

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

**March 12, 2016
Lansing, Michigan**

Minutes

I. Call to Order

The Chair of the Section, Shaheen I. Imami, called the meeting to order at 10:25 am.

II. Attendance

A. The following officers and members of Council were in attendance:

Shaheen I. Imami
James B. Steward
Marlaine C. Teahan
Marguerite Munson Lentz
George F. Bearup
Constance L. Brigman
Kathleen M. Goetsch
Hon. Michael L. Jaconette
Mark E. Kellogg
David P. Lucas
Katie Lynwood
Raj A. Malviya
Michele C. Marquardt
Richard C. Mills
Lorraine F. New
David L.J.M. Skidmore
Geoffrey R. Vernon

A total of 17 council members and officers were present, representing a quorum.

B. The following officers and members of Council were absent with excuse:

Christopher A. Ballard
Susan M. Allan
Christopher J. Caldwell
Rhonda M. Clark-Kreuer
Michael G. Lichterman
Nancy H. Welber

C. **The following officers and members of Council were absent without excuse:**

None.

D. **The following ex-officio members of the Council were in attendance:**

George W. Gregory
Phillip E. Harter
Kenneth E. Konop
Amy N. Morrissey

E. **Others in attendance:**

Jonathan Nahhat
Rob Labe
James Spica
Paul Vaidya
Susan Chalgian
Daniel Hilker
Joann Kline
Rose Scheid
Ray Harris
Jessica Schilling
Nazneen Syed
Scott Robbins
Shawn Calabrese
Neal Nusholtz
Laurie Murphy
Ryan Bourjaily

III. **Minutes of the February 13, 2016 Meeting of the Council**

The minutes of the February 13, 2016, Meeting of the Council were attached to the Agenda for this meeting which was posted on the Section's web page prior to the meeting. Last month, the Council approved the paper form of the brochures as presented by Constance Brigman. A glitch occurred when Ms. Lentz tried to convert the brochures into a pdf to attach to the minutes, which altered the formatting, particularly the table of contents. Ms. Lentz moved that the minutes be approved with corrected attachments. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions.

IV. **Treasurer's Report – Christopher Ballard**

Mr. Imami gave the report in Mr. Ballard's absence. The Treasurer's report was attached to the Agenda.

Mr. Imami noted that ICLE requested a donation of \$2500 for the Solo and Small Firm Institute. This was similar to the request last year, with \$1,000 for scholarships and \$1500 for

general support. As the amount is included in the budget, no action was needed. Mr. Imami will let Jeff Kirkey know that we will contribute as we did last year.

Mr. Imami reported that he received a request from the Young Lawyers Section for general support of the Young Lawyers Summit. Mr. Malviya will bring this to the attention of the Membership Committee and report next month.

Mr. Steward reported that the State Bar changed its policy regarding reimbursement for credit cards and expense reimbursements over \$5000. These changes were mentioned in the Treasurer's Report and the policy notices were attached to the Agenda as Attachment 3.

Mr. Imami reported that Mike McClory requested \$200 for the bike tour at Annual Probate Institute in Acme. This payment will be made from the House and Flowers fund (same as in past years).

V. **Chairperson's Report – Shaheen I. Imami**

Mr. Imami reported that volunteers are needed to draft with the EPIC/MTC updates. Mr. Imami encouraged those present to reach out to others they know in the Section. Someone can help by being on a committee and attending committee meetings, even if they are not able to attend Council meetings. Other committees could also use more help.

VI. **Report of the Committee on Special Projects – David P. Lucas**

Mr. Lucas reported on the activities of the CSP. CSP received a report from Ms. Brigman regarding the web-based versions of three brochures. CSP voted to recommend to Council that Council approve the brochures as modified for web-based format. Mr. Lucas so moved. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions.

Mr. Lucas also reported that discussions on ART are continuing.

VII. **Standing Committee Reports**

A. **Internal Governance**

1. Budget – Marguerite Munson Lentz—No report.
2. Bylaws – Nancy H. Welber—No report.
3. Awards – Amy N. Morrissey—No report.
4. Planning – James B. Steward

Mr. Steward reported that he has set tentative dates for next year's Council meetings. The schedule will be included with the April Agenda.

