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

September 8, 2012
University Club
Lansing, Michigan

Minutes

1. Call to Order

The Chair of the Section, George Gregory called the Joint Annual Meeting of the Section Members and Meeting of the Council to order at 10:25 a.m.

2. Attendance

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

George Gregory, Chair   Hon. David Murkowski
Mark Harder, Chair Elect  Hon. Darlene O’Brien
Tom Sweeney, Vice Chair   Pat Ouellette
Amy Morrissey, Secretary  Rebecca Schnelz
Shaheen Imami, Treasurer   Jim Spica
Susan Allan               Jim Steward
Chris Ballard             Robert Taylor
George Bearup             Marlaine Teahan
Constance Brigman         Nancy Welber
David Kerr

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

Josh Ard   Robert Tiplady
Marguerite Lentz   Ellen Sugrue-Hyman

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

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

Phillip E. Harter   Michael McClory
Nancy Little   Douglas A. Mielock
E. Others in Attendance

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<td>J.V. Anderton</td>
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<td>Lynn Chard</td>
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3. Annual Meeting Business

A. Minutes of the Annual Meeting

Minutes of the Annual Meeting of the Section of September 17, 2011 were distributed prior to the meeting. The following corrections are necessary: The names of Lorraine New and Hon. Darlene O’Brien were corrected, and Marlaine Teahan was added as being present at the meeting. Upon motion by George Gregory with support from David Kerr, the revised minutes were approved.

B. Chairperson’s Report

George Gregory presented award plaques for Ellen Sugrue-Hyman and Robert Tiplady, who were both absent from the meeting, in recognition of their years of service to the Council. Mr. Gregory also presented Mark Harder with a gavel as incoming Chairperson of the Section.

Mr. Gregory noted that Mr. Harder will be assigning committees and committee chairpersons. If any Section member would like to serve on a committee, he or she should make his or her preferences known to Mark Harder; one does not need to be a Council member to serve on a committee. The Section is looking for volunteers to serve on committees.

Mr. Harder commented on his observations about committees. He reported that he has already asked Council members if they wish to chair certain committees. He has also asked each committee chairperson to provide him with a list of such committee’s members. Some committees have mission statements and others do not. It is important that each committee have a defined scope of committee work.

Mr. Harder gave Mr. Gregory a plaque for his service as Chairperson.
C. **Election of Council Officers and Members**

On behalf of the Nominating Committee, Nancy Little recommended the following nominees for appointment to Council and for election as officers for the upcoming year commencing at the conclusion of the 2012 Annual Meeting and continuing until the conclusion of the 2013 Annual Meeting:

- **Chairperson:** Mark K. Harder
- **Chairperson Elect:** Thomas F. Sweeney
- **Vice-Chairperson:** Amy N. Morrissey
- **Secretary:** Shaheen I. Imami
- **Treasurer:** James B. Steward

Nominees for a second three-year term as members of the Council, commencing at the conclusion of the 2012 Annual meeting and continuing until the conclusion of the 2015 Annual Meeting are as follows:

- W. Josh Ard
- Patricia M. Ouellette
- James P. Spica

Nominees for a first three-year term as members of the Council, commencing at the conclusion of the 2012 Annual meeting and continuing until the conclusion of the 2015 Annual Meeting are as follows:

- Rhonda M. Clark-Kreuer
- David P. Lucas
- David L. Skidmore

Following presentation of the nominees by the Chair of the Nominations Committee, the Section Chair called for a vote of the Section. Amy Morrissey supported the motion. The above nominees were elected with the consent of all of the members of the Section present.

4. **Internal Governance**

   A. **Minutes of June 9, 2012 Meeting of the Council**

   Minutes of the June 9, 2012, meeting of the Council had been previously distributed for the meeting. Marlaine Teahan noted that the following correction is necessary: In Part 3.E.3 of the minutes, reference to PA 451 should be changed to
PA 141. Upon motion by Hon. Darlene O’Brien with support from Hon. David Murkowski, the revised minutes were approved.

B. Treasurer Report

Shaheen Imami reported that the financial reports for May, June, and July, 2012 were previously distributed with the Agenda for the meeting (Attachment 1 in the meeting materials circulated prior to the meeting). Mr. Imami indicated that the fund balance as of July 31, 2012 was approximately $226,571.

C. Chairperson’s Report

George Gregory reported on correspondence of July 17, 2012 from Hon. Michael J. Anderegg, Probate Judge of Marquette County, to Attorney General Bill Schuette concerning the manner in which Public administrators are being appointed. The letter is attached as an exhibit to the minutes.

Mr. Gregory next discussed revisions proposed by the Master Lawyers Section to Rule 2 of the State Bar Rules of Michigan concerning procedures to identify an Inventory Attorney in the event of a lawyer’s disability, death, or disappearance. (Attachment 2 in the meeting materials circulated prior to the meeting). Attorney Linda Pohly commented on the proposed rules. Ms. Pohly noted that one of her concerns is that the proposal does not directly address the interest of the deceased, disabled or disappeared lawyer. She also noted that the proposed Rule 2 would give jurisdiction over such matters to the circuit court rather than probate court, in which she proposed that such matters should be heard. Ms. Pohly’s full comments are attached as an exhibit to these minutes. It was noted by others that there are materials on ICLE website as to how to handle related issues and that the State Bar of Michigan also has a process and materials concerning handling of the client files for a deceased or disabled lawyer.

Finally, Mr. Gregory gave the Chairperson’s Annual Report, noting many accomplishments of the Section during the fiscal year, such as the Section’s response to changes to powers of attorney statutes and the introduction of legislation concerning Federal estate taxes, foreign guardianships, decanting, and Uniform Principal and Income Act, among others. Mr. Gregory noted that the Annual Probate & Estate Planning Institute was successful. He mentioned the benefits of our SCAO liaison and the expanded and improved online services to members, such as the new listserv platform and the Section resources that are on the Section’s new webpage developed in conjunction with ICLE, to which the EPIC Q&A has migrated. He urged Section Members to take a look.

D. Standing Committee Reports

1. Budget – Mr. Imami reported that the Section fund balance is sound; therefore, there will be no increase in dues for the coming year. He noted that the Section may want to allocate funds to a dedicated account for Amicus briefs.
2. Long Range Planning – Mark Harder reminded all present that the October Council meeting will be held at the Haworth Inn in Holland on October 27. He suggested that those needing hotels make reservations soon.

3. Awards – Doug Mielock reported that the committee is working on Michael Irish Award for the coming year. In addition, work is almost complete on the compilation of a historical list of all past recipients of the Michael Irish Award.

4. Committee on Special Projects – Jim Steward reported on two matters:

CSP discussed some of the draft proposed rules for specialization and certification and that discussion will continue at future meetings. The Section is moving in the direction of determining logistics and financing of the process to determine whether or not it is financially feasible to move this project forward.

