard Ryan P. Bourjaily Georgette E. David

In cooperation with the Section's lobbyist, to bring to the attention of the Council recent developments in the Michigan legislature and to further achievement of the Section's legislative priorities, as well as to study legislation and recommend action on legislation not otherwise assigned to another committee of the Section.		Mark E. Kellogg Jonathan R. Nahhat
Legislation Development & Drafting Committee To review, revise, communicate, and recommend proposed legislation affecting Michigan's trusts and estates law with the goal of achieving and maintaining leadership in promulgating trusts and estates laws in changing times.	Nathan Piwowarski	Heidi Aull Aaron A. Bartell Howard H. Collens Georgette E. David Kathleen M. Goetsch Daniel S. Hilker Henry P. Lee Michael G. Lichterman David P. Lucas Katie Lynwood Richard C. Mills Kurt A. Olson Christine M. Savage James P. Spica Marlaine Teahan Robert P. Tiplady II
Legislative Testimony Committee To testify on behalf of the Section regarding pending bills before Michigan House or Senate Committees and to promote and explain the Council's Public Policy Positions to Michigan Representatives and Senators or members of their staff.	Marguerite Munson Lentz	Gary Bauer Susan L. Chalgian Howard Collens Mark T. Evely Ashley Gorman Raymond A. Harris Mark E. Kellogg Carol Kramer Katie Lynwood Amy E. Peterman Nathan Piwowarski Kenneth Silver Marlaine C. Teahan Robert W. Thomas
Membership Committee To strengthen relations with Section members, encourage new membership, and promote	Nicholas A. Reister	Daniel S. Hilker, Vice-Chair Daniel W. Borst Ryan P. Bourjaily Nicholas R. Dekker Angela Hentkowski

awareness of and participation in Section activities.		David A. Kosmowski Robert B. Labe Raj A. Malviya Ryan S. Mills Robert O'Reilly Theresa A. Rose
Nominating Committee To annual nominate candidates for election as the officers of the Section and members of the Council.	Shaheen I. Imami	James B. Steward Marlaine C. Teahan
Planning Committee To review and update the Council's Plan of Work	Marguerite Munson Lentz	Christopher A. Ballard David P. Lucas David L.J.M. Skidmore Mark E. Kellogg
Premarital Agreements Legislation Ad Hoc Committee To review and compare Michigan's statutes and case law (particularly the *Allard* decision) regarding enforcement and potential effects on estate planning and estate administration with the Uniform Premarital and Marital Agreements Act and similar acts from other states and, if advisable, recommend changes to Michigan law in this regard.	Christine Savage	Kathleen M. Goetsch Patricia M. Ouellette (Family Law Liaison) Rebecca Wrock
Probate Institute To consult with ICLE in the planning and execution of the Annual Probate and Estate Planning Institute.	David P. Lucas	
Real Estate Committee To recommend new legislation related to real estate matters of interest and concern to the Section and its members.	Mark E. Kellogg	Jeffrey S. Ammon William J. Ard David S. Fry J. David Kerr Michael G. Lichterman James T. Ramer James B. Steward
State Bar & Section Journals Committee To oversee the publication of the Section's Journal and	Richard C. Mills	Nancy L. Little, Managing Editor Melisa M.W. Mysliwiec, Associate Editor.

periodic theme issues of the State Bar Journal that are dedicated to probate, estate planning, and trusts.		
Tax Committee To monitor, provide regular updates on, and deliver select educational programs concerning federal and state income and transfer taxes and, if applicable, to recommend appropriate actions by the Section in response to developments.	Raj A. Malviya	James F. (J.V.) Anderton Christopher J. Caldwell Mark J. DeLuca Angela Hentkowski Robert B. Labe Richard C. Mills Lorraine F. New Christine M. Savage Michael David Shelton James P. Spica Timothy White
Uniform Fiduciary Income & Principal Ad Hoc Committee To review the Uniform Law Commission's draft and final version of the Uniform Fiduciary and Principal Act, and, if advisable, to recommend changes to Michigan law in this area.	James P. Spica	Anthony J. Belloli Marguerite Munson Lentz Raj A. Malviya Gabrielle M. McKee Richard C. Mills Robert P. Tiplady Joseph Viviano