5. Nominating – Mark K. Harder

Mr. Imami gave the report. A notification will be sent by e-blast to section members seeking nominations.

6. Annual Meeting – James B. Steward

Mr. Steward reminded everyone that the Annual Meeting will be September 10, 2016, at the University Club.

B. Legislation and Lobbying

1. Legislative Analysis and Monitoring Committee – Michele C. Marquardt

Ryan Bourjaily gave a report on the funeral representative's bill (SB 551). Mr. Bourjaily testified at the House Judiciary Committee hearing on the bill. The bill was approved by the Committee.

Mr. Imami noted that this committee needs more members. Daniel Hilker and Joanne Kline volunteered to join the committee.

Mr. Imami also reported that the Section's lobbyist, Public Affairs Associates (Rebecca Bechler) sent us an update on various bills. A copy of that update is attached to these minutes.

2. Legislation Development & Drafting Committee – Geoffrey R. Vernon

Mr. Vernon reported on the status of two pending bills. The qualified dispositions in trust act: Robert Tiplady will meet individually with committee members of the House Judiciary Committee during the week following the Council meeting, at their request, to answer their questions.

Fiduciary Access to Digital Assets Act is waiting for a vote on the floor of the Senate. So far, four states have passed FADAA: Florida, Tennessee, Wyoming, and Oregon.

A new ad hoc committee has been formed to consider proposed legislation to provide for a forfeiture of gifts and bequests made to a lawyer in a document drafted by that lawyer. Sueann Mitchell will chair the committee. The committee members will include: Kurt Olsen, George Gregory, and David Lucas.

The Council then discussed the list of proposed changes to EPIC/MTC. One question was raised concerning secret trusts, perhaps with an accounting to named third party. Pros and cons were discussed. Mr. Mills agreed to explore the experience in states which allow secret trusts (like Florida) and discuss the issue with Robert Tiplady and the MPJA.

Mr. Vernon reported on the timing of EPIC/MTC changes. He does not expect to present any proposed changes to Council before next fall, so volunteers agreeing to help draft can work on provisions all summer. Mr. Imami plans to take up the sections as they are ready, and not present all the changes at one time.

Suggested court rules related to the EPIC/MTC changes will be added to the list.

Mr. Imami asked for volunteers to help with the drafting and the following volunteered to help: David Skidmore, Katie Lynwood, George Bearup, Rick Mills, Raj Malviya, Susan Chalgian, Kathleen Geotsch, Ray Harris, Kenneth Konop, and Susan Allan.

The invitation to the April Council meeting will encourage section members to attend the April meeting, or to contact Geoffrey Vernon at gvernon@joslynvernon.com, if they want to participate in drafting the revisions to EPIC/MTC.

3. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon

Mr. Vernon reported that the ILIT trustee exoneration statute should be introduced within next several weeks. One non-substantive change was made at the request of the Michigan Bankers Association.

4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber—No report.

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L. Skidmore—No report.

2. Probate Institute – Marlaine C. Teahan

Ms. Teahan reported that the number of registrants for the Annual Probate Institute is higher than last year at the same time (261 compared with 237). In addition, 26 have registered for the add-on seminar.

Jeff Kirkey is looking for topics for the November 2016 Experts in Estate Planning half-day seminar in Plymouth. Please contact him or Ms. Teahan if you have any ideas.

The Speakers Dinner at the Annual Probate Institute in Acme will be held at Lobdell's: a Teaching Restaurant in Traverse City.

3. State Bar and Section Journals – Richard C. Mills

Mr. Mills had no report. Mr. Skidmore asked about advertising in the Probate Journal. A discussion of pros and cons followed. Since no one expressed a strong preference for permitting advertising, the discussion was closed.

4. Citizens Outreach – Constance L. Brigman

Ms. Brigman's written report was attached to the Agenda as part of the CSP Materials. In the written report are links to the brochures on the State Bar web page which are not yet available to the public.

Ms. Brigman further reported that Mr. Imami will be sending out a survey to Section members to determine likely orders for brochures.

Ms. Brigman also reported on duplicate content issue. Outdated versions of the Sections brochures were used in connection with an MSU course and are still available with a Google search. (More details are in Ms. Brigman's written report.) Mr. Imami will contact MSU's general counsel to remove the brochures from MSU's website.