A number of concerns about the proposed rules were noted as follows:
- Most states have mandatory CLE and Michigan does not. The Section needs to consider the infrastructure necessary to implement a mandatory CLE program and qualify CLE providers as accredited. It was suggested that the rules should allow the CLE provider to certify that its program meets the criteria.
- Fees will be higher for implementation where numbers of participants are low.
- The Bar will also want to make sure that methods and testing are nondiscriminatory and set up so clearly that the Bar is not litigating matters.
- There was significant discussion about virtual offices and the extent of physical presence in the state as a requirement, as well as length of practice in general (i.e., part time versus full time).
- A significant concern shared by many was that the rules do not provide for an appeal from Board hearing and need a process.
- There was a comment that the proposed “duty to inform” rule in 6.2 (and 6.1.1 j) should refer to the acts that may be subject to the Board determination. Felony should not be automatic bar; it should be related to character & fitness to practice.
- The specialization committee is adjunct to the Board’s discretion. There is no direct tie from the Board’s discretion to the application procedures.

Mr. Steward also reported that discussion ensued concerning the draft family consent statute, in particular the liability clause. Three proposals were set forth. The Council instructed the Guardianship and Conservatorship Committee to rework a proposal concerning provider liability that addressed both the standard of care of providers and reliance on the health care representative’s decision under the Act. Discussion will continue at the next CSP meeting.

5. Legislation - Marlaine Teahan reported on three items.

She met with Rebecca Bechler of Public Affairs Associates to discuss the possibility of amendments to Sections 861 and 863 of the Revised Judicature Act relative to appeals from Probate Court in the event the Supreme Court determines that it does not have the authority to amend Michigan Court Rule 5.801.
Ms. Teahan has been appointed to a work group to work on forms for the Peace of Mind Registry.

Ms. Teahan reported that there are concerns with Senate Bills 1215-1218. The bills involve minor guardianships under the Estates and Protected Individuals Code. Judge Murkowski reported that the proposed legislation would remove a judge’s authority to remove neglect cases to EPIC guardianships which rarely happens, but the larger concern is that probate courts rely on the Department of Human Services (DHS) to perform home studies, prepare integration plans, and to supervise the integration of minors back into their home. DHS does not want this role but presently there is no other organization to do it. The Michigan Probate Judges Association has taken a position in opposition to these bills and has provided a position paper to Sen. Caswell, sponsor of the bills. The position is that DHS must service the children under an abuse or neglect petition. Our Section will take up discussion on a future agenda.

Rebecca Bechler reported that there is a short session in the Michigan Legislature before the end of this year. Some of our proposed legislation will not be taken up in that time frame, but House Bills 5154 and 5237 should be taken up this week.

Ms. Bechler reported that Senate Bills 539, 192 and 978 are in the Judiciary Committee and may be completed before the end of the year but the large number of referendums on the ballot in November could impact the legislative schedule.

6. Probate Institute – Ms. Morrissey reported that she has been working with Jeff Kirkey and Jeanne Murphy on a draft schedule; national speakers will include Jonathan Blattmachr and Robert Fleming. Materials should be made available in downloadable format for iPad users and others who want to download.

7. Section Journal – Nancy Little reported that she is working with the SBM to have a survey of Section Members to determine whether they want a hard copy or electronic copy of the Journal and then to code them appropriately. The survey will be performed electronically.

8. ListServ – Mr. Gregory reported that he is hopeful that the Committee can develop some recommendations on listserv behavior.

9. Ethics – David Kerr distributed Formal Opinion R-21 concerning Rule 1.15A on a lawyer’s obligations when acting as a fiduciary, particularly a trustee. His report is attached as an exhibit to the minutes.

10. Unauthorized Practice - Bob Taylor reported that the regional seminars held on August 1 concerning estate planning decisions went well; the SBM materials were wonderful and the seminars were generally well attended. David Kerr’s presentation had 88 participants. Mr. Gregory suggested that Mr. Taylor inform the SBM that there are attorneys who want to present at future seminars. None of the seminars were held in Clinton, Eaton, and Ingham counties because no senior group offered to sponsor.
11. Court Rules/Forms – Marlaine Teahan reported that ADM 2011-28 was issued on August 24, 2012. Rule 5.101 (C) was amended with grammatical changes.

Ms. Teahan also reported that the SCAO forms committee for Estates and Trusts met this week, with Ms. Teahan, Keven DuComb and Mike McClory participating. The Guardianship and Conservatorship work group (of which Connie Brigman, Michael McClory and Rebecca Schnelz are members) is coming up. Rebecca Schnelz and Michael McClory are involved in the Mental Health/Commitment work group. Ms. Teahan suggests that these meetings occur annually but should occur twice annually due to the need to make more timely changes. Mr. Harder will be sending a letter to SCAO recommending this change; it is possible that the Michigan Probate Judges Association and the Probate Registers Association will join in this letter (or will send their own).

E. Ad Hoc Committees

1. Updating Michigan Estate/Trust Law – Tom Sweeney reported that he had a call with Deb Minton of the Michigan Banker’s Association on repealing Michigan’s inheritance tax statute. There are approximately 56 sections of the law. The issue is that there are pre-1993 trusts in existence where determination of inheritance tax was deferred without interest due to non-vested beneficial interests; banks, as trustees of many of these trusts, have to keep track of beneficiaries. Susan Allan notes that it would not be easy to extricate the problematic sections of the statute in order to keep what might be useful in the future.

The Committee is also working on an asset protection proposal. National attorneys volunteered time to look at what the committee has developed and are tweaking it.

2. Insurance – Sen. Schuitmaker introduced Senate Bills 1102 and 1103, which address insurable interests.

3. TBE entireties property in trust – The committee has begun research and hopes to have a draft this fall.

4. Online Guidance for Non-Lawyers – Rebecca Schnelz reported that the Solutions on Self Help website is now active.

5. Decanting – Senate Bills 978, 979, 980 passed the Senate and are in the Judiciary.

6. Power of Attorney – It was noted that someone on the listserv raised the question whether an acceptance by an agent under a power of attorney is truly required because the statute says that failure of an agent to sign an acceptance does not affect the agent’s authority, but the issue is that without the signed acceptance, an institution has a valid reason for not accepting the power of attorney.

7. Transfer Tax – Lorraine New reported that a draft Form 706 is out; one interesting change is the ability to elect not to have portability pertain to that estate.
8. Guardianships, Conservatorships and End of Life – Connie Brigman reported that the guardians and DNR bills will not likely move this year.

Some comments were made on the Guardian Accountability and Senior Protection Act proposal which is a Federal proposal that would allow funds for the courts to provide background checks for guardian and conservator and to monitor courts to see if they are complying with procedure to have more limited guardianships. The funds would go to the judiciary who must coordinate with the state attorney general.

9. ICLE Community

Lynn Chard presented on the ICLE Community online. She noted that there are more than 480 unique users and lots of hits. ICLE partners currently have access to the Community, but it is not open to all Section members yet because there is currently no arrangement with the Section for that to occur. ICLE uses licensed software that it cannot modify. Cost was about $5000 to set up and $4500 quarterly to run; it is a big investment.

Jeanne Murphy gave a visual demonstration of the ICLE Community. She reviewed user profiles, which can reveal a user’s credentials and other data to be edited by the user. She also explored other areas of the Community such as blogs and discussions. ICLE partners open forums is where discussions are taking place.

There was discussion concerning the response time of blog postings and how discussion topics are sent to a user. It was noted that sometimes on the listserv, comments are stale because posters don’t promptly read and respond to a post. Hopefully, the Community will have a resolution to this.