Updated 9/15/2018

Probate and Estate Planning Section

2018-2019 Liaisons

Liaison To:	
Alternative Dispute Resolution Section	John A. Hohman, Jr.
Business Law Section	John R. Dresser
Elder Law and Disability Rights Section	Angela Hentkowski
Family Law Section	Patricia M. Ouellette
ICLE	Jeanne Murphy
Laws Schools	J.V. Anderton
Modest Means Work Group	Georgette E. David
Michigan Bankers Association	Daniel W. Borst
Probate Judges Association	Hon. David M. Murkowski Hon. Michael L. Jaconette
Probate Register	
SCAO	Melisa M.W. Mysliwiec Susan L. Chalgian Nathan Piwowarski
Solutions on Self-Help Task Force	Kathleen M. Goetsch
State Bar Commissioner	Shauna L. Dunnings
Taxation Section	Neal Nusholtz
Uniform Law Commission	James P. Spica

PAA PUBLIC AFFAIRS associates
REPUTATION MATTERS

PROBATE

HB 4021 - **PROBATE, Guardians and Conservators**, Allow guardianship petitions probate judges to schedule certain hearings before minor turns 18 years of age. (Kosowski, Robert (D), 01/12/17)
(*Status: 01/18/2017 - bill electronically reproduced 01/12/2017*)

HB 4040 - **VEHICLES, Registration**, Exempt senior citizens from vehicle registration fees increases. (Camilleri, Darrin (D), 01/12/17)
(*Status: 01/18/2017 - bill electronically reproduced 01/12/2017*)

HB 4043 - **LAW ENFORCEMENT, Communications**, Establish missing senior and vulnerable adult plan. (Farrington, Diana (R), 01/18/17)
(*Status: 01/24/2017 - bill electronically reproduced 01/18/2017*)

HB 4171 PA 155 - **PROBATE, Guardians and Conservators**, Authorize a guardian to sign physician orders for scope of treatment form. (Cox, Laura (R), 02/07/17)
(*Status: 11/09/2017 - approved by the Governor 11/8/2017 @ 11:56 AM*)

HB 4297 - **CRIMINAL PROCEDURE, Evidence**, Create presumption that certain documents affecting real property are forged or counterfeit. (Love, Leslie (D), 03/02/17)
(*Status: 03/07/2017 - bill electronically reproduced 03/02/2017*)

HB 4312 - **OCCUPATIONS, Attorneys**, Modify eligibility requirements for attorney licensed in another state to practice law in Michigan. (LaFave, Beau (R), 03/07/17)
(*Status: 06/15/2017 - read a second time*)

HB 4410 PA 143 - **PROBATE, Wills and Estates**, Allow exempt property decedent to exclude adult child by written instrument. (Lucido, Peter J. (R), 03/23/17)
(*Status: 05/10/2018 - assigned PA 143'18 with immediate effect*)

HB 4469 - **SENIOR CITIZENS, Other**, Provide for eligibility for participation in senior farmers' market nutrition program (SFMNP) and create a rotating distribution process (Guerra, Vanessa (D), 03/30/17)
(*Status: 04/19/2017 - bill electronically reproduced 03/30/2017*)

HB 4532 PA 54 - **PROPERTY, Recording**, Modify marital status in instruments conveying or mortgaging real estate. (Whiteford, Mary (R), 04/26/17)
(*Status: 06/20/2017 - approved by the Governor 6/15/2017 @ 10:36 AM*)

HB 4588 - **OCCUPATIONS, Securities**, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults and posting of information. (Brinks, Winnie (D), 05/04/17)
(*Status: 05/09/2017 - bill electronically reproduced 05/04/2017*)

HB 4589 - **OCCUPATIONS, Securities**, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults. (Graves, Joseph (R), 05/04/17)
(*Status: 05/09/2017 - bill electronically reproduced 05/04/2017*)

HB 4684 - **PROBATE, Guardians and Conservators**, Allow limited guardianship to supervise access to incapacitated individuals relative. (Lucido, Peter J. (R), 05/31/17)
(*Status: 06/06/2017 - bill electronically reproduced 05/31/2017*)

HB 4686 - **HOUSING, Affordable**, Authorize local units to impose rent limitation for senior citizens and individuals with disabilities and provide for tax exemptions and specific tax. (Chang, Stephanie (D), 05/31/17)
(*Status: 06/06/2017 - bill electronically reproduced 05/31/2017*)