5. Electronic Communications – Michael G. Lichterman—No report.
6. Membership – Raj A. Malviya

Mr. Malviya reported that the committee prepared an introductory letter to new lawyers about our Section. Mr. Lichterman will make arrangements to send the letter to new lawyers.

Mr. Malviya further reported that the committee will have a vendor table at the Annual Probate Institute in Acme and will have a social event on Friday at the office of Smith Haughey Rice & Roegge PC. The committee has also scheduled a social event in connection with the Annual Probate Institute in Plymouth.

They are also working on a joint event with the Oakland County bar association and making visits to law schools. The committee could use more help. Anyone interested in helping should contact Mr. Malviya.

D. Ethics and Professional Standards

1. Ethics & Unauthorized Practice of Law– Katie Lynwood—No report.

E. Administration of Justice

1. Litigation, Proceedings, and Forms – David L. Skidmore—No report.

F. Areas of Practice

1. Real Estate – Mark E. Kellogg

Mr. Kellogg reported that HB 4645 (dealing with uncapping with transfers to or from LLC's) was passed in the House and is now being considered by the Senate. The Council voted previously to oppose this legislation. The bill is too narrowly drawn, imposes an annual certification requirement by a qualifying LLC (or risk immediate uncapping for failure to file) and restricts (rather than clarifying) current practice concerning transfers to or from LLCs which do not cause the real estate to uncap. Mr. Imami, on behalf of the Section, will send a letter to Senator to Sen. Ramenberg opposing this. The Elder Law Section has also opposed this bill.

Mr. Imami suggested that Section members could send letters, in their individual capacities, to the Senator opposing this bill.

2. Transfer Tax Committee – Lorraine F. New

Ms. New suggested that practitioners, in their retainer letters, clearly state who will file the 8971 and who will file amended 8971s.

Mr. Labe gave a presentation on the basis consistency rules, based on the attached written materials.

3. Charitable and Exempt Organization – Christopher J. Caldwell—No report.
4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer—No report.

VIII. **Other Reports**

G. **Liaisons**

1. Alternative Dispute Resolution Section Liaison – Milton J. Mack, Jr. —No report.
2. Business Law Section Liaison – John R. Dresser—No report.
3. Elder Law and Disability Rights Section Liaison – Amy Rombyer Tripp—No report.
4. Family Law Section Liaison – Patricia M. Ouellette—No report.
5. ICLE Liaison – Jeanne Murphy—No report.
6. Law Schools Liaison – William J. Ard—No report.
7. Michigan Bankers Association Liaison – Susan M. Allan—No report.
8. Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Michael L. Jaconette

Hon. Michael Jaconette reported that he will consult with the MPJA as to their current feelings about secret trusts. If anyone has questions for the MPJA, feel free to email him at jaconette@calhouncountymi.gov with the question.

9. Probate Registers Liaison – Rebecca A. Schnelz—No report.
10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz—No report.
11. Solutions on Self-Help Task Force Liaison – Kathleen M. Goetsch—No report.
12. State Bar Liaison – Richard J. Siriani—No report.
13. Taxation Section Liaison – George W. Gregory—No report.

IX. **Other Business**

Mr. Steward gave an update on the amicus brief he filed in the *Rousch* case on behalf of the Elder Law Council. The Elder Law Section was requested to withdraw the brief. A competing brief was filed by the Michigan Elder Justice Initiative. The Elder Law Council voted unanimously not to withdraw the brief. Oral argument is set for April.