F. Specialty Areas and Liaisons

1. Probate Registers - Mike McClory mentioned that there are non-Section members who want access to EPIC Q&A website.

2. Elder Law/Liaison to Elder Law Section - Amy Tripp reported that the Elder Law Conference is October 3-5 at Crystal Mountain Resort in Thompsonville.

3. Family Law/Liaison to Family Law Section - Pat Ouellette commented on a Florida law that terminates beneficiary designations and similar governing instruments in the event divorce. Michigan does not currently have this type of statute. Nancy Little, Meg Lentz, Pat Ouellette and certain members of the Family Law Section are looking at this issue.

4. Tax Section Liaison - Fred Hoops reported that the annual meeting of the Taxation Section is September 27 in Novi; see the website.

5. ADR - Nina Dodge Abrams introduced herself as our Section’s Liaison to the ADR Section. Shari Rolland Phillips gave a report on two significant initiatives in
Michigan: the Michigan Mediates Campaign (MM!C) and the Government Task Force. See the written report attached as an exhibit to the Minutes.

6. Other Business

Tom Sweeney reported that Council members should feel free to propose topics for the Council’s 2-year plan.

Nancy Welber reported that the Sixth Circuit Court of Appeals recently held that Michigan’s bankruptcy-specific exemption statute (MCL 600.5451) is constitutional.

G. Adjournment

There being no other business brought before the Council, Nancy Little moved to adjourn; Pat Ouellette supported the motion. The meeting was adjourned at 12:24 p.m.

Respectfully submitted,

Amy Morrissey
Secretary
Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips
REPORT TO PROBATE & ESTATE PLANNING SECTION - September 8, 2012

The ADR Section met on July 13, 2012, at the State Bar of Michigan Office in Lansing, MI.

Two significant initiatives were discussed in detail at this meeting:

1. The Michigan Mediates! Campaign (MMIC) – An initiative to educate the public on the use and effectiveness of alternative dispute resolution. MMIC has merged with the Dispute Resolution Education Resource (DRER) of Lansing in order to gain 501(c)(3) status for purposes of raising funds through grants and corporate/individual sponsorships.
   a. A self-directed website is in process. There is no referral system for those who want mediation.
   b. There is a mediation campaign to address ADR needs in the areas of: Medicaid, Medicare, Family Law, Education, and the general public.
2. The Government Task Force – Task Force Members have reached out to the executive, legislative and judicial branches of government to educate them on the cost benefits and effectiveness of ADR. This initiative has been met with positive response.

The Effective Policies and Practices (EPP) Action Team reported that the Elder Law Section has signaled its objection to proposed changes to the Revised Uniform Arbitration Act (RUAA). The Elder Law Section’s objection concerns the issue of contracts of adhesion in a nursing home setting. The ADR Section recommends no further changes to the language of the RUAA at this time.

A liaison from the ADR Section to the Probate & Estate Planning Section was named:
Nina Dodge Abrams
1212 S. Washington Avenue
Royal Oak, MI 48067
(248) 546-0900
ninadabrams@abramspc.co

The ADR Section Annual Meeting will be held on Friday & Saturday, October 5 & 6, 2012 at Michigan State University College of Law, 368 Law College Bldg., East Lansing, MI 48824. Registration information is available through the State Bar of Michigan website.

Respectfully submitted,

[Signature]
Sharri L. Rolland Phillips
Liaison to ADR Section
ETHICS REPORT
September 8, 2012

At the January 15, 2011 council meeting, James H. LoPrete brought up the problem of "unintended circumstances" with MRPC 1.15A. The issue was if literally interpreted where attorneys were acting in a fiduciary capacity in a number of circumstances. Council chair Doug Chalgian appointed a committee of council members to be headed by Thomas Sweeney. Howard Linden, a public administrator and I were to be on the committee. The council members were Doug Mielock and Marlaine Teahan. Tom Sweeney sent a letter to the State Bar about our concerns. There seemed to be silence in response. Jim LoPrerte then asked for a formal opinion about "real world" situations. So far as I know, there has been nothing back from the Supreme Court Justices. Attached is the formal opinion from

The Problem

Attorneys may serve as trustee of many trusts, including their own self trusteed trust, their spouse's wife's trust, and trusts for the attorney's children and grandchildren. They may also serve as trustee for many clients and on the governing board of non-profit institutions and their place of worship where the attorney is also the lawyer for the entity. The rule provides:

1. They "shall deposit all funds held in trust in accordance with Rule 1.15". "Funds held in trust" - includes "funds held in any fiduciary capacity in connection with a representation". (Emphasis added)

That means if an attorney is the trustee selected by the attorney's client to administer a trust unless the attorney has as the attorney's lawyer someone other than the attorney or a person affiliated with the firm with which the attorney is affiliated, the attorney is subject to the rule.

2. "Lawyer" is defined as including any "organization with which a lawyer is professionally associated". (Emphasis added) That means that because the attorney is on the board of trustees of several non-profit corporations and the attorney's place of worship and the attorney represents those entities (whether paid or pro bono - the rule doesn't distinguish), that "organization" is subject to the rule regarding the investment of its "funds" because the rule makes it a "Lawyer" by definition and because the attorney is both a "fiduciary" and "represent" it as its lawyer.

Rule 1.15(d) requires "All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded". You then must look to Rule 1.15A for how to appropriately safeguard those funds.

Rule 1.15A(a)(2) requires that "Lawyers (i.e., those organizations where the attorney is a
fiduciary and their lawyer) shall clearly identify any other accounts in which funds are held in
trust as "trust" or "escrow" accounts, and lawyers must inform the depository institution in
writing that such other accounts are trust accounts for the purposes of this rule". (Emphasis
added).

3. Then Rule 1.15A(b) provides a lawyer may only deposit "lawyer trust accounts" with a
"financial institution" "approved by the State Bar of Michigan". Subsection (c) then requires
that "No trust account shall be maintained in any financial institution that has not been so
approved" (by State Bar of Michigan). (Emphasis added)

The rule, read as written, says whenever an attorney is am (a) a trustee or personal
representative of a trust or estate established by someone the attorney
represents; (b) the attorney represents herself/himself or the attorney's firm represents the
attorney as the fiduciary; and (c) the attorney has any cash to invest, that either the attorney
or any trust, estate or the organization with which the attorney is affiliated are limited as to
investment options for "funds" (i.e., cash) to "financial institutions" having an "approved status" by
the State Bar.

Statutes and perhaps the common law rules pertaining to fiduciary duty might the be violated:
Prudent Investor Rule as part of EPIC, the Uniform Prudent Management of Institutional
Funds Act,
June 11, 2012

DELIVERED BY FACSIMILE MACHINE
TO: (248) 232-8955
AND BY FIRST CLASS MAIL

James H. LoPrete
LoPrete & Lynes, P.C.
Attorneys at Law
40950 Woodward Avenue
Suite 306
Bloomfield Hills, MI 48304-5128

Re:  Formal Opinion R-21, dated June 8, 2012

Dear Mr. LoPrete:

Please find enclosed Formal Opinion R-21 pertaining to the ethical management of trust accounts. This opinion was adopted as a formal opinion by the State Bar of Michigan Board of Commissioners on Friday, June 8, upon the recommendation by both the Standing Committee on Professional Ethics and the Professional Standards Committee (a Board committee).