B 4751 - **FAMILY LAW, Marriage and Divorce**, Clarify enforceability of prenuptial agreements. (Kesto, Klint (R), 06/13/17)
(*Status: 01/30/2018 - REPORTED BY COMMITTEE OF THE WHOLE FAVORABLY WITH SUBSTITUTE S-1*)

HB 4752 PA 33 - **PROBATE, Wills and Estates**, Revise fee ratio and reporting requirement and remove sunset (Kesto, Klint (R), 06/08/17)
(*Status: 02/22/2018 - approved by the Governor 2/20/2018 @ 12:27 PM*)

HB 4754 - **COURTS, Jurisdiction** , Authorize inter-circuit concurrent jurisdiction plan. (Barrett, Tom (R), 06/13/17)
(*Status: 06/14/2017 - referred to Committee on Judiciary*)

HB 4821 PA 13 - **PROBATE, Wills and Estates**, Require appointment of the state or county public administrator as personal representative of a decedents estate in a formal proceeding and modify powers and duties of public administrators acting as personal representatives. (Runestad, Jim (R), 07/12/17)
(*Status: 02/06/2018 - presented to the Governor 2/2/2018 @ 3:35 PM*)

HB 4822 PA 14 - **PROBATE, Wills and Estates**, Require appointment of the state or county public administrator as personal representative of a decedents estate in a formal proceeding and modify powers and duties of public administrators acting as personal representatives. (Ellison, Jim (D), 07/12/17)
(*Status: 02/06/2018 - assigned PA 14'18 with immediate effect*)

HB 4885 - **CRIMES, Embezzlement**, Increase penalties for stealing, embezzling, or converting personal or real property from a vulnerable adult. (Lucido, Peter J. (R), 08/16/17)
(*Status: 09/06/2017 - bill electronically reproduced 08/16/2017*)

HB 4886 - **CRIMINAL PROCEDURE, Sentencing Guidelines**, Increase penalties for embezzlement from vulnerable adult. (Lucido, Peter J. (R), 08/16/17)
(*Status: 09/06/2017 - bill electronically reproduced 08/16/2017*)

HB 4887 PA 345 - **OCCUPATIONS, Pawnbrokers**, Establish hold process for pawned goods. (Lucido, Peter J. (R), 08/16/17)
(*Status: 10/17/2018 - approved by the Governor 10/16/2018 @ 8:56 AM*)

HB 4905 PA 133 - **PROPERTY TAX, Principal Residence Exemption**, Modify principal residence exemption for individual residing in nursing home or assisted living facility (Lucido, Peter J. (R), 09/07/17)
(*Status: 05/03/2018 - assigned PA 133'18 with immediate effect*)

HB 4931 - **CIVIL PROCEDURE, Civil Actions**, Create financial exploitation liability act (Kosowski, Robert L. (D), 09/13/17)
(*Status: 09/14/2017 - bill electronically reproduced 09/13/2017*)

HB 4959 - **FAMILY LAW, Marriage and Divorce**, Require prenuptial and postnuptial agreements to be enforceable. (Hoitenga, Michele (R), 09/14/17)
(*Status: 09/19/2017 - bill electronically reproduced 09/14/2017*)

HB 4994 - **SENIOR CITIZENS, Crimes**, Provide for public relations campaign to prevent elder abuse. (Kosowski, Robert L. (D), 09/20/17)
(*Status: 09/26/2017 - bill electronically reproduced 09/20/2017*)

HB 4995 - **SENIOR CITIZENS, Crimes**, Require neglect and mistreatment of senior citizens the department of health and human services to collect and analyze data. (Kosowski, Robert L. (D), 09/20/17)
(*Status: 09/20/2017 - bill electronically reproduced 09/20/2017*)

HB 4996 - **PROBATE, Guardians and Conservators**, Expand notification requirement of guardians. (Kosowski, Robert L. (D), 09/20/17)
(*Status: 09/26/2017 - bill electronically reproduced 09/20/2017*)

HB 5037 - **PROBATE, Guardians and Conservators**, Provide for power of guardian to implant a tracking device with a ward. (Lucido, Peter J. (R), 09/27/17)
(*Status: 09/28/2017 - bill electronically reproduced 09/27/2017*)