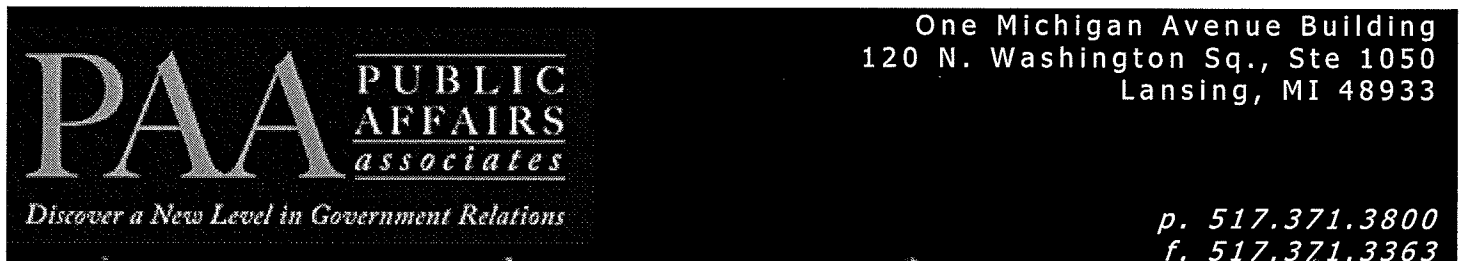
X. **Hot Topics**

XI. **Adjournment**

The meeting was adjourned by Chairperson Shaheen I. Imami at 11:54.

Lentz, Marguerite

From: Becky Bechler <bechler@paaonline.com>
Sent: Monday, March 07, 2016 11:35 AM
To: Shaheen Imami (SII@ProbatePrince.com); Michele Marquardt (Michele@dementandmarquardt.com); Lentz, Marguerite; GGregory@GGregoryonline.com
Cc: Geoffrey R. Vernon (gvernon@joslynvernon.com)
Subject: 2016 Legislative Priority Status Update
Attachments: Probate legislative chart.docx



Shaheen, Michele, Meg and George,

In preparation for this weekend's meeting, attached please find an updated status of the six priority issues for the Probate and Estate Planning Council. Below is a detailed update on each issue for your review. If you have any questions please do not hesitate to contact me.

1. Probate Appeals (SB 632/633): Shaheen and PAA met with the Rep. Klint Kesto, Chair of the House Judiciary Committee. Rep. Kesto asked to be a sponsor on this package so we are coordinating this with Senator Schuitmaker's office. Rep. Kesto agreed to move the issue along quickly, even before Spring Break if possible. PAA is coordinating this effort between legislative offices and leadership in each chamber.
2. Qualified Disposition (SB 597/598): Rep. Kesto also asked to be a sponsor on this package so we are also coordinating this effort along with the Probate Appeals issue. Legislation should be introduced this week. PAA has coordinated a schedule for Geoffrey Vernon to meet with committee members on March 16th in Lansing in preparation for an upcoming committee hearing.
3. FADA (HB 5034): The Section is supportive of this legislation. The bill is currently on the Senate Floor awaiting a vote by the Senate.
4. Funeral Representative (SB 551): This bill is on the House Floor for a vote by the full House this week (Wednesday/Thursday).
5. ILIT (Draft): The Section has asked for one change to the draft language requested by the Michigan Bankers Association). This bill should be introduced within the next two weeks. (This language was drafted as a priority of the Senate Majority Leader)
6. Optional Community Property (Draft): This draft is still in LSB.

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Probate and Estate Planning Committee
Legislative Priority Issues for 2016-2017

Bill Number	Issue	Status	Contact person
Senate Bill 632/633 (Schuitmaker)	Probate Appeals	House Judiciary	Shaheen Imami
Senate Bill 597/598 (Schuitmaker)	Qualified Disposition	House Judiciary	Geoffrey Vernon
House Bill 5034 (Forlini)	FADA	Senate Floor	Howard Collins, Meg Lentz
SB 551 (Schuitmaker)	Funeral Representative	House Floor Action this week	Michelle Marquardt
LSB	ILIT	LSB	Geoffrey Vernon
LSB	Optional Community Property	LSB	Neal Nusholtz

TAX NUGGET
MARCH 2016

Temporary and Proposed Regulations Have Been Issued Regarding Basis Consistency and Reporting Requirements

Basis always has been a very important element of pre and post-mortem tax planning. Taxpayers and their advisors generally attempt to report the lowest value possible for property subject to federal estate tax that increases the federal estate tax liability. Beneficiaries for income tax reporting purposes prefer to have the basis of the property acquired from the decedent valued at the highest amount possible to decrease the amount of income tax they will have to pay on a subsequent sale.