Sincerely,

Dawn M. Evans
Director of Professional Standards

DME:dc
Enclosure
MRPC 1.15A neither enlarges nor alters lawyers' obligations to safeguard client or third person funds expressed in MRPC 1.15. The obligations of MRPC 1.15 and MRPC 1.15A are triggered only when a lawyer represents a client and, in the course of discharging duties as a lawyer, receives funds or other property that do not belong to the lawyer.

A lawyer serving as a bankruptcy trustee, who has statutory duties as an officer of the court but does not represent a client; a lawyer appointed as a receiver, who derives powers from the court appointment and does not have a client-lawyer relationship with the person or entity whose assets are subject to the receivership; and a lawyer who serves in a fiduciary role, such as a personal representative or attorney-in-fact, in an individual capacity as, for example, a family member of the decedent or principal under a power of attorney and not as a result of being retained as a lawyer to serve in that role, are not subject to the obligations of MRPC 1.15 and MRPC 1.15A when handling funds that belong to the bankruptcy estate, receivership, or probate estate.

Lawyers may have obligations as fiduciaries that are defined by common law, statutes, legal documents, court rules, court orders, or some combination thereof. The requirements of MRPC 1.15 and MRPC 1.15A do not supersede any obligations a lawyer performs as a fiduciary, such as, for example, a trustee’s power to invest and reinvest trust property in accordance with the “Michigan prudent investor rule.”

MRPC 1.15(d) requires that “[a]ll client or third person funds” be deposited into an IOLTA or non-IOLTA account. “Client or third person funds” include unearned legal fees and unincurred expenses that have been paid in advance, funds in which a third person has an interest, and funds in which two or more persons (one of whom may be the lawyer) claim an undivided interest. When the funds received are unearned fees and unincurred costs or expenses, they must be held in trust until earned or expended.

When a lawyer receives all or any portion of a fixed or flat fee before the work has been completed and when there is no agreement between the client and lawyer regarding when the fixed or flat fee is earned or whether any portion may be disbursed to the lawyer prior to the conclusion of the representation, the entire amount received must be deposited into a client trust account and held in trust until completion of the agreed upon legal services.
A lawyer is not permitted to commingle the lawyer's funds with client or third person funds. When funds are received from a client or third person in a "lump sum" that represents a combination of earned funds or incurred expenses along with unearned funds or unincurred expenses, the entire sum must be placed in trust and then any earned funds or incurred expenses must be promptly withdrawn.

Upon receipt of client or third person funds, lawyers are obligated to determine whether the funds should be deposited into an IOLTA or a non-IOLTA account. An IOLTA account refers to a pooled interest- or dividend-bearing account at an eligible institution that includes only client or third person funds that cannot earn income for the client or third person, because the individual amounts are too small or held too briefly to earn income in excess of the costs incurred. A "non-IOLTA account" refers to an interest- or dividend-bearing account in a bank, savings and loan association, or credit union, which contains larger or longer term funds that can earn net income for the client. Lawyers must ascertain whether the client or third person funds can earn net income. If the funds will earn income for the client or third person in excess of the costs incurred to safeguard the funds while held by the lawyer, they must be deposited into a non-IOLTA account. If the funds will not earn income in excess of the costs incurred, they must be deposited into an IOLTA account. A lawyer's good-faith decision regarding the deposit or holding of trust funds in an IOLTA account is not reviewable by a disciplinary body. However, a lawyer must review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively into a non-IOLTA account.

Planning for an orderly transition in the event of sudden death or disability is important to assure that funds held in the lawyer's trust accounts are appropriately safeguarded in keeping with MRPC 1.15. Solo practitioners without another lawyer in house to manage accounts should consider including the name of a successor attorney as an alternative signatory on trust accounts who can perform the safeguarding duties required by MRPC 1.15 in the event of sudden death or disability. The successor lawyer's service in this capacity does not require membership or employment in the solo practitioner's law firm.

References: MRPC 1.2; 1.5(a); 1.8(e); 1.15(a), (b), (c), (d), (e), (g), (h) and (j); 1.15A(a); 1.16(d); R-7; RI-10; RI-69; RI-92; RI-93; RI-107; RI-189; RI-330; Grievance Administrator v Cooper, 482 Mich 1079; 757 NW2d 867 (2008) rev'g Grievance Administrator v Cooper, Case No. 06-36-GA (Sep 17, 2007).

TEXT

Since the adoption of Michigan Rule of Professional Conduct ("MRPC") 1.15A, commonly known as the TAON Rule, questions have been raised about the scope of its coverage. In particular, many lawyers are seeking clarification about the extent to which the TAON Rule applies to circumstances other than the traditional lawyer-client representation, such as when a lawyer is serving as a court-appointed receiver, trustee, personal representative or conservator; acting as a trustee pursuant to a trust instrument or other fiduciary pursuant to a probate and estate instrument;

1 TAON is an acronym for "trust account overdraft notification." The Michigan Supreme Court adopted the TAON Rule on December 15, 2009, with an effective date of September 15, 2010. Michigan was the 42nd jurisdiction to adopt the Rule.
or functioning as a bankruptcy trustee in federal court. As lawyers have sought to understand the "notice" provisions of the TAON Rule regarding non-IOLTA accounts, it has become apparent that confusion exists about when the use of a non-IOLTA account is required. Also, many lawyers are uncertain about how to handle funds that represent an advance toward unearned fees, settlement funds, or funds that are not clearly earmarked when received by the lawyer.

As a starting point, it is important to note that MRPC 1.15A neither enlarges nor alters lawyers' obligations to safeguard client or third person funds expressed in MRPC 1.15, which has been in existence since 1990. Both MRPC 1.15 and MRPC 1.15A contain language that gives direction about when each Rule's obligations are triggered, as well as the scope of their coverage.

MRPC 1.15(d) provides:

A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

MRPC 1.15A(a) provides:

Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.

Common to both Rules is the phrase "in connection with a representation." Although the term "representation" is not defined in the Michigan Rules of Professional Conduct, MRPC 1.2, entitled "Scope of Representation," describes lawyers' duties to their clients. As the phrase "in connection with a representation" is used in the MRPC, a lawyer serves in a representative capacity when rendering legal services on behalf of a client. Consistent with this usage, the obligations of MRPC 1.15 and MRPC 1.15A are triggered only when a lawyer represents a client and, in the course of discharging duties as a lawyer, receives funds or other property that do not belong to the lawyer. A lawyer serving as a bankruptcy trustee has statutory duties as an officer of the court but does not represent a client. For this reason, the obligations of MRPC 1.15 and MRPC 1.15A do not pertain to funds received by bankruptcy trustees in discharge of their duties under the Bankruptcy Code.

Similarly, lawyers who are appointed receivers derive their powers from the court appointment and do not have a client-lawyer relationship with the person or entity whose assets are subject to the receivership. Accordingly, the obligations of MRPC 1.15 and MRPC 1.15A do not

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2 IOLTA stands for "Interest on Lawyers Trust Accounts."

3 The Committee notes that federal law imposes requirements upon bankruptcy trustees as officers of the court in the handling of funds of a bankruptcy estate that in some ways are not dissimilar from the requirements of MRPC 1.15 and MRPC 1.15A, but this fact is not the basis upon which the Committee concludes that the funds handled by bankruptcy trustees do not fall within the scope of the trust account rules.