HB 5073 - **CIVIL PROCEDURE, Alternate Dispute resolution**, Revise procedures for mediation and case evaluation of civil actions. (Kesto, Klint (R), 10/10/17)
(*Status: 10/17/2017 - recommendation concurred in*)

HB 5075 - **PROBATE, Patient Advocates**, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patients best interest. (Cole, Triston (R), 10/10/17)
(*Status: 10/11/2017 - bill electronically reproduced 10/10/2017*)

HB 5076 - **HEALTH, Other**, Establish procedure to require physician and hospital to obtain the consent of certain persons to withhold or withdraw a life-sustaining treatment. (Noble, Jeff (R), 10/10/17)
(*Status: 10/11/2017 - bill electronically reproduced 10/10/2017*)

HB 5152 - **HEALTH, Patient Directives**, Create non-opioid directive form. (Singh, Sam (D), 10/19/17)
(*Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY*)

HB 5153 - **PROBATE, Guardians and Conservators**, Allow a guardian to execute a non-opioid directive form. (Canfield, Edward (R), 10/19/17)
(*Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY*)

HB 5323 - **CRIMINAL PROCEDURE, Pretrial Procedure**, Modify process for expunction and destruction of DNA samples and identification profiles. (Lucido, Peter J. (R), 12/06/17)
(*Status: 12/12/2017 - bill electronically reproduced 12/06/2017*)

HB 5362 - **PROBATE, Trusts**, Modify information required in a certificate of trust. (Lucido, Peter J. (R), 12/13/17)
(*Status: 10/02/2018 - reported with recommendation with substitute H-2*)

HB 5398 - **PROBATE, Trusts**, Allow use of a certificate of trust under the estates and protected individuals code for a trust that affects real property. (Lucido, Peter J. (R), 01/11/18)
(*Status: 10/02/2018 - reported with recommendation with substitute H-4*)

HB 5443 - **TAXATION, Estates**, Repeal Michigan estate tax act. (Johnson, Steven (R), 01/24/18)
(*tatus: 01/25/2018 - bill electronically reproduced 01/24/2018*)

HB 5456 PA 100 - **CIVIL PROCEDURE, Civil Actions**, Enact asbestos bankruptcy trust claims transparency act. (Wentworth, Jason (R), 01/30/18)
(*Status: 04/10/2018 - presented to the Governor 3/26/2018 @ 12:52 PM*)

HB 5546 - **PROPERTY TAX, Assessments**, Allow transfer of ownership from a general or limited partnership to certain individuals to be exempt from uncapping taxes after transfer. (Inman, Larry (R), 02/13/18)
(*Status: 02/14/2018 - bill electronically reproduced 02/13/2018*)

HB 5813 - **LAW ENFORCEMENT, Investigations**, Require use of standard investigation form involving the physical or financial abuse of a vulnerable adult or elder adult. (Runestad, Jim (R), 04/17/18)
(*Status: 06/07/2018 - reported with recommendation without amendment*)

HB 6127 - **COURTS, Probate Court**, Modify parental consent required for name change under certain circumstances. (Miller, Aaron (R), 06/07/18)
(*Status: 06/12/2018 - bill electronically reproduced 06/07/2018*)

HB 6129 - **PROBATE, Trusts**, Provide powers and duties of a directed trustee. (Kesto, Klint (R), 06/07/18)
(*Status: 10/02/2018 - reported with recommendation with substitute H-1*)

HB 6130 - **PROBATE, Trusts**, Provide powers and duties of a directed trustee. (Calley, Julie (R), 06/07/18)
(*Status: 10/02/2018 - reported with recommendation with substitute H-1*)

HB 6131 - **PROBATE, Trusts**, Provide powers and duties of a directed trustee. (Iden, Brandt (R), 06/07/18)
(*Status: 10/02/2018 - reported with recommendation with substitute H-1*)

SB 0039 PA 20 - **PROBATE, Other**, Revise exceptions to definition of surviving spouse in relation to a funeral representative. (Jones, Rick (R), 01/18/17)
(*Status: 04/18/2017 - APPROVED BY GOVERNOR 3/30/2017 @ 10:04 AM*)

SB 0049 PA 136 - **PROBATE, Guardians and Conservators**, Modify provision related to compensation for professional guardian or professional conservator. (Booher, Darwin (R), 01/18/17)
(*Status: 10/31/2017 - ASSIGNED PA 0136'17 WITH IMMEDIATE EFFECT*)