Under Section 1014(a), the basis of property acquired from a decedent at his or her death, is generally equal to the fair market value at the decedent's death, or the value of the property as of the alternate valuation date, if the estate qualifies for and the decedent's executor elects the alternate valuation method under Section 2032 of the Internal Revenue Code. The stepped-up basis rules have no application to property which constitutes a right to receive income in respect of a decedent under Section 691.

Prior to the enactment of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ("Act") which became law on July 31, 2015, the beneficiaries of a decedent's estate were in many instances not required to use the same value that the decedent's estate reported on the federal estate tax return for purposes of determining the beneficiaries income tax basis in the property. The Act eliminates the ability for the beneficiaries of the estate to report the fair market value of the property acquired from the decedent at a value higher than that reported on the federal estate tax return. The Act enacted new Internal Revenue Code Sections 1014(f) and Section 6035. Proposed Regulations pertaining to these Sections were issued March 2, 2016. New Code Section 1014(f) requires consistency between the basis of certain inherited property and the value of that property for federal estate tax purposes. The reporting requirements to the Internal Revenue Service and the beneficiary are set forth in new Code Section 6035. In analyzing the Act, it is important to remember that even though the basis consistency rules may not apply, you still may be subject to the reporting requirements.

The basis consistency rules apply to any property whose inclusion in the decedent's estate increased the liability for federal estate tax on such estate. (See Section 1014(f)(2) of the Internal Revenue Code). Proposed Reg. §1.1014-10(b) defines this property as property includible in the gross estate under Section 2031, as well as property subject to tax under Section 2106 (this Section pertains to a taxable estate of a non-resident who is not a citizen of the United States), that generates a federal estate tax liability in excess of allowable credits.

An executor required to file a federal estate tax return must file Form 8971, "Information Regarding Beneficiaries Acquiring Property from a Decedent," with the Internal Revenue

Service to report the value of certain property included in the decedent's gross estate for purposes of the federal estate tax. Form 8971 is required to be filed on or before the earlier of:

(i) the date that is 30 days after the federal estate tax return (including extensions, if any), or

(ii) the date that is 30 days after the date on which the federal estate tax return is filed with the Internal Revenue Service

Notwithstanding the preceding, the Internal Revenue Service has delayed the Section 6035 filing deadline for all persons required to file a federal estate tax return until March 31, 2016. See Notice 2016-9.

Section 6035(a)(1) provides that the executor of an estate required to file a federal estate tax return must also furnish to the IRS and to the person acquiring any interest in property included in the decedent's estate for federal estate tax purposes, a statement identifying the value of each interest in such property on such return, and any other information prescribed by the Secretary. Executor is broadly defined by the proposed regulations to include the appointed executor, or if none is appointed, any other person required to file a federal estate tax return.

Section 6035(a)(2) provides that each person required to file a federal estate tax return must furnish to the IRS and to each other person who holds a legal or beneficial interest in the property to which the federal estate tax return relates a statement identifying the information described in Section 6035(a)(1). The Statement is Schedule A of form 8971.

Each statement (Schedule A) required to be furnished under Section 6035(a)(1) and 6035(a)(2), pursuant to Section 6035(a)(3)(A) is due no later than the earlier of (i) 30 days after the due date of the federal estate tax return (including extensions, if any) or (ii) 30 days after the date the return is filed. Section 6035(a)(3)(B) provides that in any case in which there is an adjustment to the information required to be included on the statement after the statement is filed, the executor (or other person required to file the statement) is to provide a supplemental statement to the secretary and each affected beneficiary no later than 30 days after the adjustment is made.

The Proposed Regs. specifically exclude the application of the consistent basis requirements of Section 1014(f)(1) to all property reported on a federal estate tax return required to be filed by Section 6018 if no federal estate tax is imposed upon the estate due to allowable credits. In cases where the federal estate tax is imposed on the estate, the proposed regulations exclude from the basis consistency requirement property that qualifies for a charitable or marital deduction under Section 2055, 2056 or 2056A because the property does not increase the federal estate tax liability, however, the property is subject to the reporting requirement.

Proposed Treas. Reg. §1.6035-1(a)(1) provides that an executor who is required to file a federal estate tax return is also required to file a form 8971 (Information Regarding Beneficiaries Acquiring Property from a Decedent) with a copy of each completed Schedule A to the IRS. The

executor is also required to furnish a Schedule A to each beneficiary who has acquired (or will acquire) property from the decedent or by reason of the death of the decedent.