4 See also RI-330 (November 13, 2002), which provides in pertinent part:

A court appointed receiver is "a ministerial officer of the court appointing him." Cohan v Bolinga, 216 N.W.2d 586, 587 (Mich. App 1974). The duty of the receiver is not to represent or advocate on behalf of a client, but
apply to funds received by a receiver. Finally, a lawyer who serves in a fiduciary role, such as a personal representative or attorney-in-fact, in an individual capacity as, for example, a family member of the decedent or principal under a power of attorney and not as a result of being retained as a lawyer to serve in that role, is not engaged in a “representation” that would trigger the requirements of MRPC 1.15 and 1.15A.

Lawyers may have obligations as fiduciaries (e.g., as trustees, personal representatives, conservators, guardians, and attorneys-in-fact) that are defined by common law, statutes, legal documents, court rules, court orders, or some combination thereof. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. The commentary to MRPC 1.15 provides in pertinent part: “The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services.” It is clear from the commentary that the requirements of MRPC 1.15 and MRPC 1.15A do not supersede any obligations a lawyer performs as a fiduciary, such as, for example, a trustee’s power to invest and reinvest trust property pursuant to the “Michigan prudent investor rule.”

Simply stated, the obligations under MRPC 1.15 and MRPC 1.15A are only triggered when the lawyer receives client or third person funds or other property in the course of a representation. If the lawyer’s access is through some other means, these Rules do not apply. For example, when a lawyer serves on a charitable foundation’s board and has check-writing ability as the organization’s treasurer, the funds in the account belong to the organization as the accountholder and the lawyer’s access to the funds is based on the office held in the organization rather than “in connection with a representation.”

Some lawyers have advocated for an exemption from the requirements of MRPC 1.15 and MRPC 1.15A in circumstances where a lawyer serving a court-appointed function is required to post a surety bond and obtain court approval for payments from an account, contending that the trust account Rules are redundant and unnecessary because the court’s oversight is intended to provide the necessary safekeeping protections. Unfortunately, disciplinary orders and publicized criminal fraud convictions, albeit involving a small segment of Michigan lawyers, confirm that significant defalcations have occurred even with stringent court oversight. Moreover, there is no such exception provided for in MRPC 1.15 and MRPC 1.15A. For lawyers engaged in a representation that includes a fiduciary role, if there is no legal authority to place client or third person funds other than in an IOLTA or non-IOLTA account, then client and third person funds received must be handled in accordance with MRPC 1.15 and MRPC 1.15A. The safekeeping protections of MRPC 1.15A are intended to provide early notice that a lawyer may be engaging in financial misconduct likely to injure clients. In those instances where the trust account Rules apply to funds related to a court proceeding, the TAON Rule works in concert with the court’s oversight to enhance the safekeeping protections over funds held by lawyers in their trust accounts.

"under the order of the court, to preserve and care for the property and turn it over to the person who is ultimately decided to be entitled thereto." Westgate v Westgate, 292 N.W. 569, 571 (Mich. 1940). "Figuratively, a receiver is the arm of the court, appointed to receive and preserve the litigating parties property." Hafmeister v Randall, 335 N.W.2d 65, 67 (Mich. App. 1983). The receiver "is charged with preserving the assets of the debtor for the benefit of both debtor and creditor and the receiver's jurisdiction over these assets is, in effect, that of the court itself." Cohen, 216 N.W.2d at 587. The receiver's power is derived from the court, not from representation of a litigating party.
A careful review of both trust account Rules is necessary in order for Michigan lawyers to be fully informed about their ethical duties when receiving funds or other property in which a client or third person has an interest. MRPC 1.15 requires lawyers to ethically manage client and third person funds received by them. This caretaker obligation consists of five essential elements – a duty to notify, safeguard, segregate, deliver, and account for funds belonging to the client or third person. These requirements apply upon the lawyer’s receipt of funds, so it is essential for the lawyer to have a clear understanding of which funds are properly characterized as trust funds before coming into possession of client or third person funds. Moreover, as the commingling of client or third person funds with funds belonging to the law firm or lawyer violates MRPC 1.15(a), it is equally important for lawyers to be able to determine which funds should not be deposited into their IOLTA or non-IOLTA accounts so as not to violate MRPC 1.15(a).

MRPC 1.15(d) requires that “[a]ll client or third person funds” be deposited into an IOLTA or non-IOLTA account. “Client or third person funds” include unearned legal fees and unincurred expenses that have been paid in advance,\(^6\) funds in which a third person has an interest,\(^7\) and funds in which two or more persons (one of whom may be the lawyer) claim an undivided interest.\(^8\) When the funds received are unearned fees and unincurred costs or expenses, they must be held in trust until earned or expended.\(^9\)

For purposes of MRPC 1.15, fees can be categorized in two ways: “earned” and “unearned.” Likewise, costs or expenses can be grouped into either “incurred” or “unincurred.” Lawyers must analyze all funds they receive to determine whether they represent fees that are earned or unearned and, if the funds are for costs or expenses, whether the costs or expenses have been incurred or are yet to be incurred. Funds that represent earned fees and incurred costs or expenses must not be deposited into a lawyer’s trust account.\(^10\)

Some lawyers remain unclear about how to handle a fixed or flat fee paid before the work has been completed. When a lawyer receives all or any portion of a fixed or flat fee before the work has been completed and when there is no agreement between the client and lawyer regarding when the fixed or flat fee is earned or whether any portion may be disbursed to the lawyer prior to the conclusion of the representation, the entire amount received must be deposited into a client trust account and held in trust until completion of the agreed upon legal services.\(^11\) This is true even if the legal services are expected to be completed in a short period of time or do not require substantial attorney time to complete due to the nature of the case.

\(^5\) MRPC 1.15(b), (c), (d), (g), and (h).

\(^6\) MRPC 1.15(g).

\(^7\) MRPC 1.15(b)(1).

\(^8\) MRPC 1.15(c).

\(^9\) MRPC 1.15(d).

\(^10\) MRPC 1.15(a)(3).

\(^11\) Informal Ethics Op RI-69.
By contrast, earned fees remitted to a lawyer must not be deposited into a client trust account to avoid commingling the lawyer’s funds with trust funds. This would include, for example, funds paid for legal services already performed.\textsuperscript{12}

When funds are received from a client or third person in a “lump sum” that represents a combination of earned funds or incurred expenses along with unearned funds or unincurred expenses, MRPC 1.15(g) and the second sentence of MRPC 1.15(d) require all unearned funds and unincurred expenses to be deposited into a trust account. At the same time, the first sentence of MRPC 1.15(d) requires a lawyer to hold the lawyer’s own property separate from property of clients or third persons. Prior opinions of this Committee have concluded that these Rules require the entire sum must be placed in trust and then any earned funds or incurred expenses must be promptly withdrawn.\textsuperscript{13} We agree.