3 0071 - **VEHICLES, Registration**, Exempt vehicle registration fees senior citizens from increases. (Ananich, Jim (D), 01/31/17)
(*Status: 01/31/2017 - INTRODUCED BY SENATOR JIM ANANICH*)

SB 0284 - **PROPERTY, Recording**, Remove requirement statement of marital status in instruments conveying or mortgaging real estate. (Jones, Rick (R), 03/29/17)
(*Status: 04/26/2017 - referred to Committee on Financial Services*)

SB 0345 - **OCCUPATIONS, Securities**, Require certain record keeping and posting of information for financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults (Jones, Rick (R), 05/02/17)
(*Status: 05/02/2017 - INTRODUCED BY SENATOR RICK JONES*)

SB 0346 - **OCCUPATIONS, Securities**, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults (Ananich, Jim (D), 05/02/17)
(*Status: 02/01/2018 - HOUSE SUBSTITUTE H-2 CONCURRED IN*)

SB 0378 PA 167 - **SENIOR CITIZENS, Housing**, Amend home for the aged definition and create an exemption from licensing. (Knollenberg, Marty (R), 05/16/17)
(*Status: 11/28/2017 - APPROVED BY GOVERNOR 11/9/2017 @ 11:15 AM*)

SB 0525 PA 6 - **COURTS, Reorganization**, Modify reorganization of courts and number of judgeships (Jones, Rick (R), 09/06/17)
(*Status: 01/30/2018 - ASSIGNED PA 06'18 WITH IMMEDIATE EFFECT*)

SB 0540 - **PROPERTY TAX, Assessments**, Modify definition of transfer of ownership and certain excluded transfers. (Schuitmaker, Tonya (R), 09/07/17)
(*Status: 09/07/2017 - INTRODUCED BY SENATOR TONYA SCHUITMAKER*)

B 0597 - **HEALTH, Other**, Establish procedure to withhold or withdraw a life-sustaining treatment to require physician and hospital to obtain the consent of certain persons. (Proos, John (R), 09/28/17)
(*Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS*)

SB 0598 - **PROBATE, Patient Advocates**, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patient's best interest (Proos, John (R), 09/28/17)
(*Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS*)

SB 0644 - **TORTS, Liability**, Enact insurance agents liability act. (Jones, Rick (R), 11/01/17)
(*Status: 11/01/2017 - INTRODUCED BY SENATOR RICK JONES*)

SB 0713 - **PROBATE, Guardians and Conservators**, Provide for visitation procedures for isolated adults. (Marleau, Jim (R), 12/06/17)
(*Status: 06/07/2018 - PLACED ON ORDER OF THIRD READING WITH SUBSTITUTE S-2*)

SB 0731 PA 191 - **PROPERTY, Recording**, Change requirement that an instrument be filed to recorded. (Zorn, Dale (R), 12/13/17)
(*Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:00 PM*)

SB 0732 PA 192 - **PROPERTY, Recording**, Modify recording waiver of mortgage priority. (Zorn, Dale (R), 12/13/17)
(*Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:02 PM*)

SB 0733 PA 193 - **LAND USE, Other**, Modify certified survey map requirements. (Zorn, Dale (R), 12/13/17)
(*Status: 09/05/2018 - ASSIGNED PA 193'18 WITH IMMEDIATE EFFECT*)

SB 0734 PA 194 - **PROPERTY, Recording**, Require trust to be recorded separately under conveyance of a trust. (Conyers, Ian (D), 12/13/17)
(*Status: 09/05/2018 - ASSIGNED PA 194'18 WITH IMMEDIATE EFFECT*)

B 0735 PA 195 - **PROPERTY, Recording**, Require death certificate for joint tenant to be recorded separately from deed. (Knezek, David (D), 12/13/17)
(*Status: 09/05/2018 - ASSIGNED PA 195'18 WITH IMMEDIATE EFFECT*)

SB 0736 PA 196 - **PROPERTY, Recording**, Remove recording requirements from exception for wills. (Hertel Jr., Curtis (D), 12/13/17)
(*Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:10 PM*)

SB 0737 PA 197 - **PROPERTY, Recording**, Require recording with register of deeds an English translation document to be included. (Hertel Jr., Curtis (D), 12/13/17)
(*Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:12 PM*)