An executor who files a federal estate tax return filed solely to make the portability election under Section 2010(c)(5) or a generation-skipping transfer tax election or exemption allocation does not have to file Form 8971 or Schedule A because such returns are not required by Section 6018.

Proposed Reg. §1.6035-1(b) defines the property to be reported on Form 8971 and Schedule A as all property included in the gross estate for federal estate tax purposes except for the following property:

- a. cash (other than a coin collection or other coins or bills with numismatic value);
- b. income in respect of a decedent (as defined in Section 691);
- c. tangible personal property for which an appraisal is not required under §20.2031-6(b) (i.e., property that does not have a marked artistic or intrinsic value in excess of \$3,000), and
- d. property sold, exchanged, or otherwise disposed of (and therefore not distributed to a beneficiary) by the estate in a transaction in which capital gain or loss is recognized.

Proposed Reg. §1.6035-1(c) states the executor must furnish to each beneficiary (including a beneficiary who is also an executor) receiving property that must be reported on Form 8971, Schedule A which contains the required information regarding that beneficiary's property. If the executor has not determined the distribution of property to each beneficiary to satisfy their bequest by the due date of providing Schedule A to the beneficiary, then the executor must report on Schedule A for each such beneficiary all of the property that the executor could use to satisfy the beneficiary's interest. Proposed Reg. §1.6035-1(c)(3).

If the beneficiary is a trust or another estate, the executor must furnish the beneficiary's Schedule A to the trustee or executor of the trust or estate, rather than to the beneficiaries of that trust or estate. If the beneficiary is a business entity, the executor must furnish the Schedule A to the entity. See Proposed Treas. Reg §1.6035-1(c)(2).

Proposed Reg. §1.6035-1(e) imposes a duty to file with the IRS a Supplement Form 8971 and all Supplemental Schedule A's and to provide a corresponding Schedule A to each affected beneficiary. An adjustment to which the duty to supplement applies is any change to the information required to be reported on Form 8971 or Schedule A that causes the information as reported to be incorrect or incomplete. Such changes include, the discovery of property that should have been but was not reported on a federal estate tax return, a change in the value of property pursuant to an examination or litigation, or a change in the identity of the beneficiary to whom the property is to be distributed.

If property is discovered after the filing of the federal estate tax return or is otherwise omitted from the return, the following rules apply. If the period of limitations on assessment has not expired for the federal estate tax imposed on the estate prior to the executor reporting the after discovered property or omitted property on a supplemental estate tax return, the standard final value rules apply as set forth in Proposed Reg. §1.1014-10(c)(1) or (2). If the after discovered property or omitted property is not reported on a supplemental estate tax return before the period of limitation in assessment expires, the basis of such property is zero. §1.1014-10(c)(3)(i)(B). If no federal estate tax return has been filed and if the inclusion in the decedent's gross estate of the after-discovered or omitted property would have generated or increased the federal estate tax liability, the basis of all property included in the gross estate will be zero until the subsequent federal estate tax return is filed.

Proposed Reg. §1.6035-1(f) unexpectedly includes additional reporting requirements pertaining to subsequent transfers to a related transferee that do not appear to fall within the parameters of the statutory reporting requirements set forth in Section 6035. A recipient of a decedent's property that was required to be reported on Form 8971 (and thus, on the recipient's statement or supplemental statement) must provide a supplemental statement to the IRS and furnish a copy of the same supplemental statement to the related transferee who receives that property in a non-recognition event in whole or in part (by gift or otherwise).

Robert B. Labe is a Shareholder with Williams, Williams, Rattner & Plunkett, P.C. in Birmingham, Michigan. Labe practices in the areas of estate planning, trusts and estates, probate disputes, tax law and business law. He has been included in the Michigan Super Lawyers since 2009, is listed in Best Lawyer's in America and has received Martindale-Hubbell's AV-Preeminent rating since 1994. Labe has made numerous presentations on business planning, estate planning and estate and trust law for the Institute of Continuing Legal Education and State Bar of Michigan. Labe is a fellow of the American Bar Foundation.