A lawyer’s personal expenses must not be paid directly out of an IOLTA account or non-IOLTA account. Once funds on deposit in the trust account are earned, they become the lawyer’s property and must be withdrawn, whereupon they may be deposited into an operating or other account containing the lawyer’s property. Informal Opinion RI-10 identified a circumstance where a lawyer could ethically designate and retain a portion of a fee as something akin to liquidated damages after being discharged by a client without cause.\textsuperscript{14} Subsequently, the Supreme Court upheld as not violative of MRPC 1.5(a), 1.15(b), and 1.16(d) a fee agreement that provided for the portion of a fee paid in advance to be nonrefundable.\textsuperscript{15} When a lawyer receives payment for services already performed and expenses incurred, the lawyer must hold those funds separately from client or third person funds and must not deposit them into a trust account because they belong to the lawyer or law firm.\textsuperscript{16} Depositing such funds into the lawyer’s trust account would constitute an inappropriate commingling of the lawyer’s funds with client or third person’s funds.\textsuperscript{17} The only exception to this rule is set forth in MRPC 1.15(f), which permits a lawyer to deposit the lawyer’s own funds into a client trust account in an amount reasonably necessary to pay service charges or other fees or to obtain a waiver of such charges or fees.\textsuperscript{18}

\textsuperscript{12} Id. See also, MRPC 1.15(d).

\textsuperscript{13} After the check has cleared (i.e., the payor bank against which the check is drawn has paid the check), the portion attributable to earned fees and incurred expenses must then be withdrawn from the lawyer’s trust account and may be deposited into the lawyer’s general operating account. To avoid overdrafts to their trust accounts, lawyers should review the relevant portions of the applicable law, currently within the Commercial Transactions Code, to ensure that they understand when a check issued by a client or third person and deposited in the lawyer’s trust account has been paid.

\textsuperscript{14} Informal Ethics Op RI-10 concludes, “where a client has solicited a lawyer’s representation in complex litigation, and the client signs and understands a written fee agreement requiring payment of a large up-front “nonrefundable” retainer, then discharges the lawyer for reasons not attributable to the lawyer’s misfeasance after the lawyer has expended resources and declines other employment in reliance on the agreement, it is not unethical for the lawyer to keep the entire retainer even though the amount kept exceeds what would have been earned on an hourly rate basis.”

\textsuperscript{15} Grievance Administrator v Cooper, 482 Mich 1079, 751 NW2d 876 (2008) rev’g Grievance Administrator v Cooper, Case No. 06-36-GA (Sep 17, 2007).

\textsuperscript{16} MRPC 1.15(d).

\textsuperscript{17} Id.

\textsuperscript{18} MRPC 1.15(f).
When a lawyer receives settlement proceeds on behalf of a client, the lawyer must promptly take several steps. The lawyer must (1) notify the client of the receipt of the funds; (2) determine whether the proceeds must be deposited into an IOLTA or non-IOLTA account (based upon the factors set forth in MRPC 1.15(e)); (3) deposit the funds in an IOLTA or non-IOLTA account; (4) determine who is entitled to receive the funds; (5) secure the client’s consent to the distribution of funds; and, (6) disburse the funds in conformity with the consent given by the client. When two or more persons (one of whom may be the lawyer) claim an interest in the funds, the lawyer must keep separate the amount of money in dispute until the dispute is resolved. The funds not in dispute should be promptly distributed.

Fulfilling these obligations is best accomplished by ensuring that checks representing settlement proceeds are made payable either to the lawyer or law firm in trust for the client or jointly to the lawyer or law firm and the client. A lawyer may not ethically request that a payor issue separate checks to the lawyer and the client if the purpose in doing so is avoiding compliance with the lawyer’s obligation to deposit settlement proceeds in an IOLTA or non-IOLTA trust account. Making such a request would be incompatible with a lawyer’s obligations both to safeguard client property and to disburse client funds promptly. To the extent that RI-92 and RI-93 preclude a lawyer from making such a request, they are reaffirmed.

Additionally, a lawyer would violate both MRPC 1.8(c) and MRPC 1.15(d) by paying a client the settlement amount from funds in the law firm’s operating account and thereafter depositing the proceeds of a settlement check into the law firm’s operating account. Simply put, the lawyer who advances settlement monies out of the lawyer’s funds engages in an impermissible provision of financial assistance to the client.

Upon receipt of client or third person funds, lawyers are obligated to determine whether the funds should be deposited into an IOLTA or a non-IOLTA account. An IOLTA account refers to

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19 On the rare occasion that a lawyer receives a settlement check payable solely to the client where no other party, including the lawyer, claims any interest in the proceeds, the lawyer may promptly deliver the check to the client. Because there is no division of the proceeds to be made in that circumstance, depositing the check into an IOLTA or non-IOLTA account would only delay disbursement to the client of funds to which the client is promptly entitled, arguably violating Rule 1.15(b)(3).

20 MRPC 1.8(c) provides in pertinent part, “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that ... a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client.”

21 MRPC 1.15(d) provides, “[a] lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer’s own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.”

22 See Informal Ethics Op RI-189, which provides in pertinent part, “Under the procedure proposed, the lawyer would be advancing not the court costs and expenses, but the very proceeds from the settlement or judgment entered. The lawyer is, in essence, providing financial assistance, albeit for the short term between resolution and payment by the opposing party. The general type of financial assistance posited by the lawyer here is proscribed by MRPC 1.8(c) and its two exceptions. Neither of the two exceptions applies here. Also, the fact that the litigation has been settled is irrelevant, otherwise the underlying spirit of MRPC 1.8(c) would be impeded.”
a pooled interest- or dividend-bearing account at an eligible\textsuperscript{23} institution that includes only client or third person funds that cannot earn income for the client or third person, because the individual amounts are too small or held too briefly to earn income in excess of the costs incurred.\textsuperscript{24}

A non-IOLTA account refers to an interest- or dividend-bearing account in a bank, savings and loan association, or credit union, which contains larger or longer term funds that can earn net income for the client.\textsuperscript{25} A non-IOLTA account can either be a separate account for a particular client or a pooled account with subaccounting by the bank or by the lawyer, providing for computation of earnings for each client's or third person's funds.\textsuperscript{26}

MRPC 1.15A(c) requires that IOLTA and non-IOLTA accounts be maintained only at financial institutions approved\textsuperscript{27} by the State Bar of Michigan.

It is essential for lawyers to understand the differences between IOLTA and non-IOLTA accounts in order to ethically manage client or third person funds. For example, even large sums can be properly deposited into an IOLTA account if the net earnings do not exceed the cost of establishing and administering a non-IOLTA account (e.g., a settlement check deposited into an IOLTA account just long enough for the check to "clear" and the funds to be disbursed). Lawyers must ascertain whether client or third person funds can earn net income. If the funds will earn income for the client or third person in excess of the costs incurred to safeguard the funds while held by the lawyer, they must be deposited into a non-IOLTA account. If the funds will not earn income in excess of the costs incurred, they must be deposited into an IOLTA account. Factors to use in making this determination are set forth in MRPC 1.15(c).\textsuperscript{28}

\textsuperscript{23} MRPC 1.15(a)(2) defines an eligible institution as "a bank or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or ... an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan" that "must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications." Eligible institutions must also be State Bar-approved financial institutions under MRPC 1.15A.

\textsuperscript{24} MRPC 1.15(a)(3).

\textsuperscript{25} MRPC 1.15(a)(4).

\textsuperscript{26} MRPC 1.15(a)(4)(A-B).