SB 0738 PA 198 - **PROPERTY, Recording**, Provide certificates of correction for recording fee. (Proos, John (R), 12/13/17)
(*Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:14 PM*)

SB 0739 PA 199 - **PROPERTY, Condemnation**, Repeal prima facie evidence of ownership in fourth class cities. (Proos, John (R), 12/13/17)
(*Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:16 PM*)

SB 0784 - **HEALTH, Emergency Response**, Allow a parent or guardian to execute do-not-resuscitate order on behalf of a minor child. (Warren, Rebekah (D), 01/25/18)
(*Status: 06/12/2018 - SUBSTITUTE S-3 ADOPTED*)

SB 0785 - **EDUCATION, School Districts**, Establish filing, storage, and notice rules regarding do-not-resuscitate orders and revocations of do-not-resuscitate orders. (Jones, Rick (R), 01/25/18)
(*Status: 01/25/2018 - INTRODUCED BY SENATOR RICK JONES*)

SB 0786 - **PROBATE, Guardians and Conservators**, Authorize a guardian of a minor to execute a do-not-resuscitate order. (Warren, Rebekah (D), 01/25/18)
(*Status: 06/12/2018 - PASSED ROLL CALL # 508 YEAS 36 NAYS 0 EXCUSED 1 NOT VOTING 0*)

SB 0827 - **EDUCATION, School Districts**, Create filing, storage and notice rules regarding do-not-resuscitate orders and comfort or care plans and limitation liability for providing a comfort or care measure. (Jones, Rick (R), 02/15/18)
(*Status: 06/12/2018 - SUBSTITUTE S-2 ADOPTED*)

SB 0905 - **PROBATE, Trusts**, Allow trust property treated as property held as tenants by the entirety under certain circumstances. (Jones, Rick (R), 03/15/18)
(*Status: 03/15/2018 - INTRODUCED BY SENATOR RICK JONES*)

Skidmore, David

om:	Marguerite Munson Lentz <meglentz@gmail.com>
ɔent:	Saturday, November 10, 2018 9:19 AM
To:	cballard@varnumlaw.com; David Lucas; Skidmore, David; Mark Kellogg; Katie Lynwood; Nathan Piwowarski
Subject:	Fwd: FW: ALL MONITORED BILLS - Legislation Monitoring and Analysis

Second legislative report for Chair's report attachments.

---------- Forwarded message ---------

From: MIRS Delivery <info@mirsnews.com>

Sent: Friday, November 9, 2018 7:01 AM
To: legislationmonitoring@gmail.com
Subject: ALL MONITORED BILLS - Legislation Monitoring and Analysis

SBM | PROBATE & ESTATE PLANNING SECTION

State Bar of Michigan

ALL MONITORED BILLS - Legislation Monitoring and Analysis

Tracked Bills and Groups (4)

Guardianship, Conservatorship, and End of Life Com

HB 5152 **HEALTH, Patient Directives**, Create non-opioid directive form. (Singh, Sam (D), 10/19/17)
(Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

HB 5153 Allow a guardian to execute a non-opioid directive form. (Canfield, Edward (R), 10/19/17)
(Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

HB 5818 **PROBATE, Guardians and Conservators**, Allow guardians authority to consent to mental health treatment.(Guerra, Vanessa (D), 04/17/18)
(Status: 06/05/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

HB 5819 **MENTAL HEALTH, Other**, Allow authority to consent to mental health treatment.(Kesto, Klint (R), 04/17/18)
(Status: 06/05/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

Notes on HB 5819:

HB 5820 **MENTAL HEALTH, Code**, Revise procedure for involuntary mental health treatment and judicial admissions.(Kesto, Klint (R), 04/17/18)
(Status: 06/05/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

Notes on HB 5820:

Regarding House Bills 5818, 5819, and 5820:

A representative of the State Court Administrative Office testified in support of the bills. (5-16-18)
The Mental Health Association indicated support for the bills. (5-2-18)
The Michigan Protection and Advocacy Service indicated support for the bills. (5-2-18)
The Lieutenant Governor's office indicated support for the bills. (5-2-18)
The Michigan Probate Judges Association indicated support for the bills. (5-16-18)
The Prosecuting Attorneys Association of Michigan indicated support for HB 5820. (5-16-18)

HB 5948 **PROBATE, Guardians and Conservators**, Revise provisions in the estates and protected individuals code related to termination of a limited guardianship of a minor.(Lucido, Peter J. (R), 05/09/18)
(Status: 05/10/2018 - bill electronically reproduced 05/09/2018)

SB 0713 **PROBATE, Guardians and Conservators**, Provide for visitation procedures for isolated adults.(Marleau, Jim (R), 12/06/17)
(Status: 06/07/2018 - PLACED ON ORDER OF THIRD READING WITH SUBSTITUTE S-2)

Notes on SB 0713:

"The Probate & Estate Planning Section Opposes SB 713."

http://www.michbar.org/file/publicpolicy/documents/PEPS%20SB%20713.pdf

SB 0784 **HEALTH, Emergency Response**, Allow a parent or guardian to execute do-not-resuscitate order on behalf of a minor child.(Warren, Rebekah (D), 01/25/18)
(Status: 06/12/2018 - referred to Committee on Judiciary)

SB 0785 **EDUCATION, School Districts**, Establish filing, storage, and notice rules regarding do-not-resuscitate orders and revocations of do-not-resuscitate orders.(Jones,

Rick (R), 01/25/18)
(Status: 01/25/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

SB 0786 **PROBATE, Guardians and Conservators**, Authorize a guardian of a minor to execute a do-not-resuscitate order.(Warren, Rebekah (D), 01/25/18)
(Status: 06/12/2018 - referred to Committee on Judiciary)

SB 0798 **CHILDREN, Other**, Create safe families program to allow a parent or guardian to delegate temporary care of minor child via power of attorney.(MacGregor, Peter (R), 01/30/18)
(Status: 02/22/2018 - referred to Committee on Families, Children, and Seniors)

Legislation Development & Drafting Committee

HB 5362 **PROBATE, Trusts**, Modify information required in a certificate of trust.(Lucido, Peter J. (R), 12/13/17)
(Status: 10/02/2018 - reported with recommendation with substitute H-2)

HB 5398 **PROBATE, Trusts**, Allow use of a certificate of trust under the estates and protected individuals code for a trust that affects real property.(Lucido, Peter J. (R), 01/11/18)
(Status: 10/02/2018 - reported with recommendation with substitute H-4)

HB 6129 **PROBATE, Trusts**, Provide powers and duties of a directed trustee.(Kesto, Klint (R), 06/07/18)
(Status: 10/02/2018 - reported with recommendation with substitute H-1)

HB 6130 **PROBATE, Trusts**, Provide powers and duties of a directed trustee.(Calley, Julie (R), 06/07/18)
(Status: 10/02/2018 - reported with recommendation with substitute H-1)

HB 6131 **PROBATE, Trusts**, Provide powers and duties of a directed trustee.(Iden, Brandt (R), 06/07/18)
(Status: 10/02/2018 - reported with recommendation with substitute H-1)

SB 0905 **PROBATE, Trusts**, Allow trust property treated as property held as tenants by the entirety under certain circumstances.(Jones, Rick (R), 03/15/18)
(Status: 03/15/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

Notes on SB 0905:

This bill was drafted by the Legislation Development and Drafting Committee and approved by the Council.

Real Estate Committee

HB 5415 **PROPERTY, Conveyances**, Require both spouses to consent to conveyance of marital residence.(Yaroch, Jeff (R), 01/16/18)
(Status: 01/17/2018 - bill electronically reproduced 01/16/2018)

Premarital Agreements Legislation ad Hoc Committee

HB 4751 **FAMILY LAW, Marriage and Divorce**, Clarify enforceability of prenuptial agreements.(Kesto, Klint (R), 06/13/17)
(Status: 01/30/2018 - PLACED ON ORDER OF THIRD READING WITH SUBSTITUTE S-1)

Attachment 3

Attachment 4

MEMORANDUM

To: Probate and Estate Planning Council

From: J.V. Anderton, on behalf of the Tax Committee

RE: November 2018 Tax Nugget

This month's Tax Nugget is a brief synopsis of Full-Circle Staffing, LLC v. Commissioner of Internal Revenue, T.C. Memo 2018-66 (filed May 17, 2018). The reason to bring it to attention of the Council is that it describes a situation where an irrevocable (non-grantor) trust is deemed to be a sham and its income is held to be taxable to the people that had the trust formed. I believe many on Council are familiar with numerous cases where a corporation or partnership is held to be a sham for tax purposes, but I am not as familiar with cases where an irrevocable trust is held to be a sham (and not existent for tax purposes).