\textsuperscript{27} Lawyers have questioned why certain types of institutions are not included on the State Bar's approved list. MRPC 1.15(a) identifies the types of financial institutions that lawyers must use for IOLTA and non-IOLTA accounts, each of which must be authorized by federal or state law to do business in Michigan. IOLTA accounts can be maintained at banks or savings and loan associations with federally-insured deposits, and open-end investment companies registered with the Securities and Exchange Commission. In addition to those types of financial institutions, non-IOLTA accounts can be maintained at credit unions with federally-insured deposits. To receive approval, a financial institution must enter into an overdraft notification agreement with the State Bar of Michigan under the terms of which it agrees to provide overdraft reports under the circumstances and containing the information described in MRPC 1.15A.

\textsuperscript{28} MRPC 1.15(c) provides: In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

(i) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the
Whether to place funds into an IOLTA or a non-IOLTA account is a lawyer's decision; a client waiver to put otherwise non-IOLTA funds into an IOLTA account is not permissible. A lawyer's good-faith decision regarding the deposit or holding of trust funds in an IOLTA account is not reviewable by a disciplinary body.\textsuperscript{29} However, a lawyer must review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively into a non-IOLTA account.\textsuperscript{30}

Planning for an orderly transition in the event of sudden death or disability is important to assure that funds held in the lawyer's trust accounts are appropriately safeguarded in keeping with MRPC 1.15.\textsuperscript{31} Solo practitioners without another lawyer in house to manage accounts should consider including the name of a successor attorney as an alternative signatory on trust accounts who can perform the safeguarding duties required by MRPC 1.15 in the event of sudden death or disability.\textsuperscript{32} The successor lawyer's service in this capacity does not require membership or employment in the solo practitioner's law firm. Accordingly, RI-107 is distinguished from this opinion as overly broad to the extent it requires "that signatories on a law firm trust account must be members or employees of the [same] firm."

In summary, MRPC 1.15A was adopted to facilitate financial institution notification of overdrafts occurring in lawyer trust accounts, which is intended to provide an early warning of unethical activity. The ethical obligations set forth in MRPC 1.15 to safeguard clients and third parties are neither enlarged nor altered by MRPC 1.15A. A clear understanding of the requirements of both MRPC 1.15 and 1.15A is necessary for lawyers to ethically manage client and third person funds that come into their possession.

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likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.


\textsuperscript{29} MRPC 1.15(f).

\textsuperscript{30} MRPC 1.15(f).


\textsuperscript{32} The successor attorney should agree to the designation and be notified that it has been made; however, no trust account identifying information should be given at that time.
AVOIDING ESTATE PLANNING MISTAKES
SEMINAR FOR SENIORS ON AUGUST 1, 2012

J. David Kerr

The Probate and Estate Planning Council was requested to participate in a new approach to elder financial abuse which has boarded on the unauthorized practice of law. Many of have seen trusts sold after a free meal was offered, a free book offered, a non-lawyer visiting the home, etc. Many of us have been concerned because the plans written, many by licensed attorneys, do not line up with:

1. that which the beneficiaries tell us the deceased intended
2. our sense of that which we might expect clients would do
3. omitting important provision unique to a family’s situation such as an outright distribution to a child who is receiving needs based assistance
4. other provisions which just do not feel right if there had been professional assistance

Often these plans are sold at a low price, but are followed with a funding discussion in which an annuity is sold. We may suspect that these annuities were not suitable for the client(s).

The State Bar over the years has wanted a complaint from the client before processing an Unauthorized Practice of Law suit.

The problem has been that the person who might complain is deceased.

The Sub-committee of the Unauthorized Practice of Law Committee developed an education program to alert seniors to the tactics used to sell these plans and annuities. A PowerPoint program entitled Who Should You Trust was developed by the Sub-committee together with a packet of hand out materials. Presentation sites were arranged by Danon Garland and her team at the State Bar. The Probate and Estate Planning Section was requested to help fill speaker positions.

Our section and the Elder Law Section assisted in filling speaker positions. Personal contact with attorneys was the most effective recruiting technique. Several members of this Council suggested speakers and I know that our chair, George Gregory, assisted. Members of the Council and our section made presentations. Presentations were made at the prearranged sites on August 1. As the date drew nearer, inquires came in from attorneys in areas where there was no presentation asking about their areas.

Attendance at sites ranged from 8 to 88. Feedback on reaction of participants was very positive. Attorneys in areas not served asked whether the program was going to be presented again and presented in their areas.

This may be a way to address a chronic problem which we have observed for years. Education to inform choice may be a better way to protect the public than the Unauthorized Practice of Law suit. This program appeared to be a successful beginning.
Ms. George Gregory
Chair, Probate & Estate Planning Section
c/o State Bar of Michigan
Michael Franck Building
306 Townsend St.
Lansing, MI 48933-2012

re: Proposed Amendment to Rule 2

Dear Mr. Gregory:

The Master Lawyers Section proposes an amendment to Rule 2 of the State Bar Rules of Michigan. It submitted this proposed amendment to the Representative Assembly for comment at its next meeting on September 20, 2012. I attach a copy of the proposed amendment.

The proposed amendment would require that each member of the SBM representing any client, other than a governmental agency, identify in the annual dues statement another member of the SBM who will serve as "Inventory Attorney" in the event of the death, disability, or disappearance of the reporting member. The "Inventory Attorney" will agree to take appropriate action to "protect the interest of the clients". The proposed amendment does not directly address the interest of the deceased, disabled or disappeared lawyer. The proposed Rule appears to provide that the Inventory Attorney will perform this function unsupervised by a court, although the Attorney Grievance Administrator "may assist" the Inventory Attorney as co-counsel. Rule 2, after amendment, will supplement the procedures in MCR 9.113(G), which provides that the Attorney Grievance Administrator will protect the interest of the clients of a lawyer who has died, disappeared, or is otherwise unable to practice law for various reasons, and the interest of the lawyer, unless some responsible person is conducting the lawyer's affairs. The Grievance Administrator acts as a receiver pursuant to Circuit Court Order.

I support the Master Lawyers Section in its attempt to propose a solution to a serious problem in our profession. I have personally served as the lawyer responsible for settling the affairs of two cherished colleagues. In one case, a young lawyer with a large active family law practice was suddenly stricken and incapable of practicing law, and died after 8 months in the hospital. In the other, an older but still active lawyer died unexpectedly while on vacation. I have also consulted or otherwise assisted with several similar cases in Genesee County. These matters are usually managed by friends or other lawyers of good will, sometimes at considerable personal sacrifice. The profession has offered little guidance in resolution of the many issues which arise when a lawyer is no longer able to manage a law practice due to death or disability. The SBM has begun to explore solutions to these issues, and has made serious effort to educate lawyers on the need for planning for disability and death. I do not believe, however, that this proposed Rule will provide many satisfactory solutions.
I request that the Section formally review these issues, and take a position requesting modification of this proposal at the Representative Assembly meeting and thereafter, for the following reasons:

1. Most of these cases require court supervision. Every lawyer understands that a legal practice is an asset which requires active management. Every probate lawyer understands that if an asset is to be managed by someone other than its beneficial owner, the manager must be accountable to someone other than themselves. Perhaps in a well planned estate, a legal practice could be managed by a trustee under the Michigan Trust Code, but in many cases the "Inventory Attorney" will assume responsibility at a time of crisis, with the need for immediate access to bank accounts, including trust accounts, and other resources of the dead, disabled or disappeared attorney. Access to those assets needs to be closely supervised to avoid mismanagement and fraud.

2. The probate courts are the appropriate courts to supervise these cases.

   a. The probate courts have exclusive jurisdiction. Section 1302 of EPIC, MCLA §700.1302 provides that the probate court has exclusive jurisdiction of matters which relate to the settlement of the affairs of a deceased individual, and of a proceeding that concerns a guardianship, conservatorship or protective proceeding. Section 5401(3)(a) provides that the probate court may appoint a conservator or enter a protective order if an individual is unable to manage his or her own affairs for a variety of reasons, including disability or disappearance. There is no statutory exception for the business affairs of lawyers.

   b. The probate courts have the skills and procedures to provide appropriate supervision. The probate courts are accustomed to supervision of on-going businesses, and have standardized procedures in place to ensure proper accountability.

   c. All of the other affairs of the lawyer will be handled in probate court. Administrative convenience and financial economy suggest that although there might be special considerations affecting a legal practice, there is no need for separate legal proceedings or procedures for the administration of what is, at heart, a specialized business with special regulations. Without common court supervision, conflicts are likely to arise between the "Inventory Attorney" who is charged with protecting the interest of the clients, and the personal representative or conservator who is charged with collecting assets of the estate such as unpaid fees, and who is accountable to the probate court.

   d. It is possible to appoint a family member as Personal Representative to manage other affairs, and a Special Personal Representative to manage the practice. Section 3614(b) provides that a probate court may appoint a Special Personal Representative if "... the court finds that the appointment is necessary to preserve the estate or to secure its proper administration, including its administration in circumstances in which a general personal representative cannot or should not act." (emphasis added). Although a court usually appoints a special personal representative to manage assets pending
appointment of the general personal representative, there is no such limitation in the statute. The Genesee County Probate Court appointed me as Special Personal Representative by a detailed Order specifying my responsibilities. I managed the practice, referred the active clients, collected (some) of the fees due, returned files to clients, and destroyed the files not returned. The Personal Representative was a family friend named in the Will. We both filed accountings with the Court, and I paid the net proceeds into the general estate when the practice was liquidated. A probate court could accomplish the same by protective order in the case of disability or disappearance.

3. **Section members will be directly affected by this Rule.** Many Section members are sole practitioners. Many of those practices have value which should be preserved for the benefit of the family of a deceased lawyer, or the disabled or disappeared lawyer. Every one of those practices has obligations to clients which need to be honored as well. This proposed amendment seeks only to protect the interest of the clients. Existing procedures in probate courts will permit protection of both the clients and the lawyer.

Thank you for your consideration. If asked, I will assist.

Very truly yours,

Linda A. Pohly
Rule 2, Rules Concerning the State Bar of Michigan

Those persons who are licensed to practice law in this state shall constitute the membership of the State Bar of Michigan, subject to the provisions of these rules. Law students may become law student section members of the State Bar. None other than a member’s correct name shall be entered upon the official register of attorneys of this state. Each member, upon admission to the State Bar and in the annual dues statement, must provide the State Bar with the member’s correct name and address, and such other information as may be required. If the address provided by the member is a mailing address only, the member also must provide a street or building address for the member’s building or residence. No member shall practice law in this state until such information has been provided. Members shall notify the State Bar promptly in writing of any change of name or address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member’s name. The name and address on file with the State Bar at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office. Every member who represents any client other than a governmental agency, public body, or political subdivision, in the annual dues statement must identify and certify the name of an active member who has agreed to serve as inventory attorney in the event of the death, disability or disappearance of the reporting member. In the event the reporting member learns of the unavailability, incompetence or death of the inventory attorney, the reporting member shall identify to the State Bar within thirty days an active member of the State Bar who has agreed to serve as inventory attorney. The reporting member should maintain this information, together with instructions directing that the inventory attorney and the State Bar of Michigan be contacted upon the death, disability or disappearance of the reporting member. Upon receipt of such notification, the inventory attorney shall take such action as is appropriate to protect the interests of the clients, including but not limited to notifying clients of the changed status of the reporting member, returning files and papers as appropriate, and retaining files as appropriate. The Attorney Grievance Commission may assist the inventory attorney as co-counsel in this process. In the event the inventory attorney is unable or unwilling to act, MCR 9.119(C) shall apply. Every active member shall annually provide a certification as to whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and third-party funds. The certification shall be placed on the face of the annual dues notice and shall require the member’s signature or electronic signature.
July 17, 2012

Bill Schuette
Attorney General
P.O. Box 30755
Lansing, MI 48909

Dear Mr. Schuette:

In yesterday’s mail, I received a notice that Michael Moody, the State Public Administrator, had appointed Karl A. Weber as a Public Administrator for Marquette County.

This is the second time in two months that I have been notified that a new Public Administrator has been appointed for Marquette County. I have served as Marquette County Probate Judge for 35 ½ years. Prior to May 2012, four attorneys have served as Marquette County Public Administrator, the most recent being attorney Thomas Clark, who has provided exemplary service for the past 25 years.

These two recent appointments are the first during my tenure which I was not asked for any input before the appointment was made. Earlier this year, Mr. Clark was asked by your office if he wanted to continue as Public Administrator, and he indicated that he did. To date, Mr. Clark has not been notified about whether his appointment was continued or terminated.

On May 9, I had a telephone conference with Mr. Moody. He indicated that the appointment of Mr. Sean Fosmire did not terminate Mr. Clark’s previous appointment. I asked him to send me a letter to that affect, with a copy to Mr. Clark. I have not yet received that letter. On July 10, 2012, I made the same request in a letter of my own to Mr. Moody. (Copy attached) His apparent response to that request was to appoint another unsolicited Public Administrator.

I understand that Mr. Moody has the statutory authority to appoint county Public Administrators, with or without my input. However, the Public Administrator is someone who must work closely with the Probate Judge, handling delicate and difficult matters. The judge determines when the public administrator will be appointed in
individual cases, and determines the reasonableness of the Public Administrator's compensation in individual cases. Like Mr. Fosmire, Mr. Weber has had little or no experience in handling probate matters in my court prior to his appointment. I intend to take that fact into account in determining which cases he should handle.

I do not know how widespread this recent practice has become, but I want to assure you that it is not one which inspires my confidence or admiration, either in your State Public Administrator or in his appointees.

Sincerely yours,

Michael J. Anderegg
Probate Judge

MJA/jth
cc: Michael Moody
    Thomas Clark
    M. Sean Fosmire
    Karl Weber
    Hon. Karen Tighe, President, MPJA
    George W. Gregory, Chair
    Probate & Trust Law Section,
    State Bar of Michigan
July 10, 2012

Michael Moody
State Public Administrator
P.O. Box 30212
Lansing, MI 48909

Dear Mr. Moody:

Two months ago, we had a telephone conference call about the appointment of M. Sean Fosmire as Marquette County Public Administrator. In a subsequent telephone call that same day, I asked you to send me written confirmation that your appointment of Mr. Fosmire did not terminate the appointment of attorney Thomas Clark, who has served as Marquette County’s Public Administrator for the past twenty-five years, and that you also send a copy of that letter to Mr. Clark.

To date I have not received a response to that request, and neither has Mr. Clark.

I believe that it is very important that you clarify this situation as soon as possible.

Sincerely yours,

Michael J. Anderegg
Probate Judge

MJA/jth
cc: Thomas Clark