The facts involve Richard and Mitzi Pudlo (husband and wife) who were successfully turning themselves into freight distribution tycoons in Texas at the turn of the millennium. Upon the advice of Richard Ohendalski, C.P.A (until his license was stripped for failure to file tax returns), the Pudlos formed three entities: 1) Watchman, an irrevocable trust, 2) Lighthouse, a nonexempt charitable trust, and 3) Limited, a limited partnership. Attorney John Fant was engaged to help create the entities, and per the opinion is the "creator" of the Watchman trust, with Mr. and Mrs. Pudlo each being a 50% beneficiary, and Mr. Ohendalski's side venture as the Trustee of the Watchman trust. The Pudlos then donated their interests in the Watchman trust to Lighthouse trust, in which the Pudlos were described as "creators" and Trustees. The Lighthouse trust was formed to allow the Pudlos to make charitable donations anonymously. Limited was formed to actually operate the freight business, and the Watchman trust had a 94% limited partnership interest, with the Pudlos controlling the remaining limited partner and general partner interests.

From an operational standpoint, Mr. Pudlo thought he could control how much cash was distributed to the partners of Limited. Mr. Pudlo used this control to transfer Limited's net business income to other Pudlo related entities, without much consideration for proportionate distributions to the Watchman trust. Additionally, the Watchman trust had no business activity and provided no services to Limited. In fact, the Watchman trust did not even maintain a bank account, and when Limited would issue checks to Watchman, the trustee (Ohendalski) would endorse them over to Lighthouse.

The opinion recites the four factors to be evaluated in determining if a trust lacks economic substance: 1) whether the taxpayer's relationship to the trust's assets materially changed after the trust's creation; 2) whether the trust has an independent trustee; 3) whether an economic interest passed to other trust beneficiaries; and 4) whether the taxpayer feels bound by the restrictions imposed by the trust agreement or the law of trusts. Suffice it to say the Court holds the Watchman trust to lack economic substance and finds for the Commissioner on each of the factors. The factor analysis most interesting to me is holding that Mr. Ohendalski's entity serving as trustee of the

Watchman trust was not an independent trustee because he did not prevent Mr. Pudlo from acting against the interest of the beneficiary of the trust (Lighthouse) and did not take part in the decision making for the business (Limited). While I certainly understand the concern for failing to protect the beneficiaries, most limited partnership acts that I am familiar with prohibit a limited partner for being involved in management and still being afforded limited liability protection.

The case is an interesting read and I commend it to you.

Attachment 5

To: Probate and Estate Planning Council

From: Legislation Development and Drafting Committee

Re: November 2018 Committee Report

Our Committee offers the following updates:

- **Omnibus.** The EPIC Omnibus has been introduced in the form of HB 6467, 6468, 6470, and 6471. The watercraft transfer bill was accidentally assigned to the Natural Resources Committee (the fact that it amends the NREPA likely caused the confusion). We still believe that the bills may move this session.

- **Certificates of trust (HB 5362 and 5398).** Nothing to report this month. These bills did not move during the last month.

- **Entireties trusts (SB 905).** Nothing to report this month. This is unlikely to move this legislative session, so it is on the backburner.

- **Attorney-in-Fact's Authority to Create a Trust.** Nothing to report this month. This will not be included in the EPIC omnibus. At best, we may have proposed legislation ready for introduction in the next legislative session.

- **Prebate.** Nothing to report this month. Aaron Bartell and Dan Hilker serve as the drafting subcommittee on this proposal. They are scheduled to give a "decision document" to our committee at the end of this month.

- **SLATs.** Nothing to report this month. We've identified the potential need for a technical fix concerning spousal lifetime access trusts. Rob Tiplady is spearheading this effort. We hope to have proposed legislation ready for introduction in the next legislative session.

Attachment 6

M E M O R A N D U M

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan

From: James P. Spica

Re: Uniform Law Commission Liaison Report

Date: November 9, 2018

I shall miss the November 17 Council meeting in order to be in Washington, D.C. for November 16-17 meetings of the ULC Electronic Wills and Management of Funds Raised through Crowdfunding Efforts Drafting Committees. I plan to report to the Council on the status of these uniform law projects in December.

JPS
DETROIT 40411-1 1416338v12